[2019] UKUT 19 (TCC)
Appeal number: FS/2016/0012

FINANCIAL SERVICES – costs - whether all or any part of costs claimed by unsuccessful applicant should be awarded -Tribunal Procedure Upper Tribunal) Rules 2008 rule 10 (3) (d) and (e)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ALISTAIR RAE BURNS	**Applicant**
- and -	
THE FINANCIAL CONDUCT AUTHORITY	**The Authority**

TRIBUNAL: Judge Timothy Herrington

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 17 December 2018

The Applicant in person

Simon Pritchard, Counsel, instructed by the Financial Conduct Authority, for the Authority

© CROWN COPYRIGHT 2019

DECISION

Introduction

1. By a decision notice dated 22 July 2016 (the "Decision Notice") the Authority decided to impose a financial penalty on Mr Alistair Rae Burns ("Mr Burns") pursuant to s 66 of the Financial Services and Markets Act 2000 ("FSMA") and to make an order prohibiting Mr Burns from performing any senior management function and any significant influence function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm. In the Decision Notice the Authority decided to impose a financial penalty of £233,600. Mr Burns referred the matter to this Tribunal on 7 September 2016. Following the Authority's acceptance in the course of the case management proceedings relating to this reference that certain aspects of the Authority's case were time-barred pursuant to the provisions of s 66 (4) FSMA, as referred to below, it invited the Tribunal to impose a reduced penalty of £116,830.

2. The matters which were the subject of the reference related to the conduct of Mr Burns in his capacity as a holder of the CF 1 (Director) controlled function at TailorMade Independent Limited ("TMI") during the period between 22 January 2010 and 20 January 2013. TMI carried on business as an independent financial adviser specialising in the giving of advice to retail customers on the merits of their transferring their pension monies into Self Invested Personal Pension Schemes ("SIPPs").

3. The penalty that the Authority decided to impose pursuant to the Decision Notice was in respect of two separate matters. The first of those matters was in respect of the Authority's findings that TMI's personal recommendation process did not in practice comply with the Authority's regulatory requirements and that Mr Burns had failed to take reasonable steps to ensure that TMI's personal recommendation process complied with the relevant regulatory requirements (the "Advice Issue"). The second of those matters was that Mr Burns had failed to ensure that TMI managed fairly, and disclosed clearly, Mr Burns's personal conflicts of interest and the conflicts of interest relating to other individuals at TMI ("the Conflict of Interest Issue").

4. During the regulatory proceedings before the Authority's Regulatory Decisions Committee ("RDC") Mr Burns had argued that a financial penalty in respect of the Advice Issue was time barred pursuant to s 66 (4) of the Financial Services and Markets Act 2000 ("FSMA"). Mr Burns contended that because the Authority knew by 16 January 2012 (a date which was more than 3 years before the Warning Notice was issued) TMI would not advise its SIPP clients on the suitability of the underlying investments to be held in the SIPPs which it was recommending to its customers the Authority knew that TMI's business model and hence its personal recommendation process was flawed. Those investments consisted of alternative investments such as overseas properties and TMI took the view, contrary to the position of the Authority, that when advising its customers on the suitability of moving their existing pension assets into a SIPP it did not need to give advice on the proposed underlying

investments, which were promoted through an unregulated entity which formed part of TMI's corporate group.

5. In the Decision Notice the RDC found that TMI's business model, which Mr Burns established, was based on TMI's customers having the objective of using their pension funds to purchase alternative investments and that TMI's personal recommendations process was inadequate as, rather than taking account of the customer's individual circumstances, demands and needs, it resulted in TMI making personal recommendations predominantly on the basis of the customer's objective of using pension funds to purchase alternative investments.

6. The RDC also found in the Decision Notice that the limitation issue raised by Mr Burns ("the Advice Limitation Issue") did not arise on the basis of the specific findings in the Decision Notice.

7. The Authority filed its Statement of Case in relation to Mr Burns's reference on 5 November 2016 which was broadly in line with the findings in the Decision Notice. In his Reply to the Statement of Case Mr Burns repeated the submissions he had made to the RDC on the Advice Limitation Issue. He also now contended that any financial penalty sought by the Authority in relation to the Conflict of Interest Issue was also time barred ("the Conflict of Interest Limitation Issue").

8. Later, having made further internal enquiries and further analysis of the evidence, the Authority reappraised its approach to the Advice Limitation Issue and the Authority decided in July 2017 that the issue should be conceded. Following notification of that decision to the Tribunal and following a case management hearing on 12 July 2017, the Authority was directed to file an Amended Statement of Case. In that document, the Authority stated that it no longer argued that it did not have information from which the specific misconduct which formed the basis of its contentions on the Advice Issue could be inferred more than 3 years before issuing a Warning Notice. Accordingly, the Authority now sought a reduced financial penalty of one half of the amount originally sought, reflecting the position that a financial penalty was now only being sought in relation to the Conflict of Interest Issue.

9. In a decision ("the Decision") dated 31 July 2018 ([2018] UKUT 0246 (TCC)) the Tribunal determined Mr Burns's reference. The reader is referred to the Decision for the detailed findings but in summary the Tribunal found that:

(1) TMI's advice model was flawed and its personal recommendation process did not in practice comply with the Authority's regulatory requirements;

(2) In relation to the Advice Issue, Mr Burns failed to take reasonable steps to ensure that the business of TMI for which he was responsible complied with the relevant requirements and standards of the regulatory system, in breach of Statement of Principle 7;

(3) Mr Burns breached Statement of Principle 7 in carrying out his controlled function at TMI by failing to take any or any reasonable steps to ensure that TMI's personal recommendation process complied with the relevant regulatory

requirements and by failing to ensure that TMI managed fairly, and disclosed clearly, Mr Burns' personal conflicts of interest and the conflicts of interest relating to other individuals at TMI;

(4) The limitation period for the imposition of a financial penalty in relation to the Conflict of Interest Issue had not expired by the time the Authority issued its Warning Notice to Mr Burns;

(5) A financial penalty of £60,000 in respect of the Conflict of Interest Issue was appropriate;

(6) Mr Burns showed limited insight into the duties of a director and the board of a regulated firm and he had given no serious thought to what he would need to do to address his failings;

(7) There is a risk that Mr Burns' failings would be repeated in the foreseeable future if he were permitted to continue to perform a senior management or significant influence function within a regulated firm;

(8) There was no basis for interfering with the Authority's decision to prohibit Mr Burns from performing any significant management or significant influence function ("the Fitness and Propriety Issue");

10. On 26 August 2018, Mr Burns made an application for costs. His claim in total was originally in excess of £130,000 and was calculated on the basis of him having been a litigant in person in reliance on The Litigants in Person (Costs and Expenses) Act 1975, on the basis of the fixed hourly charge permitted by the legislation. The costs relate to the period from 2 July 2015 to the present day and accordingly cover both the Authority's regulatory proceedings as well as the proceedings in this Tribunal. Mr Burns relies for his claim on Rule 10 (3) (d) and (e) of The Tribunal Procedure (Upper Tribunal) Rules 2008. As discussed in detail below, Mr Burns contends that both the Decision Notice and the Authority's conduct in relation to the proceedings on his reference were unreasonable as regards the manner in which the Authority dealt with the Advice Limitation Issue and its disclosure obligations.

11. Having received further written reasons from Mr Burns in support of his claim, written submissions from the Authority in response to the claim, and a further response from Mr Burns, I directed that there should be a hearing in relation to the application, dealing with the question as to whether a costs order should be made, and if so whether such order should extend to the whole or a specified part of the costs claimed by Mr Burns. My direction envisaged that if I determined that such an order should be made, I would then consider whether I could undertake a summary assessment of the costs concerned myself, or whether to direct that the application be made the subject of a detailed assessment by a costs judge.

Relevant Law

12. Section 29 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA"), so far as relevant, provides that:

> "(1) The costs of and incidental to –
>
> (a)….
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules."

13. This provision makes it clear that whether or not costs are to be awarded in any particular case and, if so, of what amount, is a matter of discretion for the Tribunal. Like all judicial discretions, it must be exercised having taken account of all relevant circumstances and ignoring all irrelevant factors. As Mr Pritchard submitted, one of those relevant factors will include the findings made by the Tribunal on the substantive reference.

14. Section 29 (3) TCEA makes it clear that the power to award costs is also subject to Tribunal Procedure Rules. The relevant rules in this case are Rules 10(3)(d) and 10(3)(e) of The Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Rules") which provide so far as relevant as follows:

> "(3) …. the Upper Tribunal may not make an order in respect of costs or expenses except—
>
> …
>
> (d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings;
>
> (e) if, in a financial services case … the Upper Tribunal considers that the decision in respect of which the reference was made was unreasonable."

15. As Mr Pritchard submitted, these two provisions focus on different acts: Rule 10 (3)(d) focuses on conduct during the Tribunal proceedings and Rule 10(3)(e), which only applies to financial services cases (a category into which Mr Burns's reference fell) focuses on the nature of the decision that is the subject of the reference (in this case, the Decision Notice).

16. Therefore, I cannot consider whether to exercise my discretion to award costs in Mr Burns's favour unless I find either or both of the following to be the case:

(1) the Authority has "acted unreasonably" in bringing, defending or conducting the proceedings on Mr Burns's reference;

(2) the RDC's decision as recorded in the Decision Notice was "unreasonable".

17. The question of whether a decision of the RDC was unreasonable has been considered in *Baldwin v FSA* (5 April 2006), a decision of this Tribunal's predecessor, the Financial Services and Markets Tribunal ("FSMT"). There are two points of importance which emerge from that case and which I will take account of in considering the reasonableness of the Decision Notice.

18. First, judging whether something is reasonable or unreasonable is wholly distinct from judging whether it is right or wrong: a decision may be wrong without being in the slightest degree unreasonable: see [8] of the decision.

19. Secondly, the Tribunal needs to take account of the fact that proceedings before the RDC are administrative rather than judicial. The FSMT said this at [15]:

> "… We are required to focus on the decision itself. In our judgment the right approach is to ask ourselves whether we consider that the Authority's decision was unreasonable, given the facts and circumstances which were known or ought to have been known to the FSA at the time when the decision was made. In taking this approach, we remind ourselves that the process leading to the FSA's decision was not a full judicial hearing of the kind conducted by the Tribunal. As the Tribunal said in the case of Legal and General Assurance Society Ltd: *"When dealing with a large volume of regulatory matters informally and speedily, FSA should not be expected or compelled to follow procedures, or express its conclusions, as required of a court"* (paragraph 29)."

20. *Baldwin* was a case of alleged market abuse, and the whole case turned on whether the RDC, and subsequently the Tribunal, believed the applicant, Mr Baldwin, when he said that a particular conversation during which it was suggested he received price sensitive information did not take place or believed the other participant to the alleged call and on whom the Authority relied, who said it did. The RDC accepted the evidence of the Authority's witness whereas the Tribunal accepted that of Mr Baldwin with the result that his reference was allowed. On Mr Baldwin's subsequent application for costs the FSMT concluded that whilst it was clear that the Authority's decision was wrong, it did not find itself able to say that it was unreasonable, given the facts and circumstances known (or which ought to have been known) to the Authority at the time. In other words, although it turned out following the Tribunal proceedings in which both participants in the alleged conversation were cross-examined that the RDC had been wrong in the event not to accept Mr Baldwin's evidence, it did not have the benefit of cross-examining either Mr Baldwin or the Authority's witness and so taking that into account in the other circumstances the FSMT said the RDC's decision was not unreasonable.

21. In the case of *HMRC v Jackson Grundy* [2017] UKUT 0180 (TCC) ("*Jackson Grundy"),* the Upper Tribunal considered whether HMRC had acted unreasonably in defending or conducting an appeal in the First-tier Tribunal ("FTT") against the amount of a financial penalty imposed on a small firm of estate agents for breach of anti-money laundering procedures in circumstances where the FTT reduced a penalty from £169,652 to £5,000. In that case the Upper Tribunal was considering the provisions of Rule 10(1)(b) of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 which is in identical terms to Rule 10 (3) (e) of the Rules. The

Upper Tribunal decided that it should have been plain to HMRC when the notice of appeal was served on them that the penalty was grossly excessive and could not be defended. Therefore, HMRC acted unreasonably in preparing a Statement of Case which sought to defend the original penalty and conducting the proceedings on that basis with the result that the appellant was awarded its costs of and incidental to the proceedings before the FTT.

22. At [47] of its decision the Upper Tribunal identified from previous authorities the following principles to be applied when it is alleged that a party has acted unreasonably in bringing, defending or conducting proceedings:

(1) The rule is a threshold condition. It is only if the tribunal concludes that a party has acted unreasonably in the relevant respect that the question of the exercise of a discretion to award costs can arise. A determination of the question whether a party has, or has not, acted unreasonably is, accordingly, not the exercise of a discretion, but a matter of value judgment;

(2) The phrase “bringing, defending or conducting the proceedings” is an inclusive phrase designed to capture cases in which an appellant has unreasonably brought an appeal which he should know could not succeed, a respondent has unreasonably resisted an obviously meritorious appeal, or either party has acted unreasonably in the course of proceedings, for example by persistently failing to comply with the rules and directions to the prejudice of the other side;

(3) HMRC would be acting unreasonably in defending an appeal if they ought to have known that their view of the case had no reasonable prospect of success but not otherwise; it cannot be that any wrong assertion by a party to an appeal is automatically unreasonable;

(4) The restriction in s.29 Tribunals, Courts and Enforcement Act 2007 to the recovery of costs “of and incidental to” the proceedings means that there is no power to make an order in respect of anything else and, particularly, in respect of any investigation or decision made which preceded the institution of the proceedings or the preparation of those proceedings before the tribunal and;

(5) Nevertheless, although it is not possible for a party to rely upon the unreasonable behaviour of the other party prior to the commencement of the appeal, nor can costs incurred before that period be ordered, behaviour of a party prior to the commencement of proceedings might well inform actions taken during proceedings.

Mr Burns’s grounds for claiming costs

Costs claimed pursuant to Rule 10 (3) (e) of the Rules

23. Mr Burns contends that the material in the Authority’s possession in July 2015 but which was deliberately withheld from him, when the Authority entered into settlement discussions with him, should have led the Authority at that time to have concluded that the misconduct allegations which related to the Advice Issue were time-barred and should therefore have significantly reduced the proposed fine at that

time. Mr Burns contends that had the Authority done so he would have settled the matter at that time with the result that both the RDC and Tribunal proceedings would have been unnecessary.

24. Mr Burns contends that once this information came to light, and was disclosed to the RDC and accordingly to him as well in October 2015, the Enforcement Division of the Authority colluded with the RDC to change the basis of the allegations made against him, in an attempt to avoid the time barring question, at the same time not making the RDC aware of other information and knowledge possessed by individuals within the Authority which were relevant to the issue. Consequently, the RDC issued a decision, unreasonably, that decided that the Advice Limitation Issue did not need to be addressed. Mr Burns contends that he would have accepted the RDC's decision and settled the matter had it not been, in his words, "corrupt".

25. The Authority's response to this claim can be summarised as follows:

(1) There is no evidential basis for arguing that the RDC was corrupt, acted in bad faith or colluded;

(2) Mr Burns's complaints about disclosure disregards the fact that the RDC decided that on the basis of the findings it had made the Advice Limitation Issue did not arise;

(3) The Tribunal agreed with much of what was found by the RDC in the Decision Notice;

(4) Accordingly, Mr Burns cannot argue that the decision was unreasonable in its entirety, he can only argue that part of the Decision Notice was unreasonable, namely that which rejects his arguments regarding the Advice Limitation Issue;

(5) Whilst the Tribunal's own decision indicates that it would not have agreed with the RDC's reasoning as to why it did not need to address the Advice Limitation Issue, that reasoning is not unreasonable. The RDC's conclusion was not reached after a hearing of the type one experiences in a Tribunal, nor was the decision written by Judge. In so far as Mr Burns disagreed with the Decision Notice, the remedy decided by Parliament was a statutory right to refer the matter to an independent tribunal;

(6) Mr Burns's contention that he would have settled the matter had the Authority conceded the Advice Limitation Issue earlier is fanciful; he continued to contest the proceedings in respect of the penalty sought to be imposed in relation to the Conflict of Interest Issue and the prohibition order after the Authority's concession; and

(7) At times Mr Burns's own conduct in the proceedings was unreasonable. He conceded his arguments around financial means to pay a penalty during the course of cross examination; his refusal to answer questions on the issue gives rise to an inference that he could not substantiate the position.

Costs claimed pursuant to Rule 10 (3) (d) of the Rules

26. Mr Burns contends that the Authority conceded the Advice Limitation Issue unreasonably late. From the time of the making of his reference in September 2016, to their concession of the Advice Limitation Issue in July 2017, the Authority had ample opportunity to disclose to both himself and the Tribunal all the documents and knowledge it had in its possession in relation to the issue. Mr Burns also contends that it was unreasonable of the Authority to seek a financial penalty of £116,830 in respect of the Conflict of Interest Issue, following the amendment of its Statement of Case, bearing in mind the Tribunal's finding that a penalty of £60,000 in respect of this issue was appropriate.

27. The Authority's response to this claim can be summarised as follows:

(1) It was reasonable for the Authority to file its Statement of Case largely based upon the terms of the Authority's Decision Notice;

(2) It was during the Authority's preparations to be ready to serve witness statements that the Authority had cause to reconsider the Advice Limitation Issue and the making of the concession would have enabled the Tribunal to deal with the case efficiently and in accordance with the overriding objective;

(3) This approach was not unreasonable because by informing Mr Burns that the Authority no longer sought to impose a penalty in relation to the Advice Issue at this stage in the proceedings, Mr Burns was saved from the need to spend time preparing witness statements dealing with the Advice Limitation Issue and the Tribunal was saved time dealing with arguments on an issue which the Authority recognised that Mr Burns had a strong argument;

(4) It was not unreasonable in the circumstances not to have conceded the issue earlier where the RDC's analysis meant that the Advice Limitation Issue did not arise at all and the Authority's later decision not to advance that argument was a reasonable decision and there was nothing unreasonable in the Authority taking it when it did;

(5) There was nothing unreasonable in the Authority seeking a penalty of one half of the original amount claimed in respect of the Conflict of Interest Issue, following its concession on the Advice Limitation Issue.

28. The Authority also contended that two other issues arose in relation to Mr Burns's grounds.

29. First, Mr Burns had referred to materials arising from his settlement discussions with the Authority. The Authority submits that the Upper Tribunal must ignore such materials because they are protected by privilege and the Authority does not waive privilege in them. The Authority submits that privilege in such documents was recognised by Birss J in *Property Alliance Group Limited v RBS* [2015] EWHC 1557 (Ch) at [87] ("*PAG*").

30. Secondly, the Authority submits that it is not open to Mr Burns to claim any sums in respect of costs which were incurred prior to the commencement of the

proceedings in the Tribunal, that is in respect of any period before he filed his reference notice on 9 September 2016.

31. I dealt with those matters as preliminary issues at the commencement of the hearing and gave oral decisions on them, before proceeding to deal with the remaining issues arising in respect of Mr Burns's application.

32. I decided to follow the reasoning of Birss J in *PAG* and directed that it was not open to Mr Burns to refer to the substance of the settlement discussions he had with the Authority or any documents generated during those discussions.

33. I decided to follow the reasoning of the Upper Tribunal in *Jackson Grundy* and decided that because of the restriction in s 29 TCEA to the recovery of costs "of and incidental to" the proceedings I have no power to award costs in respect of any of the Authority's regulatory proceedings or the investigation which preceded those proceedings. I do, however, have power to award costs in respect of time spent by Mr Burns in preparing his notice of reference, which would of course precede the commencement of proceedings in this Tribunal, on the basis that such costs are incidental to the Tribunal proceedings.

34. As a result of my ruling at the hearing, Mr Burns subsequently submitted a revised schedule of costs, dealing only with costs incurred since he made his reference as well as the costs involved in preparing his application for costs. In total, the revised claim was for an amount of £58,283.30.

Evidence

35. Mr Burns gave oral evidence on which he was cross-examined, particularly as regards his state of mind with respect to the question whether he would have continued with his reference had the Authority dealt with the Advice Limitation Issue differently.

36. Mr Anthony Monaghan, a Head of Department in the Authority's Enforcement & Market Oversight Decision ("Enforcement"), provided a witness statement, covering the Authority's conduct of the regulatory proceedings as well as the conduct by the Authority of the proceedings in relation to Mr Burns's reference up to the point at which the Authority conceded the Advice Limitation Issue. Mr Monaghan had previously given evidence on aspects of these matters in the substantive hearing of Mr Burns's reference. Mr Monaghan was cross-examined by Mr Burns on these matters.

37. As well as the hearing bundle prepared for the substantive reference, I was provided with an additional bundle for this hearing, which included some material regarding the conduct of both the regulatory and the Tribunal proceedings which had not previously been provided.

Findings of fact

38. From the evidence that I heard, and the documents I saw, I make the following findings of fact as regards the issues which are relevant to Mr Burns's costs

application. These findings should be read in conjunction with findings of fact made in the Decision in order to get the full picture.

Events prior to the commencement of the Authority's investigation

39. As found in the Decision at [190] to [192], Mr Burns's first significant contact with the Authority since TMI was authorised early in 2010 took place on 16 January 2012 when Mr Burns and other colleagues, representing TMI's newly established SIPP operator, TM SIPP, which was seeking authorisation from the Authority, met Mr Peter Kesic, of the Authority's Permissions Department and Ms Ilene McIvor from the Authority's Small Firm's Division. The purpose of that meeting was to discuss TM SIPP's application for authorisation.

40. A note of that meeting, prepared by the Authority, records that the focus of the discussions were on how TM SIPP would operate, although the note records the Authority stressing the importance of carrying out checks on the investments which a client would wish to include in their SIPP and the connection between TMI and TM SIPP was discussed in the context of the need to disclose conflicts of interest which may arise out of that connection. The note also records the following in relation to Tailormade Alternative Investments Limited ("TMAI"), the unregulated company connected with TMI:

> "The same principle of disclosure would apply in relation to Tailormade Alternative Investments Ltd in relation to any investment that involved this company. Tailormade Investments Ltd provides services in relation to non-regulated investments such as overseas commercial property and renewable energy projects."

41. The note also records TMI confirming that clients of TM SIPP would be sourced from IFAs which included TMI.

42. Mr Burns's evidence at the substantive hearing of his reference was that he did inform Ms McIvor at the meeting held on 16 January 2012 that TMI did not advise on the underlying investments held within a SIPP which it recommended. As discussed in more detail below, Mr Burns's evidence was accepted by the Tribunal: see [197] of the Decision. The Tribunal also found at [197] that it was not until after the visit of the Authority to TMI in January 2013 that the Authority raised this as an issue of concern with TMI.

43. It was on 30 November 2012 that the Authority decided to look further into TMI's activities. As found at [216] of the Decision, on 10 December 2012 Mr Jonathan Smart of the Authority prepared a note recording a conversation he had with Ms McIvor in which he had sought further information regarding the Tailormade Group in the knowledge that Ms McIvor had dealt with the authorisation application for TM SIPP. In particular, the note records that Ms McIvor informed Mr Smart that within the group, TMAI did the direct marketing and promotion of alternative investments and refers clients direct to TMI and that TMI would advise on the SIPP but not on the underlying investment.

Events occurring during the Authority's investigation

44. Enforcement's investigation into Mr Burns commenced on 6 June 2014, following a referral from the relevant manager in Supervision, Ms Simone Ferreira. It would appear that neither Ms Ferreira nor any other colleagues in this context mentioned to Enforcement Mr Smart's note of 10 December 2012 and the discussions with Ms McIvor. In November 2014 Mr Burns was interviewed by the Authority and during that interview he stated that the Authority have been told on several occasions about TMI's advice model and the fact that it did not advise customers on the suitability of the underlying investments to be held in their SIPP.

45. On 17 February 2015 representatives of Enforcement held a meeting with Mr Kesic and Ms McIvor (the latter participating by telephone from Edinburgh). Enforcement specifically asked if TMI's business model was something that was discussed at the meeting of 16 January 2012. Ms McIvor was recorded as saying that the authorisations team were not interested in the IFA's business model but wanted insight into the whole group. She is recorded as saying that she was interested in where the business came from and was reassured that the SIPP operator firm would not be the sole channel of TMI's business. Enforcement sought confirmation that there was "no signing off" of the business model of TMI to which Ms McIvor gave a positive response.

46. No mention was made of Mr Smart's note of 10 December 2012 and what that note records about what Ms McIvor had said to Mr Smart about her knowledge of the business model. This is because at this stage Enforcement had not discovered the existence of that note.

47. By 3 July 2015 Enforcement's investigations had reached the point at which they were in a position to propose a settlement of the matter with Mr Burns. He was sent a draft Warning Notice on that date, as the basis for the settlement discussions.

48. Attempts at a settlement were unsuccessful, and accordingly steps were taken to conclude the investigation and place the matter before the RDC for a decision.

49. As a result of an in-depth documentary review carried out in August 2015 in advance of papers being prepared for the RDC, Mr Smart's note of 10 December 2012 was discovered by Enforcement and identified as relevant on 16 September 2015. In addition, a relevant email dated 22 November 2012 was found. It appeared that the latter document had not previously been discovered as a result of Enforcement's trawls of the Authority's records because of a defect with the Authority's systems in that certain search terms would not discover a document if it could not be identified from the body of the text of the document.

50. The discovery of these documents prompted Enforcement to have further discussions with Ms McIvor.

51. On 28 September 2015 a member of the Enforcement team sent an email to Ms McIvor referring to the fact that Mr Smart's note of 10 December 2012 had been discovered and remarking that the note differed to the position as Enforcement had

understood it (that Ms McIvor was not aware of the business model of TMI) from the discussion held with Ms McIvor or in February 2015. Ms McIvor was asked to read through Mr Smart's note and various emails between Mr Smart and herself following the conversation recorded in the note of 10 December 2012 as well as any other records that Ms McIvor held in relation to the matter.

52. Just over an hour after that email was sent a discussion took place between Mr Richard Topham and other members of the Enforcement team and Ms McIvor, which is recorded in a note of the same date. The note records that Ms McIvor stated that she had not reviewed the material she was asked to look at fully.

53. Ms McIvor was asked whether the statement in the note of 10 December 2012 which records that Ms McIvor said that TMI advised on the SIPP but not the underlying investment was a true reflection of what she said at the time. The limitation issue was explained to Ms McIvor.

54. Ms McIvor said that a key question for her during the meeting in January 2012 was who was providing advice on the underlying investments and that she had stated to "the firm" the need for advice on the underlying products to be provided to customers. She said that there was confusion as to who was doing what in the TailorMade Group and at the time she knew little about the business model of TMI. Following prompting by Mr Topham, Ms McIvor stated that the position of the SIPP operator was the priority during the meeting.

55. Pressed further on whether she made the statement attributed to her in the 10 December 2012 note, Ms McIvor said that "she cannot say 100% whether that was what she said and confirmed that she was only interested in the esoteric investments". She then said she was not 100% certain whether TMI did advise on the esoteric investments, but that she told the firm that they should have been, stating that at the time her team was focused on the SIPP operator and whether they were conducting adequate due diligence on the IFA from whom this business would be referred. She confirmed that her team would have asked who was providing advice on the underlying investments.

56. Ms McIvor was asked to review all her notes from the period to see whether there was anything further that could assist. Mr Topham suggested that the December 2012 note could have contained an error and perhaps should have referred to the SIPP operator rather than the IFA.

57. Later in that day, Ms McIvor sent an email to Enforcement with her further thoughts on the matter, having referred to her notes of the meeting held on 16 January 2012. She confirmed that the documents she had looked at showed that she was more interested in TM SIPP than in TMI.

58. However, she stated that her responses to Mr Smart on 10 December 2012 clearly indicates that TMI was giving the advice and that view would have come from the interview and some of the information received from the firm after this date. She then summarised the position as being that "I do think we knew in January 2012 that

[TMI] did not give advice on the esoteric investments within the SIPP if it was referred by [TMAI], however we did tell them that it was the responsibility of the IFA to ensure that the underlying investment was suitable for the client." She then said that in an email that she sent to Mr Smart on 10 December 2012 she "made it clear that the advice was not given by TMI". She concluded her email by saying that "you could argue that we did know, to a degree, that [TMI] did not give advice on the underlying investment in Jan 2012, but through further clarity it was confirmed in April 2012 of the various documents, the interview was to establish the processes of the SIPP operator not to establish without doubt the role of [TMI]".

59. On 5 October 2015 the Authority issued its Investigation Report, which majored on the failings in TMI's advice model identified by the Authority, in particular that no advice was given by TMI on the suitability of the underlying investments which it was aware that its customers were intending to acquire and place in a SIPP. That report referred to Mr Burns's contentions that the Authority had been informed that TMI did not advise on the underlying investment product, including at the 16 January 2012 meeting. The Report referred to the note of 10 December 2012 as indicating that "one of the Authority's employees had formed the opinion that TMI's advice was limited to advising on the decision to invest in a SIPP". That is not, of course, a fully accurate summary of what Ms McIvor was recorded as having said in that note or what she told Enforcement on 28 September 2015. There is no further detailed analysis of the limitation issue in this document.

The RDC proceedings

60. On 5 October 2015 Enforcement sent its Enforcement Submissions Document to the RDC setting out its case for the issue of a Warning Notice to Mr Burns. In accordance with usual practice, that document annexed, among other things, a draft Warning Notice and a copy of the Investigation Report. Enforcement had realised by this time that it would have to make its position on the limitation issue known to the RDC in some detail.

61. In its submissions to the RDC, as it had done previously, Enforcement majored on the issue of the lack of advice by TMI as regards the underlying investments to be held in the customer's SIPP. As regards the limitation issue, the document stated that Enforcement "currently considers that the limitation period began to run on 10 December 2012 meaning that the expiry of the period is deemed to be 9 December 2015". The document went on to say that Enforcement would submit a Supplemental Enforcement Submissions Document addressing the limitation question in detail and would update the RDC in good time before the scheduled meeting to discuss whether the RDC was willing to give a Warning Notice to Mr Burns.

62. The basis for the regulatory action that was proposed in the draft Warning Notice, namely the imposition of a financial penalty of £233,600 and the making of a prohibition order against Mr Burns, was that Mr Burns had breached Statement of Principle 7 because he had failed to:

(1) take reasonable steps to ensure that TMI assess the suitability of the underlying products within the SIPP for the customer; and

(2) identify, manage and mitigate and disclose adequately his own personal conflicts of interest as well as the conflicts of interest that existed between individuals at TMI and TMAI.

63. On 20 October 2015 a further telephone conference took place between Mr Topham and other colleagues from Enforcement and Ms McIvor. This discussion once again focused on what Ms McIvor had previously said about what was said in Mr Smart's note of 10 December 2012 and the emails that were exchanged between Ms McIvor and Mr Smart on that day.

64. Mr Topham asked Ms McIvor whether she believed at the time that there was "no more than a suspicion" that TMI would not be advising on the underlying investments. The note records a response as being that she "confirmed that she could only act on what the individuals of TailorMade Group told at the time."

65. In response to another question, Ms McIvor's answer was recorded as her confirming that her email to Mr Smart on 10 December 2012 related to TMI SIPP and not TMI.

66. On 23 October 2015 Enforcement sent its Supplemental Enforcement Submissions Document to the RDC which dealt with the limitation issue in detail.

67. This document commented on the emails sent and discussion held on 28 September 2015 and records that Ms McIvor did not dispute the accuracy of the note of 10 December 2012 but that despite this, she was unable to explain how she reached her view or identify the source of the information that she relied on and which prompted that comment. The document had an annex which set out details of all of the relevant documents discovered by Enforcement covering the period from 2009 onwards. The annex records that in respect of none of those documents was there any reference to TMI's advice model.

68. Enforcement concluded in its recommendation to the RDC that the statement attributed to Ms McIvor in the note of 10 December 2012 does not constitute "knowledge" within the meaning of s 66 (5) FSMA as it was not based on a reasonable belief from which misconduct could reasonably be inferred. Its reasoning for that conclusion was that the statement was:

(1) not reasonably supported by documentary evidence, in particular the note of the 16 January 2012 meeting;

(2) not corroborated by previous correspondence with the relevant firms;

(3) inconsistent with the account of Mr Kesic as to what was discussed at the 16 January 2012 meeting;

(4) inconsistent with Ms McIvor's recollection of events before Enforcement's discovery of the 10 December 2012 note;

(5) inconsistent with action that would have reasonably been expected of an Authority staff member (s) with that purported knowledge; and

(6) more consistent with being a "suspicion" by one Authority staff member, which has mistakenly been expressed, and subsequently recorded, as a statement of fact.

69. Accordingly, Enforcement recommended that the RDC considered that the limitation period began to run on 24 January 2013, being the date when the Authority's Supervision Department was informed about TMI's role as a major introducer for Harlequin.

70. On 28 October 2015 the Warning Notice meeting with the RDC took place. The RDC's procedures require that any significant communications between the Enforcement team and the RDC which in essence indicate the reasons why the RDC has decided to give a Warning Notice should, in the interests of transparency and in order to enable the recipient of a Warning Notice to make effective representations to the RDC, be disclosed to the subject of the Warning Notice.

71. No such disclosure happened in this case. If the RDC followed its usual practice the note in question would have been prepared by the RDC's legal adviser and sent by the RDC to the recipient of the Warning Notice with the Warning Notice. No such note appears among the documents disclosed for the purposes of Mr Burns's reference and Mr Monaghan was unable to shed any further light on the matter in his evidence.

72. However, shortly before the hearing of Mr Burns's costs application, a note of the Warning Notice meeting, prepared by a member of the Enforcement Team was disclosed. This is a much fuller note than would have been expected to have been prepared by the RDC legal adviser, whose notes of substantive communications between Enforcement and the RDC tend to deal with the points raised in summary form.

73. The Enforcement note, however, reveals in considerable detail the thinking of the RDC and in particular, why, as it transpired, the Warning Notice which the RDC agreed to issue was substantially different to the draft Warning Notice provided with Enforcement's Submissions Document.

74. The note records that the RDC was concerned that, based on its assessment of the inadequacies of TMI's suitability reports, Mr Burns would be "let off lightly" in terms of the classification of the rule breaches involved. The RDC Chair is recorded as raising concerns that the case as currently drafted was not as strong as it could be. The note records that from his perspective, the case was one of suitability and he questioned "whether the RDC would like to get into the argument relating to the obligation to advise on the underlying investments".

75. As far as the limitation issue was concerned, an RDC member referred to the note of 10 December 2012 and expressed the view that it could be said there that Ms McIvor knew about the failure to advise on the underlying investment, adding that

this could have been a mistake on her part, but this would be a curious thing to come up in a mistaken context.

76. In response, Enforcement is recorded as stating that Ms McIvor had no basis for more than a suspicion. Following further discussion on the issue, the RDC Chair is recorded as stating that in the Upper Tribunal, the issue would fall on Ms McIvor's cross examination and that "this is a risky basis on which to proceed", but he confirmed his understanding that all previous references in the relevant material had been to TMI SIPP and it was therefore acceptable to proceed with 10 December as the starting point for limitation.

77. On 7 December 2015 the RDC issued a Warning Notice to Mr Burns. The basis for the regulatory action that was proposed in the Warning Notice, namely the imposition of a financial penalty of £233,600 and the making of a prohibition order against Mr Burns, was significantly different from that proposed in the draft Warning Notice, as summarised at [62] above. This difference reflects the discussions between Enforcement and the RDC recorded in the note of the meeting held on 28 October 2015, as summarised above.

78. The Warning Notice stated that Mr Burns knew that all, or nearly all, of TMI's customers would share the same investment objective of using their pension funds to purchase alternative investments and accordingly he knew, or should have known, that the process by which TMI gave personal recommendations to its customers would be inappropriate for most, if not all, of its customers given that the outcome of the process would depend predominantly on this common objective as opposed to each customers' individual circumstances, demands and needs.

79. The basis of the regulatory action proposed was now that Mr Burns had breached Statement of Principle 7 because:

(1) the processes adopted by TMI, failed to comply with the requirements of the regulatory system. TMI's personal recommendations did not, and could not, take account of the customers' individual circumstances, demands and needs. In most, if not all, cases the process operated by TMI resulted in a personal recommendation to the customer to transfer into a SIPP since the sole criterion on which was based was the customers' desire to use existing pension funds to purchase alternative investments and the personal recommendation did not take account of

(i)the fact that many customers were in secure defined benefit pension schemes;

(ii) TMI's understanding of the customers' attitude to risk;

(iii) TMI's understanding of the customer's demands and needs other than the demand to hold the high-risk investment in the SIPP;

(2) in addition, Mr Burns knew, by reason of being a Director of TMAI, that all, or nearly all, of TMI's customers share the objective of using pension funds to purchase alternative investments. Accordingly, Mr Burns knew, or should

have known, that TMI's process for making personal recommendations would be inadequate for all, or nearly all, of TMI's customers;

(3) he failed to identify, manage, mitigate and adequately disclose his own personal conflicts of interest as well as the conflicts of interest that existed between individuals at TMI and TMAI as well as the wider conflicts of interest that occurred as a result of the business models and processes applied across the regulated and unregulated entities involved in the SIPP transfer process.

80. Mr Burns made both written and oral representations to the RDC on the Warning Notice. Unusually, there were two meetings at which Mr Burns's oral representations were made. Mr Burns was given the opportunity of a second meeting because it was apparent at the first meeting, at which he appeared without legal representation, that he had not sufficiently well understood the allegations in the Warning Notice and, in particular, the way in which they had changed from the draft Warning Notice.

81. At the second meeting, which took place on 17 May 2016, Mr Burns was represented by Counsel, Mr Farhaz Khan, who acted on a pro bono basis.

82. Mr Khan focused his representations on the Advice Limitation Issue. The main thrust of his representations was that notwithstanding the changes made from the draft Warning Notice, the substance of the allegations had not changed and therefore the issue of whether or not advice was provided on the underlying investments remained the gravamen of the complaint the Authority had against Mr Burns and whether or not the Authority had knowledge of that prior to 7 December 2012.

83. In response to that point, the RDC Chair explained that the substantive change that was made at the warning notice stage was to look at the advice that was being given in relation to the transfer of pension funds, rather than the underlying investment that was held in the SIPP.

84. Mr Khan's response was that the way the case was put in the Warning Notice was simply a different way of making the same allegation, namely that TMI ought to have been advising on the underlying investment. He contended that the legal test was whether the Authority had broad knowledge of the essence of the allegation and that Ms McIvor had that knowledge, perhaps as early as January 2012. He contended that if Ms McIvor's conclusion in her email of 10 December 2012, as referred to at [58] above, given after her review of the relevant documents, is accepted as the best evidence of her recollection, then it could be inferred that the knowledge that the Authority had at the relevant time was good enough to satisfy the test in s 66 (5) FSMA.

85. Enforcement's response on the Advice Limitation Issue was to take the RDC panel through the various documents from which it contended that what appeared to be a "quite clear statement" by Ms McIvor on 28 September 2015 about her state of knowledge, "doesn't bear scrutiny". Enforcement contended that she had only looked at the documents quickly and provided a "fairly, briefly considered response." They contended that Ms McIvor "shot from the hip" and drew the wrong conclusion

"because she hasn't analysed the documents correctly." When asked by the RDC whether this observation had been pointed out to her, Enforcement responded that Ms McIvor had been told that they were "going a different way" but she had not indicated that she accepted that she had been mistaken in her conclusion.

5 86. The RDC Chair asked Enforcement directly whether if they knew in January 2012 that TMI did not give advice on alternative investments that would mean that the limitation period started running from that point, even on the basis of the revised allegations in the Warning Notice. Enforcement's response took a while to get direct to the point, but they did say that where an IFA was giving advice to a retail client on 10 how and where to invest their pensions, it would follow that a failure in those circumstances to advise on esoteric underlying investments is "something from which a failure to give adequate personal recommendations can be inferred".

87. There was some discussion as to what the effect might be on the financial penalty sought by the Warning Notice were the RDC to be with Mr Burns on the 15 Advice Limitation Issue. Mr Khan tentatively suggested that a penalty of say 10 or 20% of the original penalty may be appropriate and Enforcement said they were not in a position to say what the appropriate penalty should be in the event of the limitation argument being successful, which was a matter for the RDC.

88. Although, as I have mentioned, the focus of the second oral representations 20 meeting was on the Advice Limitation Issue, Mr Burns made it clear in his separate representations to the RDC, that he was continuing to contest the imposition of a prohibition order. He said that it would be difficult for him to live with a prohibition and his view was that there should be a distinction between people who have made mistakes and people who have acted without integrity and honesty. He concluded by 25 saying "I feel that a ban isn't appropriate".

89. Following consideration of the representations made by and on behalf of Mr Burns, the RDC issued the Decision Notice on 22 July 2016. The basis of the findings, in relation to the Advice Issue, that Mr Burns had acted in breach of Statement of Principle 7 were set out at paragraph 5.2 of the Decision Notice. It was 30 found that Mr Burns had failed to take reasonable steps to ensure that TMI complied with the relevant regulatory provisions relating to personal recommendations in that:

> "TMI's Personal Recommendations Process, which Mr Burns was jointly responsible for, was inadequate, as, rather than taking account of the customer's individual circumstances, demands and needs, including whether they were 35 intending to transfer from a Defined Benefit Pension Scheme, it resulted in Personal Recommendations being made predominantly on the basis of the customer's objective of using their existing pension funds to purchase Alternative Investments. Further, the Personal Recommendations Process resulted in TMI's customers being misled, and not being treated fairly, because it 40 did not meet customers' information needs and because customers would have been given the impression from the steps taken by TMI as part of the Personal Recommendations Process that the Personal Recommendation they received reflected their individual circumstances, demands and needs."

90. The RDC dealt with the Advice Limitation Issue in Annex B to the Decision Notice which set out a summary of Mr Burns's representations and the Authority's conclusions in respect of them. It stated the following at paragraphs 4 to 6 of that Annex:

> "4. The Authority's initial view, as set out in the Draft Warning Notice and in the [Preliminary Investigation Report], was that Mr Burns' misconduct related to a failure by TMI to advise customers on the suitability of the Alternative Investments. However, after reviewing the relevant evidence, the Authority (through its Regulatory Decisions Committee) concluded that the evidence most strongly supported the misconduct described in the Warning Notice (and in this Decision Notice). This misconduct concerns Mr Burns' failure to take reasonable steps to ensure that TMI's Personal Recommendations Process complied with regulatory requirements. It does not include, and does not rely upon, a finding that TMI failed to advise customers on the suitability of the Alternative Investments. Instead, the Authority's finding is that Mr Burns failed to take reasonable steps to ensure that TMI's Personal Recommendations Process was adequate because, rather than taking account of the customer's individual circumstances, demands and needs, the Personal Recommendations Process resulted in TMI making Personal Recommendations predominantly on the basis of the customer's objective of using pension funds to purchase Alternative Investments. This is a specific finding of misconduct, which is separate from any allegation that Mr Burns failed to ensure that TMI gave advice on the Alternative Investments.
>
> 5. The Authority does not agree that, if it had knowledge that TMI did not advise on the Alternative Investments, that would constitute knowledge from which the Authority could reasonably infer that Mr Burns had committed the misconduct described in the Warning Notice and in this Decision Notice. Therefore, it is not necessary for the Authority to reach a conclusion as to when the Authority became aware that TMI did not advise on the suitability of the Alternative Investments.
>
> 6. For these reasons, the Authority does not accept Mr Burns' arguments on limitation."

Events occurring up to and after the commencement of the Tribunal proceedings

91. In his reference notice dated 7 September 2016, Mr Burns complained of collusion between the RDC and Enforcement in "re-hashing allegations" in the Warning Notice to avoid the Advice Limitation Issue. Specifically, he said that the revised allegations in the Warning Notice appeared to be "rehashed versions of the old allegations" and therefore time-barred. It is therefore clear that Mr Burns was making it clear that notwithstanding the basis of the Decision Notice, he did not accept that the RDC had successfully avoided the Advice Limitation Issue.

92. However, it was clear that Mr Burns also challenged other aspects of the Decision Notice. He said:

> “Notwithstanding the above the sanctions proposed to be taken against me are not appropriate and proportionate to the level responsibility I had within the business.”

93. In particular, Mr Burns pleaded that a prohibition order was not appropriate or proportionate on the basis that he had acknowledged his mistakes and apologised for them, learned from them and demonstrated his competence by his actions following the Authority’s alerts issued in January 2013. He also challenged the imposition of a financial penalty on grounds of financial hardship.

94. On 5 October 2016 the Authority filed its Statement of Case. As Mr Monaghan said in his evidence, the Statement of Case was broadly in line with the Decision Notice which Mr Monaghan said was the approach that Enforcement took in the normal course of events, particularly because under the Tribunal’s procedure rules the Authority only had 28 days from the filing of the reference notice to file its Statement of Case.

95. However, there are some differences from the Decision Notice in the way in which the Statement of Case expresses the Authority’s case against Mr Burns. In paragraph 22 specific reference was made as to how TMI approached its obligations to give advice. It said:

> “TMI did not use the information it had obtained from its customers to provide advice as to the appropriateness the customer’s overall strategy in both transferring his or her pensions into a SIPP and thereafter investing in Alternative Investments. Instead, TMI’s overriding concern was to meet the customer’s stated intention of transferring his or her pension to a SIPP in order to invest in Alternative Investments.”

96. Paragraph 36 of the Statement of Case criticises TMI’s personal recommendation process, stating that it:

> “did not incorporate any consideration as to the suitability for the customer of the Alternative Investments the customer intended to put into its SIPP in circumstances where TMI was aware that its customers intended using the SIPP to invest in the Alternative Investments.”

97. Echoing what was said at paragraph 5.2 of the Decision Notice, as quoted at [89] above, paragraph 37 of the Statement of Case stated:

> “In the circumstances, the Personal Recommendation Process was flawed and deficient and it was implemented inadequately. Rather than taking account of the customer's individual circumstances, demands and needs, the Personal Recommendation Process resulted in a personal recommendation being made predominantly on the basis of the customer's stated objective of using their existing pension funds to purchase the Alternative Investments without TMI giving any or any sufficient consideration to the suitability of that objective.”

98. It is to be noted, however, that the words after "Alternative Investments" in the penultimate line of that paragraph did not appear in paragraph 5.2 of the Decision Notice.

99. In paragraph 49 of the Statement of Case, the Authority relied on the following as constituting failure on Mr Burns's part to take reasonable steps to ensure that TMI's business model complied with the relevant regulatory requirements, namely that he:

> "knew or should have known that TMI's Personal Recommendation Process was inadequate and flawed and could not be relied upon to ensure that TMI gave appropriate advice and personal recommendations to customers".

100. The Statement of Case did not mention the Advice Limitation Issue at all, despite Mr Burns having raised it in his reference notice and therefore clearly indicating that this would be an issue on his reference. Mr Monaghan confirmed that the evidential picture had not changed on this issue since the matter had been argued before the RDC.

101. In cross examination Mr Monaghan was unable to shed any light on whose decision it was to file a Statement of Case broadly in line with the findings of the Decision Notice and was rather vague about the process by which the final version of the Statement of Case came to be approved, stating that it was an iterative process between the case team, Enforcement's in-house legal advisers and their external counsel.

102. In answer to a question from myself at the hearing, Mr Monaghan said that despite Mr Khan's representations at the oral representations meeting that the different way in which the case had been put in the Warning Notice made no difference to the Advice Limitation Issue, Enforcement did not consider it was necessary to consider whether the RDC had been right to sidestep the issue in the way that it did in the Decision Notice. Mr Monaghan said that because the issue had been fully ventilated at the oral representations meeting and the RDC had "strongly landed on the coast that they had landed" it would have been quite unusual for Enforcement to move away from that conclusion at that point. Although he had not been privy himself to the discussions that took place on the topic, he was sure it was given some thought, but there had been no discussion with the RDC after the issue of the Decision Notice to seek an explanation as to why it had decided that the Advice Limitation Issue could be safely sidestepped.

103. Mr Burns filed his Reply to the Statement of Case on 1 November 2016. In that Reply he denied that he was personally culpable and that he was entitled to rely on his co-director Mr Pope to ensure compliance with the regulatory regime. He reiterated his view that the sanctions proposed were not appropriate and proportionate and disputed that he was not fit and proper to hold senior management and significant influence functions.

104. As regards the limitation issues, it was clear from the Reply that Mr Burns was now claiming that the imposition of a financial penalty was time barred both in

respect of the Advice Issue and the Conflict of Interest Issue and he repeated his allegations of collusion between the RDC and Enforcement to sidestep the limitation issue. He said nothing further in his Reply about the amount of the financial penalty sought, presumably on the basis that on his analysis of the limitation issues, the question did not arise.

105. In January 2017, anticipating that the Tribunal may make directions for exchange of witness evidence within a relatively short timeframe, and because Mr Burns's pleadings had made it clear that he intended to contest the limitation issues, Enforcement decided that it would be necessary to prepare Ms McIvor and Mr Kesic as potential witnesses on that issue. It would appear from this decision that Enforcement was of the view that it could not safely sidestep the Advice Limitation Issue in the way that the RDC had.

106. Enforcement carried out thorough preparations for an interview of Ms McIvor which were approved by Mr Monaghan. She was sent one full lever arch file of documents. A full working day on 9 March 2017 and further time on 14 March 2017 was spent interviewing Ms McIvor, with representatives of enforcement testing Ms McIvor's recollection in detail in relation to a wide range of documents, including a number which had not been available until a relatively late stage in the RDC proceedings, such as witness statements regarding the 16 January 2012 meeting which had been filed by Mr Burns and Mr Legerton with the RDC shortly before the second oral representations meeting. Mr Monaghan explained Enforcement's objective as being to resolve what it saw as a crucial conflict of evidence in respect of the central documents on which the parties made their key submissions before the RDC.

107. This process did not take matters further forward. Ms McIvor's position remained that she was unable to exclude the possibility that representatives of TMI had communicated information regarding TMI's business model to her on 16 January 2012 so that in Enforcement's view the source of the knowledge she purported to impart to Mr Smart on 10 December 2012 regarding TMI's advice model remained unclear.

108. Mr Kesic was also interviewed but was not able to add significantly to its previous evidence.

109. On 10 May 2017 Mr Burns made an application to the Tribunal for additional disclosure of documents, none of which related to the Advice Limitation Issue and that application was set down for the hearing on 12 July 2017.

110. In the meantime, following a further analysis of the evidence, in early May 2017 Enforcement reappraised its approach to the Advice Limitation Issue. By this time, it had formulated a number of concerns about maintaining its position on limitation in the Tribunal proceedings which Mr Monaghan summarised as follows:

(1) The Tribunal may disagree with the RDC's view of the Advice Limitation Issue, and agree with the view (which had been put forward by Enforcement during the RDC proceedings) that the Advice Limitation Issue was fundamental

to the decision whether or not the Authority had the power to fine Mr Burns with regard to TMI's advice model;

(2) if so, the fact that Ms McIvor was unable to gainsay with any certainty the version of events at the 16 January 2012 meeting put forward by Mr Burns was likely to be of some importance;

(3) As a consequence of (1) and (2), Mr Burns's position on the Advice Limitation Issue was strongly arguable; and

(4) There was a risk that the issue would distract the parties and the Tribunal from what the Authority regarded as the most important aspects of the case, namely the culpability of Mr Burns and the need for him to be prohibited and the Tribunal's view on the proper scope of SIPP advice where consumers are proposing to invest in a risky investment product.

111. Accordingly, after further consideration, in which Mr Monaghan was involved, and following consultation with counsel and the Director of Enforcement, the Authority notified the Tribunal on 5 July 2017 that it had decided to concede the Advice Limitation Issue. In making the concession at this time, Enforcement was mindful of the fact that any questions that arose out of this decision from Mr Burns or the Tribunal could be dealt with at the forthcoming applications hearing.

112. At the applications hearing, which took place before me, I expressed my concern as to why the concession could not have been made earlier and the matter addressed at the time the Statement of Case was being prepared. Mr Pritchard, appearing for the Authority, confirmed that the concession arose because of the review of the existing evidence that had taken place and that if the Authority had proceeded on the basis that the Advice Issue was not time-barred "we would be progressing an argument that we think is strongly flawed", a statement which he later clarified as meaning that the Authority accepted that Mr Burns's points on limitation as regards the Advice Issue were "strongly arguable".

113. The Authority was directed to amend its Statement of Case so as to indicate the level of financial penalty that it would now be seeking purely in relation to the Conflict of Interest Issue.

114. Mr Burns was clearly angry about the lateness of the concession. This was understandable because he had consistently been maintaining that the Advice Issue was time barred as far as a financial penalty was concerned, right through the RDC proceedings and in his pleadings in the proceedings before the Tribunal. He contended that the whole investigation was unfair and prejudiced against him and he asked for "summary judgment in this case to dismiss it" or for the Tribunal to invite the FCA to withdraw its case.

115. The Authority had made it clear when making the concession that it still maintained that a financial penalty in respect of the Conflict of Interest Issue was not time-barred. Mr Burns said at the hearing that in the light of the latest development, that assertion could not be taken seriously.

116. In view of the concerns raised by Mr Burns, the Tribunal directed the Authority to conduct a further search of its records in case there was any further information relevant to the Conflict of Interest Limitation Issue. The Tribunal confirmed that there was no power to proceed to a "summary judgment" and no basis on which the reference could be struck out, because the Authority was proceeding with other matters which were not affected by the concession on the Advice Limitation Issue.

117. The Authority's amended Statement of Case was filed on 9 August 2017. It now pleaded that the Authority was seeking a reduced penalty of £116,830 to reflect the concession made on the Advice Limitation Issue.

118. Mr Burns accepted that he did not seek to open discussions with the Authority after the filing of the amended Statement of Case with a view to negotiating a reduced financial penalty, on the basis of the submissions made by Mr Khan at the RDC oral representations meeting that a penalty in the region of 10 to 20% of the original penalty would be appropriate. In particular, he accepted that he did not approach the Authority and indicate that he was willing to settle the matter on the basis of a financial penalty in the region of £40-£50,000 and an acceptance of a prohibition. He accepted that he continued to challenge the revised penalty in the Tribunal proceedings and said: "thank goodness I did because I ended up with [a much lower penalty]", the Tribunal imposing a penalty of £60,000 in respect of Mr Burns's failings in relation to the Conflict of Interest Issue.

119. Mr Burns also continued to maintain that he was not personally culpable for the alleged failings in the Advice Model and the Personal Recommendation Process, continued to maintain that the Conflict of Interest Issue was time-barred as far as a financial penalty was concerned but in any event the imposition of a financial penalty was not appropriate. He also resisted the making of a prohibition order. He accepted in his evidence in the costs hearing that he did so because he believed that he had arguable cases as regards all of those issues.

120. As regards the financial hardship issue, although it had previously been raised before the RDC, and, as mentioned above, it was mentioned in Mr Burns's reference notice, there was no mention of it in his Reply. During the hearing of the substantive reference, the Tribunal sought clarification during the hearing from Mr Burns as to whether he wished to press a case on financial hardship and he decided not to do so, after Mr Pritchard had started to ask Mr Burns during his cross examination some questions about his means.

Discussion

121. As indicated at [11] above, in this decision I need to decide first whether there is jurisdiction to make a costs order in favour of Mr Burns. That will be the case if I find either or both of the following contentions by Mr Burns to be made out:

(1) The RDC's decision as recorded in the Decision Notice was "unreasonable";

(2) The Authority has "acted unreasonably" in bringing, defending or conducting the proceedings on Mr Burns's reference.

122. As far as (1) is concerned, Mr Burns does not contend that the whole of the RDC's decision was unreasonable. He accepts, in view of the findings of this Tribunal, that it is not arguable that the RDC's findings regarding Mr Burns's failings as regards the Advice Issue and the Conflict of Interest issue and its decision to make a prohibition order were unreasonable. The allegation of unreasonableness therefore relates purely to the manner in which the RDC dealt with the Advice Limitation Issue and consequently its findings on the level of financial penalty to be imposed. In that regard, Mr Burns contends that Enforcement colluded with the RDC to ensure that the Advice Limitation Issue was sidestepped in the Decision Notice and consequently the view that the RDC took on the way the case could be characterised was unreasonable.

123. As far as (2) is concerned, Mr Burns contends that it was unreasonable of the Authority to make the decision to concede the limitation issue as late as they did and that the matter should have been addressed before the Statement of Case was prepared. He also contends that having made that concession, the amount proposed by way of revised financial penalty was unreasonable.

124. If I accept all or some of Mr Burns's contentions, I must then consider whether, as a matter of judicial discretion, I should make a costs order in favour of Mr Burns and, if so, whether such order should extend to the whole or a specified part of the costs claimed by Mr Burns. If I determined that a costs order is appropriate I will then consider whether I can undertake a summary assessment of the costs concerned myself or whether to direct that the application be made the subject of a detailed assessment.

125. I shall therefore proceed to deal with each of these issues in turn.

Issue 1: Whether the RDC's decision was unreasonable

126. I start by making some observations and findings on the manner in which the Authority investigated the Advice Limitation Issue and subsequently presented its case on that issue to the RDC.

127. First, it is unfortunate that for the reasons mentioned at [49] above, Mr Smart's note of 10 December 2012 and the associated emails were not discovered until September 2015, some months after discussions had taken place for the first time between Enforcement and Ms McIvor and Mr Kesic as to what was discussed at the meeting of 16 January 2012. It is also surprising that Enforcement had not by that time talked to either Ms Ferreira or Mr Smart about their discussions with Ms McIvor. It seems to me reasonable to expect that at the outset of an investigation that Enforcement would seek to find out as definitively as possible what was known by the Authority about the firm or individual under investigation by speaking to all of those who may have had contact with the firm and its representatives, particularly those in supervision. That is because it seems to me prudent that Enforcement should seek to

establish at an early stage when the limitation period starts to run in respect of the issue of Warning Notice. Had that happened, then the Advice Limitation Issue might well have been bottomed out at a much earlier stage.

128. The matter might also have been investigated following Mr Burns's interview in November 2014 when he informed his interviewers about what the Authority had been told about TMI's advice model.

129. It was therefore unfortunate that the settlement discussions with Mr Burns took place at a time when Enforcement had no clear view on the Advice Limitation Issue and did not appear to have investigated to any material extent. Whilst I cannot say, in the light of my later findings, that the parties would have been able to agree a settlement of all of the issues in dispute had the true picture on limitation emerged at that stage, there must have been a reasonable prospect that they may have been.

130. Once the evidence available to the Authority on the limitation issue began to emerge in September 2015, it appears to me that the Authority approached the issue with something of a closed mind. Unfortunately, this is not the first time this has happened. I refer to the observations of the Tribunal at [313] of the substantive decision in this case on the decision in *Hussein v FCA* [2018] UKUT 186 (TCC) and the comments of the Complaints Commissioner on the Authority's approach in that case.

131. Despite Mr Monaghan having said in his evidence in the substantive hearing of Mr Burns's reference, that there was no difference in the rigour that Enforcement applied to considering a limitation issue in the context of RDC proceedings as compared to Tribunal proceedings, the facts do not bear that out in this case. Ms McIvor was not given much time to review the document she was sent and it is quite apparent from my findings at [51] to [56] above that in the discussions with Ms McIvor she was repeatedly prompted by Enforcement to give answers which were designed to achieve a desired outcome that Ms McIvor had not, despite the clear terms of the note of 10 December 2012, been told about the lack of advice from TMI on the underlying investments. That is particularly borne out by the suggestion recorded at [54] that the position of the SIPP operator was the priority for discussion and the suggestion recorded at [56] that the December 2012 note could have contained an error.

132. Similarly, Mr Topham's suggestion to Ms McIvor on 20 October 2015 that she had "no more than a suspicion" that TMI would not be advising on the underlying investments seems to be an attempt to put words into Ms McIvor's mouth so as to refute the suggestion that, through Ms McIvor, the Authority had knowledge of the position.

133. Likewise, Enforcement's reasoning as to why the "knowledge" test had not been met, as set out at [69] above, does not present a balanced view of the evidence available to Enforcement at that time. It only makes points which are favourable to the making of a decision on the issue which is consistent with Enforcement's recommendation and omits anything from which the contrary position could be

inferred. For example, it failed to say why it placed no weight on what Mr Burns had said in interview on the issue and consistently thereafter. At no stage in the regulatory investigation, and during the RDC proceedings and in this Tribunal, had Enforcement suggested that there was any question as to Mr Burns's integrity. Therefore, it does not appear that Enforcement considered whether the December 2012 note and Ms McIvor's subsequent statements when interviewed by Enforcement in fact corroborated what Mr Burns had said he said at the meeting, which was the basis of the Tribunal's finding at [197] of the Decision on this point.

134. Whilst in its discussions with Ms McIvor Enforcement had suggested that she may have been mistaken as to which entity within the TailorMade Group was responsible for giving advice as a result of the confusion arising out of the names of the IFA and the SIPP operator which were subsequently swapped, the recommendation contains no discussion on the point that the 10 December 2012 note recorded that there was one company within the group (TMAI) which promoted the alternative investments and another company in the group (which if Ms McIvor was confused could only have been TMI or TMI SIPP) advised on the SIPP but not on the underlying investment. Therefore, there was no analysis as to why this did not amount to knowledge that whoever advised on the merits of the SIPP did not advise on the merits of the underlying investment. Nor did it consider the point that which of the two entities it was who was responsible for giving advice could clearly have been inferred from other information about the Tailormade Group and its entities which would have been in the possession of the Authority at that time.

135. Furthermore, in its recommendation Enforcement gave no indication that it considered whether the reason that the note of the meeting prepared by the Authority contained no reference to the point was that those at the meeting did not appreciate the significance of what they were being told, focused as they were on the position of the SIPP operator and the question of whether it should be authorised.

136. This lack of balance is further demonstrated by Enforcement's representations on the point at the second RDC oral representations meeting, as summarised at [85] above. Without having informed Ms McIvor why they were not going to accept her account of what was said at the 16 January 2012 meeting, thus giving her the opportunity of reacting to that, they clearly overstated the position by saying that Ms McIvor's statement "doesn't bear scrutiny" and of course Enforcement's criticism that Ms McIvor had not analysed the documents correctly, must be put into context; Ms McIvor was not given much time to offer a considered view.

137. All of this is in clear contrast to what appears to have been a rigorous approach to the issue once Enforcement decided to revisit it following the closing of the pleadings in the Tribunal proceedings, as described at [106] to [111] above.

138. However, although as discussed below, Enforcement's approach to the investigation and the RDC proceedings is of some relevance in the context of the timing of the Authority's concession on the Advice Limitation Issue, it is not, as Mr Pritchard submitted, directly relevant to the question as to whether the RDC's decision was unreasonable.

139. That is because, as I have described above, the RDC sidestepped the issue in the manner in which it formulated the findings against Mr Burns in the Decision Notice. The question for me is whether it was unreasonable for the RDC to have taken that course, notwithstanding the clear expectation on Enforcement's part that it was an issue that the RDC were going to have to grapple with.

140. The note of the Warning Notice meeting between Enforcement and the RDC held on 28 October 2015, demonstrates that it was the RDC that on its own took the initiative to recast the allegations in the final version of the Warning Notice. I find that it did this for two reasons; first, because it believed that Mr Burns would otherwise be "let off lightly" in terms of classification of the rule breaches involved and secondly because of its concerns about the limitation issue, describing it as a "risky basis" to leave it to Ms McIvor's cross examination in the Tribunal. I therefore see no evidence to support Mr Burns's contention that there was collusion between Enforcement and the RDC to recast the allegations and ensure that the limitation issue was sidestepped. Neither is there any evidence that the RDC acted corruptly in any way or in bad faith. It may, as I conclude below, have been mistaken in the approach that it took, but there is no evidence that the RDC was doing anything other than in good faith following a course that would lead it to the position where it could conclude that the Advice Limitation Issue did not arise.

141. Mr Pritchard submitted that the RDC set out its reasons for concluding that the Advice Limitation Issue did not arise in the Decision Notice, explaining that the evidence most strongly supported the misconduct described in the Decision Notice, namely that TMI's personal recommendations process was inadequate because, rather than take account of the customer's individual circumstances, demands and needs, it resulted in TMI making personal recommendations predominantly on the basis of the customer's objective of using pension funds to purchase alternative investments. The RDC decided that this misconduct was separate from any allegation of a failure to advise on alternative investments, and that Mr Burns's misconduct, as set out in the Decision Notice, did not include, or rely upon, such a failure.

142. Mr Pritchard submitted that I did not need to decide whether the RDC was right in this analysis. The question is whether the RDC's reasoning, as set out in Annex B of the Decision Notice and quoted at [90] above, was unreasonable. Mr Pritchard submitted that it was not unreasonable; it was important to remember that the conclusion was not reached after a hearing of the type experienced in the Tribunal, nor was the decision written by a Judge. Rather, the Decision Notice records the Authority's decision following an administrative decision-making process and Mr Burns's remedy where he disagreed with the Decision Notice was his statutory right to refer the matter to an independent tribunal.

143. I accept what Mr Pritchard says about the differences in procedure between the RDC and the Tribunal and the differences in character between administrative decision-making and an independent judicial decision.

144. However, I do not believe in relation to the question as to whether it was open to the RDC not to deal with the Advice Limitation Issue head on, that those

differences are material. The RDC had to consider whether there was a proper basis for its analysis that its characterisation of Mr Burns's misconduct as failing to take reasonable steps to ensure that TMI's Personal Recommendations Process complied with regulatory requirements did not rely on a finding that TMI failed to advise customers on the suitability of the underlying investments. In that context, it was assisted by its own legal adviser.

145. In my view the RDC failed to consider why, if the Authority did have knowledge that TMI did not advise on the underlying investments, that knowledge was not in itself sufficient for the Authority to be regarded as having knowledge of the "particular misconduct" that the Authority was relying on, namely the failure to take reasonable steps to ensure that the Personal Recommendations Process was compliant. However one looks at it, failure to advise on the underlying investments meant that there was a failure in TMI's Personal Recommendations Process. As the Tribunal said at [322] of the Decision, the test of knowledge of the "particular misconduct" is the right approach when considering the application of s 66 (5) FSMA and the RDC does not appear to have given any consideration to this issue. In my view such failure meant that there was a significant gap in the RDC's reasoning and, in my view, it was reasonable to expect that the RDC would have realised that in order for its reasoning to be complete, that was an issue that needed to be addressed. That being so, I must regard the RDC's conclusions as to why the Advice Limitation Issue did not arise as being unreasonable.

146. I therefore conclude on this issue that I do have jurisdiction to make a costs order in favour of Mr Burns on the basis that the RDC's decision as regards the Advice Limitation Issue was unreasonable.

Issue 2: Whether the Authority has acted unreasonably in bringing, defending or conducting the proceedings

Timing of the Authority's concession of the Advice Limitation Issue

147. As Mr Pritchard submitted, in order to determine this issue, I need to decide whether or not it was unreasonable for the Authority not to have made the concession on the Advice Limitation Issue earlier than it did.

148. Mr Pritchard submits that the Authority's approach was not unreasonable. By informing Mr Burns that the Authority no longer sought to impose a penalty in relation to the Advice Issue at an early stage in the proceedings, Mr Burns was saved the need to spend time preparing witness statements dealing with the Advice Limitation Issue and the Tribunal was saved time dealing with arguments on an issue on which the Authority recognised Mr Burns had a strong argument. Mr Pritchard also submits that it was not unreasonable to take this course in circumstances where the RDC's analysis meant that the Advice Limitation Issue did not arise at all. The Authority's later decision not to advance that argument was a reasonable decision and there was nothing unreasonable in the Authority taking it when it did.

149. Mr Pritchard submits that the appropriate time to have reconsidered the Advice Limitation Issue was at the time that the Authority was preparing to proof its witnesses so that changing the case before the exchange of witness evidence was not an unreasonable position to take.

5 150. I have concluded that the Authority acted unreasonably in the conduct of the proceedings by not addressing the Advice Limitation Issue in its Statement of Case. It follows that I reject Mr Pritchard's submission that the appropriate time to have reconsidered the Advice Limitation Issue was at the witness evidence preparation stage. My reasons for this conclusion are as follows.

10 151. First, Enforcement had taken the view during the RDC proceedings, as it stated in its submissions in response to Mr Burns's costs application, that the question as to whether Ms McIvor or and Mr Kesic were told at the 16 January 2012 meeting that TMI did not advise on the underlying investments held in a customer's SIPP was "fundamental" to the question as to whether the Authority had power to impose a 15 financial penalty with regard to TMI's advice model.

152. Secondly, since the RDC had sidestepped that issue in the Decision Notice, Enforcement should then have thought carefully as to whether it should depart from its usual practice of presenting to the Tribunal broadly the same case as formed the basis of the Decision Notice. It should have considered at that point whether the 20 RDC's reasoning caused it to reconsider the position it took before the RDC, namely that the Advice Limitation Issue was "fundamental" to the question of the ability to impose a financial penalty as regards Mr Burns's failings in relation to TMI's advice model. It would have been prudent for Enforcement at that stage to have had a discussion with the RDC to understand fully its reasoning and to consider whether the 25 gaps in that reasoning, which I have referred to above and has caused me to conclude that the RDC's decision on this point was unreasonable, should lead it to depart from the RDC's case before the Tribunal. It is clear from Mr Monaghan's evidence that no such discussion with the RDC took place.

153. Third, Mr Burns had clearly flagged the Advice Limitation Issue in his 30 reference notice. The reference notice plays an important part in Tribunal proceedings in indicating the issues which are going to be in dispute and which therefore the Authority would be expected to reply to in its Statement of Case. The burden is on the Authority in the Tribunal proceedings to satisfy the Tribunal that the circumstances are such that the imposition of a financial penalty is appropriate. One of those 35 circumstances is the question of limitation, when that is an issue that has been raised by the applicant in the proceedings. The issue should therefore have been addressed in the Statement of Case. In his evidence, Mr Monaghan explained that the reason the Authority decided to address the Advice Limitation Issue at the time it did was because the issue had been raised in Mr Burns's pleading. However, that was a 40 reference to Mr Burns's pleading in his Reply and overlooks the fact that there was an earlier pleading in which the issue been raised, namely the reference notice.

154. Fourth, had Enforcement addressed the issue appropriately at that stage, it would have realised that the approach taken by Enforcement to the issue before the

RDC was, as I have indicated above, less than rigorous. I see no reason to suppose that if the issue had been addressed, it would not have been carried out in the rigorous fashion that it clearly was when it was ultimately addressed and, as a result, quite correctly, the Authority would have decided to concede the Advice Limitation Issue at that point.

155. I do not accept that the 28-day time limit for the filing of a Statement of Case following the filing of the reference notice should have been an impediment to Enforcement considering the matter earlier than it did. The evidence shows that the process of proofing Ms McIvor or and Mr Kesic as potential witnesses, by persons who were already familiar with the matter, did not take an inordinate length of time. There was subsequently a considerable elapse of time before Enforcement took the decision to concede the issue, but there is no reason to suppose that that period could not have been shortened had it been necessary to comply with the time limit. In any event, there is of course scope in the Rules for an extension of time to be granted for the filing of a Statement of Case, a power which the Tribunal would normally be willing to exercise where there is a good reason. The fact that an important issue needed to be bottomed out before the Statement of Case could be finalised was clearly a good reason.

156. Finally, there is no evidence that the decision to file the Statement of Case in the form in which it originally took was a result of a structured process and clear decision making. It is surprising that Mr Monaghan was vague about his own role in the decision making in the process that was followed. As I have already indicated, there was an important decision to make as to whether or not to run with the RDC's case and it seems to me that as the senior person with responsibility for the conduct of the proceedings Mr Monaghan should have been more actively involved. As I have noted above, there were some differences between the Decision Notice and the Statement of Case and it ended up as being something of a halfway house between the original allegations made in the draft Warning Notice and the Decision Notice. In particular, the provisions of paragraphs 22, 36, and the last few words of paragraph 37 of the Statement of Case indicated strongly that the Advice Limitation Issue had to be addressed.

157. I therefore conclude on this issue that I do have jurisdiction to make a costs order in favour of Mr Burns on the basis that the Authority's decision not to address the Advice Limitation Issue in its original Statement of Case was unreasonable.

The size of financial penalty proposed in respect of the Conflict of Interest Issue

158. Mr Burns submits that bearing in mind what Mr Khan had said during the second RDC oral representations meeting about the appropriate level of financial penalty as regards this issue and the findings of the Tribunal on this point, which resulted in a reduction of nearly one half of the penalty sought by the Authority, the Authority acted unreasonably in proposing a penalty of £116,830.

159. In my view the Authority did not act unreasonably in this regard. The position is quite different from that in *Jackson Grundy,* as referred to at [21] above, where it was

held that HMRC acted unreasonably in defending a penalty of £169,652 which was subsequently reduced on appeal to £5,000.

160. In this case the Tribunal agreed with the Authority that a substantial financial penalty in respect of the Conflict of Interest Issue was appropriate: see [327] to [329] of the Decision. The Authority's argument that its proposed penalty was appropriate because TMI was at the heart of huge, crystallised consumer detriment which was directly attributable Mr Burns's conflict failings was a perfectly reasonable argument to run and have tested by the Tribunal. In the event, the Tribunal differed from the Authority as regards the seriousness of the Conflict of Interest Issue as opposed to the Advice Issue and for that reason reduced the penalty, but that is a question on which there was clearly room for debate. This was not a case where the Authority ought to have known that their view of the level of financial penalty had no reasonable prospect of success.

161. I therefore conclude that I have no jurisdiction to make a costs order in respect of the Authority's conduct on this issue.

Issue 3: Whether and to what extent a costs order should be made

162. As mentioned above, the basis of Mr Burns's contention that he should be entitled to all of the costs that he has incurred in respect of his reference is that he would have settled the proceedings on the basis of an acceptance of a prohibition order and a financial penalty in respect of the Conflicts of Interest Issue had:

(1) The RDC accepted his arguments on the Advice Limitation Issue and decided on a financial penalty in respect of the Conflict of Interest Issue in the region of £25-£50,000 as suggested by his counsel at the second oral representations meeting; or

(2) The Authority had dealt appropriately with the Advice Limitation Issue in its Statement of Case and proposed a reasonable financial penalty in the same region as that proposed at the oral representations meeting.

163. As a consequence, of neither of those situations occurring, Mr Burns contends that all his costs from 7 September 2016 have arisen as a direct result of the unreasonable decision taken by the RDC.

164. Mr Burns contends that at the substantive hearing he argued against a prohibition order, the Conflict of Interest Limitation Issue and the amount of the financial penalty because he had "very arguable cases" on those issues. Nevertheless, he contends that it was the failure to deal with the Advice Limitation Issue appropriately that was at the heart of his decision to continue the proceedings following the issue of the Authority's Statement of Case.

165. I accept that Mr Burns genuinely believes that he would have settled these proceedings had the events described at [162] come to pass. However, that question is hypothetical. The reason that the Tribunal proceedings continued after the Authority made its concession on the Advice Limitation Issue was because, as the evidence clearly shows, Mr Burns wished to contest all the other issues which he had set out in

his reference notice, and, previously, had contested before the RDC. It cannot therefore be said that the reason the proceedings continued was because of the failure of the Authority to address the Advice Limitation Issue appropriately.

166. The evidence which supports this conclusion is the following:

5 (1) The fact that Mr Burns continued to contest the prohibition order during the second oral representations meeting (see [88] above);

(2) The issues that Mr Burns said he wished to dispute on his reference, as set out in his reference notice (see [92] and [93] above);

(3) The issues that Mr Burns said he wished to dispute in his Reply to the 10 Statement of Case (see [103] and [104] above). In my view Mr Burns was spurred on to contest the Conflict of Interest Limitation Issue in particular in response to what he regarded as the Authority's failings in relation to the Advice Limitation Issue, but nevertheless the fact was that he decided to contest all the issues mentioned in his Reply.

15 167. There is no evidence that Mr Burns attempted to settle the proceedings either before or after the Authority made its concession on the Advice Limitation Issue. He could have opened discussions with the Authority as regards the level of financial penalty in respect of the Conflict of Interest Issue after the amendment of the Statement of Case on the basis of what he regarded as a more appropriate penalty but 20 he did not do so. His strategy before the Tribunal was to argue that the Conflict of Interest Issue was time barred, which he was perfectly entitled to do, in the hope of avoiding a financial penalty in its entirety. He contested the other issues which he disputed, as set out in his Reply, with some vigour and considerable skill in the Tribunal proceedings which followed on the basis, as he said, he thought he had 25 arguable points on all of those issues and, as he accepted, he achieved a significant reduction in the financial penalty.

168. In those circumstances, there is no case for Mr Burns to be awarded any part of his costs incurred after the Authority made its concession on the Advice Limitation Issue. As I have found, there is no case for any finding of unreasonableness on the 30 part of the Authority in respect of the manner in which it conducted the proceedings following the concession and, in those circumstances, the usual position of there being no costs order should apply in relation to all of the proceedings which took place after that time.

169. I do, however, consider that there should be a costs order in favour of Mr Burns 35 to a limited extent in relation to the period between 7 September 2016 when the reference was made and 5 July 2017, when the Advice Limitation Issue was conceded.

170. Mr Pritchard submitted that even if I found (as I have done) that both aspects of the Decision Notice and the Authority's conduct of the proceedings was unreasonable 40 I should not exercise my discretion and make a costs order for the following reasons:

(1) The Tribunal has determined that Mr Burns committed serious misconduct which significantly contributed to huge consumer losses;

(2) Mr Burns profited considerably from his misconduct whereas many consumers have not been fully compensated for their losses and insofar as they have, that expense has been met by the wider industry in the form of FSCS awards;

(3) As Mr Burns repeatedly notes, the Authority has already incurred considerable expense establishing the important points made by the Tribunal in the Decision;

(4) The issues which the Tribunal determined were very important, in particular the Advice Issue. The Authority has already expended considerable resource in investigating and bringing proceedings against Mr Burns and his fellow directors of TMI and establishing the answer to the Advice Issue. The Tribunal should not add further to those costs via a costs order;

(5) Whilst the Authority does not make a costs application, Mr Burns own conduct in the proceedings has been, at times, unreasonable. Mr Burns conceded his arguments around financial means during the course of cross-examination. It is to be inferred from Mr Burns' refusal to answer questions on the issue that he could not substantiate the position.

171. Other than item (5), these are powerful points, but I have decided that in the circumstances it is appropriate that I should make a limited costs order. To do so will send out an important message to the Authority that, even in circumstances of what is found to be serious misconduct on the part of the applicant, which I accept is the position here, it is imperative that all subjects of investigation and enforcement proceedings should be treated fairly and reasonably. There have been a number of significant instances in this case where I have found that the Authority has fallen below the standards that should reasonably be expected of it. In addition, although not specifically dealt with in this decision, because I do not think they have been material in this case, there have, as submitted by Mr Burns been other disclosure failings in addition to the late disclosure of the 10 December 2012 note.

172. I should stress that Mr Burns has not made out his case that any of the Authority's failings have been deliberate, or that there has been collusion between Enforcement and the RDC. Nevertheless, the matters on which I have made findings of unreasonableness are significant and they have resulted, as Mr Burns submitted, in him not being treated as fairly as he could reasonably have expected to have been in some respects.

173. I reject the submission that Mr Burns's own conduct has been unreasonable. His position on his financial means was somewhat ambivalent; although financial hardship was pleaded in the reference notice, it was not pursued in his Reply and when the Tribunal sought clarification during Mr Burns's cross examination as to whether he was pursuing that issue he swiftly conceded it. I therefore do not believe that this late concession was material in the context of the proceedings as a whole.

Issue 4: The amount of the costs award

174. In view of the limited nature of the costs award that I have decided to make, I have decided that I can make a summary assessment of the amount to be awarded, by reference to Mr Burns's schedule of costs and the Authority's detailed response thereto.

175. As the Authority submits in its response, as my findings on unreasonableness relate only to a small aspect of the proceedings as a whole, Mr Burns's claim must be limited to a small part of the total costs he incurred in the relevant period. I can only take a broad approach to that issue. In that respect, I accept the Authority's submissions that my award should be in the region of between 10 and 20% of the total relevant costs incurred. I have decided that 20% is the appropriate figure in this case. I also accept the Authority's observations on the amount claimed by Mr Burns in respect of interlocutory hearings and in preparing his application for costs.

176. As submitted by the Authority, I cannot in this case make an order in respect of lost earnings. Furthermore, I have no power to award costs in respect of the services of any person other than Mr Burns himself.

177. In conclusion, I accept the Authority's calculations and direct that the Authority pay to Mr Burns £4,440.55 in respect of the costs he has incurred in relation to the proceedings arising out of his reference.

JUDGE TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGE
RELEASE DATE: 26 JANUARY 2019