David Jonathan Francis v The Jersey Financial Services Commission

Jurisdiction:	Jersey
Judge:	Sir Michael Birt, Jurats Nicolle, Pitman, Birt
Judgment Date:	04 December 2017
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Text

[2017] JRC 203A

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, Commissioner, and Jurats Nicolle and Pitman

Between
David Jonathan Francis
Appellant
and
The Jersey Financial Services Commission
Respondent

Advocate P. C. Sinel **for the Appellant**.

Advocate B. H. Lacey **and** E. M. Layzell **for the Respondent**.

Authorities

Financial Services (Investment Business (Restricted Investment Business — Exemption)) (Jersey) Order 2001.

Financial Services (Trust Company Business (Exemptions No. 5)) (Jersey) Order 2001.

Financial Services (Jersey) Law 1998.

Banking Business (Jersey) Law 1991.

Collective Investment Funds (Jersey) Law 1988.

Insurance Business (Jersey) Law 1996.

Financial Services Commission (Jersey) Law 1998.

Interface Management Limited v Jersey Financial Services Commission [2003] JLR 524.

Anchor Trust Company Limited v Jersey Financial Services Commission [2005] JLR 428.

Token Limited v Planning and Environment Committee [2001] JLR 698.

Minister for Planning and Environment and Others v Hobson [2014] (2) JLR 57.

Anchor Trust v JFSC [2006] JCA 040.

Royal Court Rules 2004.

UV and W -v- JFSC [2014] JRC 202.

W -v- JFSC [2015] JRC 017.

W -v- JFSC [2015] JCA 060.

W -v- JFSC [2014] JRC 250.

JFSC -v- W [2015] JRC 094.

W -v- JFSC [2015] JCA 135.

W -v- JFSC [2015] JRC 241.

W -v- JFSC [2016] JRC 199.

W -v- JFSC [2016] JRC 231A.

South Bucks District Council -v- Porter [2004] 1 WLR 1953.

Clarke Homes Limited -v- Secretary of State for the Environment [1993] 66P&CR 263.

De Smith, Judicial Review (7th Edition).

Interface Management Limited -v- Jersey Financial Services Commission [2003] JLR 524.

Anchor Trust Company Limited -v- Jersey Financial Services Commission [2005] JLR 428.

R -v- Westminster City Council Ex p Ermakov [1996] 2 All ER 302.

European Convention on Human Rights.

Kanda -v- Government of the Federation of Malaya [1962] AC 322.

R -v- Secretary of State for the Home Department, Ex P Doody [1994] 1 AC 531.

Real Estate Opportunities Limited -v- Aberdeen Asset Managers Jersey Limited [2007] Bus LR 971.

Real Estate Opportunities Limited -v- Aberdeen Asset Managers (Jersey) Limited [2007] Bus LR 971.

Re Galileo Group Limited [1999] Ch 100.

Newell-Austen -v- Solicitors Regulatory Authority [2017] EWHC 411 (Admin).

Twinsectra Limited -v- Yardley [2002] UK HL 12.

Bolton -v- Law Society [1994] 1 WLR 512.

Solicitors Regulation Authority -v- Wingate [2016] EWHC 3455 (Admin).

Malins -v- Solicitors Regulation Authority [2017] EWHC 835 (Admin).

Financial Conduct Authority -v- Macris [2017] 1 WLR 1095.

Business — reasons for dismissing the First Appeal but allowing the Second Appeal.

CONTENTS OF THE JUDGMENT

THE COMMISSIONER:

1 In this case the appellant ("the appellant" or "Mr Francis") appeals against a decision of the Jersey Financial Services Commission ("the Commission") to issue a direction prohibiting him from engaging in any manner in financial services business in the Island and to issue a Public Statement to that effect. He also appeals against the decision of the Commission to issue Public Statements in respect of three other individuals in circumstances where he contends that he is identified in such statements.

2 The Court has been provided with a large amount of material comprising some 20 files. The parties provided a reading list (i.e. material which the Court was asked to read before the hearing) and estimated (correctly) that this would take some five days. The hearing itself

took four days. In order to keep this judgment within manageable proportions, we shall not be referring to all the documents which we have read or to which we were referred but only to those which we regard as necessary to explain the reasons for our conclusion. Nevertheless, in view of the nature of the arguments put forward by the parties, it is of necessity a lengthy judgment.

3 We think it would be helpful to explain the general structure of this judgment. We begin by setting out the general factual background so as to set the scene for what follows. We then describe the process followed by the Commission in reaching its decision and the applicable statutory provisions. We then consider the grounds of appeal under the various headings listed by the appellant before finally summarising our conclusions.

Factual background

(i) General

4 Horizon Trustees (Jersey) Limited ("HTJL") was a Jersey company registered to carry on trust company business. It formed part of an informal group of companies which had some common ownership. That informal group was known as the Horizon Group and included entities in Jersey, Cyprus, Poland and Switzerland. The particular companies which we should mention are Horizon Fund Management Limited ("HFML"), Horizon Investments (Jersey) Limited ("HIJL") and Horizon Management Services Limited ("HMSL") in Jersey, Horizon Group (Cyprus) Limited ("Horizon Cyprus") and Horizon Trustees (Suisse) Limited ("Horizon Suisse").

5 The appellant joined the Horizon Group from Coutts in 2005. He acquired shares in HTJL. In February 2010 the then executive chairman, Mr Gary Bellot, left and the appellant bought out his shares, bringing his total percentage shareholding to 50.15%, which he retained at all material times. He funded the purchase of the additional shares in February 2010 by means of a loan from Mr Christopher Bucknall who then became executive chairman.

6 From January 2008 until his departure in August 2011, the appellant was described as CEO (Chief Executive Officer) of the Horizon Group. As already mentioned, there was no legal entity called Horizon Group but it was used as a description of the appellant's role within the group of companies bearing the Horizon name. He was a director of HTJL from shortly after he joined in 2005 until 13 th May, 2009, when he resigned although retaining his role in the Horizon Group. He was re-appointed as a director of HTJL on 9 th February, 2010, i.e. some nine months later.

7 Other directors of HTJL at the relevant time whose names will appear in this judgment are Andrew Treharne (Chief Operating Officer), Timothy McKimmon (Head of Trust and Fund Administration), Julie McClafferty (Director), Lesley MacDonald (Finance Director) and Sarah Roberts (Director).

8 Following the examinations by the Commission in 2011 which ultimately gave rise to the regulatory action which is the subject of this appeal, HTJL's book of clients was transferred to a new service provider, namely JTC. In May 2012, the Royal Court ordered that HTJL be wound up on the basis that it was just and equitable to do so. The appellant had resigned from the board of HTJL on 1 st August, 2011.

(ii) The Handmade/Paragon Structure

9 The Commission's regulatory action arose as a result of its concern over the Handmade/Paragon structure and it is necessary to describe briefly what this involved.

10 Handmade Limited ("Handmade") was an English company formed with a view to financing/producing films. Through four subsidiaries it owned a library of films ("the film library"). Handmade was acquired in 1999 by Cartier Investments Limited ("Cartier") which was owned by the P Meehan Family Settlement ("the Meehan Settlement") which was established for the benefit of Mr Patrick Meehan ("Mr Meehan") and his family. HTJL became trustee of the Meehan Settlement in 2005.

11 In 2006, shares in Handmade were listed on the Alternative Investment Market ("AIM") and the company became Handmade PLC as a result. Following the listing, Cartier was the owner of approximately 40% of Handmade's issued share capital.

12 In August 2007 HTJL established a limited partnership called the Horizon Media Fund 1 LP ("the Media Fund"). This was a limited partnership whose general partner was a BVI company called Horizon Media Holdings Limited ("the Media GP") which was owned by another BVI company which was in turn beneficially owned by Mr Bellot and the appellant. The Media GP was administered by HTJL. The Media Fund raised some £8.75m.

13 The aim of the Media Fund was, through loans to various companies, to provide pre-production or gap financing for five specified film projects. The Media Fund qualified as a professional investor regulated scheme pursuant to the Financial Services (Investment Business (Restricted Investment Business — Exemption)) (Jersey) Order 2001 and the Financial Services (Trust Company Business (Exemptions No. 5)) (Jersey) Order 2001. The investors in the Media Fund as limited partners were a select number — which appears to have been eight from the document at 1725 of the joint bundle — of what were referred to in the documents as UHNWI (which stands for Ultra High Net Worth Individuals). These are said to be wealthy individuals who were able to invest significant sums (usually over £1m) in alternative asset classes which principally comprised Horizon's own branded products. They all had a close connection with the appellant and frequently invested on his recommendation. We shall refer to them for simplicity as HNW investors. We should emphasise at this stage that although, as a result of the events in relation to Handmade, HNW investors have lost substantial sums of money, this is not the subject of any complaint

by the Commission. It is accepted that these were wealthy individuals who entered into these various investments with their eyes open and knowing the risks. They were high risk investments but investors stood to make substantial sums if they were successful. The Commission's concern has been in respect of the investors we describe at paragraph 22 below.

14 In November 2009, following lifting of the suspension of Handmade's shares on AIM (which had occurred on 30 th June, 2009, pending delayed publication of the audited annual accounts), a total of some £17m was raised from third party investors. £7m was raised by the issue of shares at 10p and the remainder (£10.2m) by the issue by Handmade of 12% convertible secured loan stock (CLNs). The CLNs were constituted by a trust deed dated 18 th November, 2009, entered into between Handmade and BNY Corporate Trustee Services Limited as trustee on behalf of the holders of the CLNs. The terms of the CLNs were that they were to be issued in amounts or multiples of £50,000, they were to carry interest at 12% and the maturity date was the business day immediately prior to 18 th November, 2012. The CLNs were accordingly a liability of Handmade.

15 On the same date, BNY Corporate Trustee Services Limited as trustee for the CLN holders entered into a debenture (“the Debenture”) with four subsidiaries of Handmade, namely Flaming Films Inc., Equator Films Limited, SF Productions Limited and Genie International Limited (together “the Subsidiaries”) whereby the Subsidiaries guaranteed the performance of the CLNs by Handmade and in support thereof granted a floating charge over the film library.

16 Despite this injection of cash, Handmade continued to face financial problems and on 7 th January, 2010, the listing of its shares on AIM was again suspended pending clarification of the company's financial position. It appears that concerns were even then being raised as to what had happened to the monies raised in the fundraising exercise of November 2009.

17 In February 2010, Satya Productions Limited (“Satya”), an HNW investor structure administered by HTJL, provided further emergency funding to Handmade in the sum of £2m and in exchange received a first charge in that sum over the film library. It followed that thereafter the security held by other holders of the CLNs pursuant to the Debenture was a second charge over the film library.

18 In circumstances we shall describe more fully later in this judgment, it became clear during the early part of 2010 to the appellant and others that the financial position of Handmade was dire. A number of HNW investors were by now shareholders (through their various structures) in Handmade. A plan was hatched, involving the appellant and various HNW investors to take over Handmade. Accordingly a company called Almorah Services Limited (“Almorah”), which had been incorporated in the BVI on 4 th January, 2010, was acquired on 9 th April, 2010.

19 As will be seen, one of the key complaints made by the appellant is that the Commission misunderstood or misrepresented the appellant's role in Almorah when it referred variously in the Public Statement to his having " *claimed to own [it] beneficially"* (paras 2.5 and para 4.4.5), or to his being the " *disclosed beneficial owner of [Almorah]*" (para 3.3). Suffice it to say for the moment that the appellant caused Almorah to be incorporated and was initially presented to the outside world as the owner. However, by August 2010 his continuing interest was stated to be a very small percentage (less than 1%).

20 Almorah agreed to purchase Cartier's 40% shareholding together with other shares owned by members of what was described in the AIM press release referred to below as the 'Concert Party' (which consisted largely of HNW investors). This required Almorah then to make a mandatory offer for the remaining shares in Handmade. That offer is described in an AIM press release dated 29 th April, 2010. The offer was to buy each share in Handmade for 1p and also to acquire the CLNs for a consideration of 55p for each £1 in nominal value of a CLN inclusive of accrued interest. As a result of that offer, Almorah became the owner of approximately 95% of the shares in Handmade and also acquired £6.65m of the CLNs at a cost (at 55p per £1 of CLN) of £3,657,600. According to the chronology, the purchase of the CLNs by Almorah took place between 29 th April, 2010 and 4 th June, 2010.

21 It was by now clear to the appellant that Handmade needed further funds to keep going. He caused to be established a limited partnership governed by the law of New Zealand of which the general partner was a BVI company called Paragon Media Holdings Limited ("the Paragon GP"). The initial name of the limited partnership was the Horizon Secured 18 Month Bond Limited Partnership but it subsequently changed its name to the Paragon Limited Partnership and we shall simply refer to it as "Paragon". It appears that Paragon was originally constituted by agreement dated 4 th May, 2010, and was then restated in its current form by an agreement dated 29 th July 2010. There was also established on 12 th April, 2010. a second New Zealand partnership known as the Piat Partnership. This latter partnership was intended for those who wished to invest by way of equity whereas Paragon was intended to acquire the CLNs. There was however some confusion in the paperwork in relation to Paragon. The initial minutes of the general partner referred to the purpose of the limited partnership being to issue units to the limited partners for investment in the purchase of CLNs ' *via a secured bond*'. HTJL prepared what was referred to as a ' *terms sheet*' which again referred to the investment being by ' *a secured bond*' and stated that this bond had a fixed coupon of 12% for the first 12 months increasing to 15% after 12 months through to maturity, which was said to be a maximum period of 18 months. As can immediately be seen, this interest rate did not match that of the CLNs nor did the maturity date. This lends support for the suggestion that the bond being referred to was some form of bond to be issued by Paragon or a wholly owned company of Paragon and which would be secured on the CLNs; but in fact what appears to have happened (as set out in the affidavit of Mr Bowen filed for this appeal) is that limited partners have ultimately been allocated an interest in the CLNs directly via their limited partnership interest in Paragon.

22 Be that as it may, the appellant procured from 7 th June onwards that funds from eight clients (or their structures) of HTJL were invested through Paragon. These clients were not the HNW investors and had not previously had any involvement with Handmade. The first such investment was made on 7 th June, 2010, and the 20 th and last investment was made on 11 th April, 2011. The total amount invested was £3,445m. We shall refer to these clients as the 'ordinary clients' or the 'Paragon investors' and it is four of them who have given statements to the Commission. Paragon acquired £1 of CLN for every pound invested with the result that Paragon acquired each CLN from Almorah for £1 whereas Almorah had paid only 55p for each CLN very shortly before. In order to respect the confidentiality of clients of HTJL, references in this judgment to the clients and their respective structures together with certain other individuals have been anonymised.

23 The Commission began looking into the matter in April 2011 and on 9 th August, 2011, asked Mr Treharne of HTJL for a detailed explanation of the security attached to the Paragon investment together with confirmation that HTJL had verified the security. There had been earlier internal emails between HTJL and Horizon Suisse where it was stated that the CLNs were still in Almorah's name and that there did not appear to be any security for the Paragon investors. On 10 th August, 2011 (i.e. one day after the Commission's inquiry) Horizon Suisse gave instructions to Kleinwort Benson as custodian to transfer £3.445m of the CLNs from Almorah's account to Paragon's account.

24 Handmade was placed in administration on 11 th July, 2012, and subsequently in creditor's voluntary liquidation on 24 th April, 2013. It is clear that it was hopelessly insolvent and it had not repaid the CLNs at their maturity date (being the business day immediately before 18 th November 2012). We deal later in this judgment with the question of recoveries made by the holders of the CLNs.

The Commission's investigation

(i) General procedure

25 Although the Commission is one body in law, it divides itself into two parts for many purposes. The Board of Commissioners ("the Board") consists of the Commissioners appointed by the States (including the Director General who is also a member of the Executive). They have ultimate responsibility for the affairs of the Commission. All other officers and employees of the Commission are referred to as the Executive. They are responsible for the day to day authorisation and supervision of regulated financial services business and for exercising the role within delegated authority from the Board. The Executive will refer matters to the Board for determination where the relevant powers that might be exercised are retained by the Board or where the Executive otherwise considers that the matter under consideration requires consideration by the Board.

26 When considering whether to exercise its statutory powers of sanction against any person,

the Commission follows its published Decision Making Process *("DMP")* which is outlined in its published guidance note entitled 'Decision Making Process", the revised edition of which was issued on 5 th August 2011.

27 Prior to embarking upon a DMP the Executive will have carried out such investigations as are necessary and held a Preliminary Review to decide whether to initiate a DMP or whether the matter can be dealt with in some other manner. If the DMP is initiated, there are four stages:–

Stage 1 — Disclosure and Verification of Information.

Stage 2 — Review Committee

Stage 3 — First Meeting of the Board

Stage 4 — Second Meeting of the Board.

28 The guidance note explains in some detail what is involved at each stage. Stage 1 involves disclosure to the subject of the information which will be the basis of the decision to be taken by the Commission. The guidance note states the objective of this process as being to ensure that the subject is provided with all the information on which the Commission will rely in making its decision and to have that information examined as being reliable and complete. The subject is therefore requested to respond to the Executive with any comments, corrections or additions which he may wish to make. The guidance note states at paragraph 7.3 that, in determining the date by which the response should be provided, the Executive will take account of the nature and volume of information and the extent to which individual items have been previously available to the subject for review and comment. Following consideration of the comments, the document package, amended as necessary in the light of the comments received, is presented to a Review Committee as Stage 2. At the same time the subject is provided with a copy of any new and revised information from that previously provided.

29 Stage 2 involves consideration of the matter by the Review Committee. This is convened on a case by case basis and consists of members of the Executive. The Director General may well chair the Review Committee and it will also usually be attended by the Director, Enforcement and the Director of the relevant sector (e.g. banking, trust company business, etc.) together with one other Director or Deputy Director not directly connected with the case. The Review Committee considers whether further investigations should take place or whether the matter should be discontinued or whether it should be referred to the Board. A written record of the decision is kept and is provided to the subject.

30 Stage 3 consists of the first meeting of the Board if the Review Committee has decided to refer it to the Board. After considering the documents presented by the Review Committee, the Board may request further information or decide that it is 'minded-to' take the recommended action or some other action. If the Board is 'minded-to' exercise any one or

more of its powers, the subject is notified in writing to that effect and provided with a copy of the documents supplied to the Board, including the memorandum prepared by the Executive in order to present the matter to the Board. It is intended therefore that the subject should have all the information placed by the Executive before the Board.

31 The notification to the subject states the date on which the second meeting of the Board will be held and offers the subject an opportunity to make written submissions to the Board within a specified time frame and to attend the second meeting of the Board to make oral submissions. Where written submission is made by the subject, the Executive may prepare comments on that submission. The comments of the Executive will be submitted to the Board and disclosed to the subject prior to the second meeting of the Board.

32 Stage 4 consists of the second meeting of the Board. Prior to that meeting the Board and the subject will be provided with any information or documents that have been added to the package since the first Board meeting, any written submissions made by the subject and any comments of the Executive. At that meeting the subject may make oral submissions and be questioned by the Board. At the conclusion of the hearing the subject, the Executive (including the Director General) and all other persons who are not Commissioners or the Commission's Secretary leave the meeting. The Board then considers the matter and either reaches a decision or delays it. The guidance note makes it clear that it is for the Board to decide which of the matters it accepts and which it does not. The guidance note goes on to say that once a decision has been reached to exercise any statutory powers, the Board will give notification of its decision and will include the reasons for the decision and particulars of any right of appeal.

(ii) The particular investigation

33 In the present case, the Executive began by carrying out the necessary investigations in relation to HTJL. Some of these were carried out over the course of 2011 and 2012. The appellant attended a 'Corporate Governance and Compliance' interview' ("the first interview") on 19 th / 20 th June 2012 and a 'Conduct of Business' interview ("the second interview") on 4 th / 5 th December 2012. Other directors and officers of HTJL underwent similar interviews. The appellant was supplied with transcripts of his interviews shortly after each interview.

34 Having considered the matter, the Executive decided to commence a DMP in relation to HTJL in May 2013. A draft HTJL report was sent out on 14 th May to the directors and other individuals for comment. These included the appellant. The draft report contained a number of appendices including the interviews with some of the directors. Each director only received the appendix which contained his or her own interview. Interviews with other parties were not supplied on the basis that such material constituted *"restricted information"* for the purposes of Articles 37 and 38 of the Financial Services (Jersey) Law 1998.

35 At the request of the appellant the draft report was couriered to his mother's address in Swansea and he confirmed receipt on 18 th May. Following assistance from the Executive's I.T. department he confirmed on 28 th May that he had accessed the information on the disc which contained the appendices.

36 The letter from the Executive sending out the draft HTJL report requested comments by no later than 6 th June 2013.

37 On 4 th June the appellant sent an email indicating that he considered the timescale for responding to the draft HTJL report to be unreasonable and that he was meeting with his advocate shortly. Advocate Sinel, on behalf of the appellant, followed this with a letter dated 6 th June reiterating that the timescale was unreasonably short and that the appellant would provide his comments as soon as Sinels had had the chance to properly review the documentation. A response the same day from the Executive pointed out that all the other persons sent a copy of the draft report had managed to make comments within the deadline but they agreed to extend the deadline to the following day 7 th June. The response the next day from Sinels pointed out that Advocate Sinel was out of the office until 17 th June and that the matter would be put in front of him upon his return. On 25 th June, following a telephone call from Advocate Sinel, the Executive emailed Sinels to say that should the appellant fail to respond with comments by the close of business on 28 th June, the Executive would proceed on the basis that he had no such comments.

38 On 1 st July the Executive wrote to the appellant noting that they had not received any comments and stating that they had now finalised the HTJL report, a copy of which was enclosed with the letter.

39 On 9 th July the Executive decided to initiate a DMP in respect of the appellant and other individuals connected with HTJL. A draft Individual Criticism Paper *("ICP")* in respect of each individual was prepared. By letter dated 9 th July, a draft ICP in respect of the appellant was sent to him and he was asked to provide comments by 31 st July. There followed various exchanges with Sinels when requests were made by Sinels for disclosure of transcripts of the interviews with all the other individuals but these were rejected by the Executive. On 7 th August, Sinels wrote to say that they expected replies by the appellant to both the HTJL report and the ICP to be ready by the middle of September, although they said they were seeking to gain access to the various emails of HTJL via that company's liquidator as the emails had not been available to the appellant since his resignation as a director in August 2011. There followed various further exchanges between Sinels and the Executive or Lacey Advocates (acting for the Commission) concerning the timescale and the need for access to the third party interviews and other material.

40 On 16 th September, Sinels provided what they described as the appellant's 'provisional' response to the draft ICP. It was described as provisional in the sense that further

documents were still awaited and the appellant was ill and therefore unable to sign it. The final signed response dated 3 rd October was provided under cover of a letter from Sinels dated 4 th October.

41 We should interpose at this stage to revert to the DMP in connection with HTJL. This had reached Stage 2, namely consideration by the Review Committee, which had already held two meetings. Following receipt of the 'provisional' response from the appellant on 16 th September, the Review Committee reconvened for a third meeting on 19 th September. It was noted that the Review Committee was considering the case against HTJL and not the individuals and it was agreed that the correspondence from the appellant did not change the position of the HTJL report. It was therefore recommended to move to Stage 3. The Board held its Stage 3 meeting on 3 rd October and decided that it was minded-to issue a Public Statement in the form of a draft which it approved. The Public Statement reflected the conclusions of the HTJL report. The letter and draft Public Statement were sent to the liquidators of HTJL who did not have any comments and accordingly on 7 th November, the Stage 4 meeting of the Board was held at which time the Public Statement in respect of HTJL was approved and then published.

42 It is clear that the Commission took the HTJL report as a basis for consideration of the conduct of the individual directors. It is a very detailed report but it may be helpful at this stage to extract certain key findings in that report:–

(i) For the reasons set out at paras 4.2.2.1–9 (including that he was the majority shareholder of HTJL, was the CEO of the group, was the principal customer relationship manager particularly for the HNW investors and the attitude of his colleagues) the report concluded that the appellant was the dominant force at HTJL.

(ii) There was a lack of transparency over fees in that fees were extracted from structures at multiple levels without there always being full disclosure.

(iii) There were substantial conflicts of interest which were not identified, recorded or managed.

(iv) HTJL had breached all seven principles of the Codes of Practice for trust company business.

(v) HTJL had poor standards of corporate governance compounded by issues of incompetence and a lack of integrity.

(vi) The report was particularly critical of the conduct of HTJL in relation to the Handmade/Paragon structure. It pointed to numerous conflicts of interest. These included that the appellant was the sole beneficial owner of Almorah at the time of its bid for Handmade and when the first ordinary investors were placed in Paragon; that he had provided a personal guarantee of US$4m to a well-known actor ("the Actor") in connection with a legal settlement entered into between Handmade and the Actor, the

first payment of which was funded in part from subscription monies of Piat and Paragon; that the rationale for Almorah acquiring Handmade was to protect the interests of HNW Investors via the Media Fund; and that Paragon acquired the CLNs from Almorah for £1 when Almorah had shortly before acquired the CLNs for £0.55. The report found that there had been a lack of disclosure to ordinary investors in relation to such matters and it summarised the matter at 7.1.2.8 of the report as follows:–

> "Put simply, we find it unconscionable for a regulated entity to permit its CEO to acquire a distressed media company (principally for the benefit of its UHNWI customers) and for it then to be used as an underlying 'investment opportunity' for customers who had little, if any, knowledge of the true position."

43 Reverting to the procedure in relation to the ICP (referred to at para 40 above), the appellant's response of 3 rd October went through the draft ICP paragraph by paragraph and gave his comments on those paragraphs with which he took issue. In particular, he objected strongly to the comments in the draft ICP that he was ' *the driving force*' or ' *a dominant force*' of HTJL or ' *was able to unilaterally direct HTJL's affairs*' and gave his reasons for so submitting. In particular, he submitted that the fact that his colleagues executed all his instructions in relation to Paragon was not a ground to support such statements. He said his colleagues were free to question his suggestions and did so routinely. The fact that they did not do so in respect of instructions relating to Paragon was simply because there was either nothing in the instructions that ought not to be followed or that the people executing the instruction failed to challenge it.

44 On 1 st November, 2013, the Executive issued a final version of the ICP. This was sent to Sinels on that date together with a twenty-three page letter commenting on the points raised in the appellant's response to the draft ICP. The letter also enclosed a memorandum which was being sent to the Review Committee. This memorandum recommended that the Review Committee should in turn refer the matter to the Board for consideration of making a direction placing restrictions on the appellant's ability to work in the financial services business and of issuing a Public Statement.

45 Following receipt of those documents, Sinels wrote on 29 th November, 2013, to the Commission enclosing what was described as a 'second response' to the draft ICP. This repeated and emphasised the appellant's concern that the Executive had not reached a fair and proper conclusion in relation to the operating environment of HTJL and in particular had not taken account of an agreement which had been executed as to the respective roles of various directors, to which we will shall refer later. The second response again challenged the suggestion that the appellant was the dominant figure at HTJL.

46 On 11 th December, 2013, Sinels wrote to Lacey Advocates ("Laceys"), who acted for the Commission, stating (incorrectly as it transpired) that Handmade had 'exited' liquidation.

The following day, Sinels sent a further submission from the appellant asking that it be placed before the Review Committee at its meeting on 13 th December. The letter contained details of a possible proposal from a German fund to acquire Paragon's interest in Handmade, i.e. the CLNs.

47 The Review Committee met on 13 th December, 2013, and resolved to refer the matter to the Board with a recommendation that a direction under Article 23 of the Financial Services (Jersey) Law 1998 and equivalent provisions of the other regulatory laws be issued to the appellant and that a Public Statement to that effect be issued. Sinels were informed of this decision and on 17 th December were sent a copy of the memorandum from the Review Committee to the Board supporting its recommendation.

48 On 21 st January 2014, Sinels wrote enclosing a further letter from the appellant asking that it be placed before the Board at its Stage 3 meeting scheduled for 23 rd January 2014. The letter from the appellant raised two main concerns in relation to the Executive. The first was that the investigating officers and the Review Committee had failed to address issues he had raised concerning the operating environment (this being the Horizon management imperative on him to develop and win business and not to be involved in the day to day running of the Horizon Group) and his alleged dominance within the Horizon Group. The second was that the investigating officers and the Review Committee had failed to recognise that there was value in the Paragon bonds and that the investment was far from the lost cause portrayed by the Executive. In that connection he attached a letter from Charles Russell containing a proposal from an associate of the appellant to acquire the CLNs from Paragon on certain terms.

49 The Stage 3 meeting of the Board took place on 23 rd January, 2014. At that meeting, the Board decided that there was a case to answer that the appellant, as a principal person and former director of HTJL, had failed to act with integrity and competence and that it was necessary, reasonable and proportionate for the Board to be *'minded-to'* issue a direction to the appellant in connection with his ability to work in the financial services sector. The Board however considered that amendments to the draft Public Statement prepared by the Executive were required and asked that these be prepared and presented to it at its February 2014 meeting for further consideration.

50 At the meeting on 6 th February, 2014, the Board received an amended draft Public Statement. It was not happy with that draft and required further amendments to be made, but at the conclusion of the meeting it agreed that it was *'minded-to'* issue a direction and a Public Statement in the form then produced to it and that it would move to Stage 4 of the DMP.

51 The Commission wrote to Sinels on 12 th February notifying them of the decision of the Board and enclosing copies of the minutes and the terms of the proposed direction and Public Statement. The letter went on to say that the Stage 4 meeting of the Board would be

held on 2 nd April. The appellant was invited to submit written representations before then and to attend the Stage 4 meeting with or without legal representation to make any oral representations. On 25 th February the Commission supplied to Sinels a CD containing all the documents which were to be before the Board. The Stage 4 meeting was subsequently put off at the request of Advocate Sinel who was unable to attend on the original date.

52 On 7 th March the appellant provided written submissions to the Board in response to the 'minded-to' letter. He repeated his criticism of the approach of the Executive and repeated his view that value remained in the Handmade structure and that there could be a return of capital to the Paragon investors. He felt that all the points which he had made to the Executive at different times had simply been ignored.

53 The Stage 4 meeting of the Board took place 1 st May, 2014. It was attended by the appellant accompanied by Advocate Sinel. The appellant was given the opportunity of addressing the Board and was then questioned. In particular, he was taken through the draft Public Statement paragraph by paragraph and asked to comment on each paragraph. According to the minutes, the meeting started at 8:53am. and was completed at 12:37pm. The Court has read the transcript of that meeting and of what was said by the appellant. At the end of the meeting, members of the Executive together with the appellant and Advocate Sinel withdrew, leaving only the members of the Board and the Commission's secretary.

54 The minutes then record a further meeting of the Board which lasted one minute beginning at 12:46pm. and ending at 12:47pm, the relevant part of which reads:–

> *"The Board, having previously discussed and considered the detail of all the documents and having regard to the submissions made by and on behalf of Mr Francis and the Executive, was satisfied, at this stage, by reference to the established facts and matters set out in paragraph 4 of the draft Public Statement, that Mr Francis had failed to act with integrity and competence, and this conduct provided what, in the opinion of the Commissioners, was ample evidence to conclude Mr Francis was not fit and proper, with reference to Article 9 of the FS(J)L and those equivalent provisions in the other regulatory laws.*
>
> *Given that Stage 4 Meetings were still to be concluded concerning other former HTJL principal and key persons, the Board determined it appropriate to hold over the final decisions until a later date to ensure consistency in approach, proportionality and overall fairness."*

55 Following the meeting, the deputy chairman of the Board wrote to Advocate Sinel on 2 nd May to say that, after the meeting on 1 st May the Board had received a further memorandum from the Executive on the issue of the beneficial ownership of Almorah. The letter enclosed that memorandum together with the attachment to it, which was an email dated 26 th April, 2010, from the appellant to two colleagues at HTJL in connection with the ownership of Almorah. Given the submissions made by the appellant at the meeting of the

Board on 1 st May, the letter invited any further submissions on the content of the Executive's memorandum by 8 th May.

56 The Board held a further meeting on 5 th May. It was noted that a response on the issue of the beneficial ownership of Almorah was still awaited from the appellant. The Board noted that the purpose of the meeting, having considered the various documents submitted by the Executive and the written and oral representations on behalf of the appellant, was to ensure that the final decision arrived at by the Board in respect of the appellant was necessary, proportionate and fair in all the circumstances of the case. After a discussion which appears to have lasted approximately one hour and twenty minutes the Board concluded that the appellant had acted with a *'most serious lack of integrity'* and his displayed level of incompetence was ' *of the most serious kind*', such that the proposed direction should be issued. The Board considered the draft Public Statement and requested a number of revisions. It noted that the proposed Public Statement might require further change subject to the response received on Almorah. In view of Ground 3(i) of the grounds of appeal, we think it appropriate to quote the exact terms of the minutes of that meeting, which are as follows:–

> *"The Board found, by reference to the established facts and matter set out in paragraph 4 of the draft Public Statement, that Mr Francis's acts, failings and misconduct as a director of various entities and as Chief Executive Officer and former principal person of HTJL were so serious that these caused the Board to conclude that Mr Francis had acted with a most serious lack of integrity and his displayed level of incompetence was of the most serious kind, such that the proposed directions should be issued to Mr Francis prohibiting him from performing any function, holding any position or being employed by any business licensed to conduct financial services business in Jersey*.
>
> *The Board then gave further consideration to the proposed public statement in the light of the findings in relation to Mr Francis and stated that a number of revisions be made to the proposed public statement in accordance with the attached public statement.* It was noted that the proposed public statement might require further change subject to the response received on Almorah."

57 Various correspondence took place between Sinels and the Commission in relation to Almorah but we do not think it necessary to refer to this in detail, other than to say that the deputy chairman clarified in his letter of 8 th May that the Board was seeking comment on the apparent discrepancy between what the appellant had said to the Board at the meeting on 1 st May in connection with the ownership of Almorah and the content of the email of 26 th April 2010. However, during the course of this correspondence, in response to a request from Advocate Sinel, Mr Averty, the deputy chairman wrote this on 29 th May:–

> *"I can confirm that, other than the Stage 3 'minded-to' decision, the Board has reached no decision, as yet, in relation to the final determination of the position concerning your client.* The Board is meeting again on 5 June 2014 to consider

the matter further. I should then be in a position to write advising of the Board's decision later that month……"

As we shall see, Advocate Sinel is very critical of that letter and submits that it was untrue.

58 The Board duly met again on 5 th June 2014 at a meeting which lasted some one and a half hours. The Board was provided with a letter dated 4 th June, 2014 from Sinels on the topic of the ownership of Almorah. It made additional amendments to the draft Public Statement but agreed at the end of the meeting to issue a Public Statement and recorded its decision in respect of the appellant. The final terms of the Public Statement and the letter to the appellant were approved by a paper meeting of the Board held on 18 th June 2014.

59 As a matter of technicality, the Board issued directions under four statutes, namely the Financial Services (Jersey) Law 1998 ("the FS Law"), the Banking Business (Jersey) Law 1991, the Collective Investment Funds (Jersey) Law 1988, and the Insurance Business (Jersey) Law 1996 ("the Regulatory Laws"). However, they are in identical terms in all material respects and accordingly all of the parties concentrated on that issued under the FS Law. We shall do the same.

60 The key part of the direction in each case was as follows:–

"1.1 [The appellant] shall be prohibited from:–

1.1.1 performing any function at all for;

1.1.2 engaging in any employment at all by;

1.1.3 holding any position at all in the business of any registered person at all; or

1.1.4 performing any function or service which falls within the definition of "financial service business" under Article 2 of the [FS Law]

without having successfully applied to the Commission for the withdrawal or variation of the direction".

61 The direction goes on at paragraph 2 to state that the reasons for giving the direction are all those facts, matters and findings summarised in the Public Statement to be issued under the FS Law with that Public Statement being appended to and forming part of the direction. Paragraph 2 goes on to say that based on those facts, matters and findings, the Board has concluded that the appellant acted with a most serious lack of integrity and has displayed a level of incompetence of the most serious kind.

62 In view of the attention paid during the hearing to the terms of the Public Statement, we think it necessary to set it out almost in full. We should explain that references in the Public

Statement to *"the Film Co"* are to Handmade, to " *Bid Co*" are to Almorah, and to *"Structure X"* are to Paragon.

63 The relevant terms of the Public Statement are as follows:–

"1. Action

The Jersey Financial Services Commission (the "Commission") issues this public statement pursuant to Article 25(a) of the FS(J)L with respect to directions issued to Mr Francis under Article 23 of the FS(J)L.

The Commission's actions support its objectives of reducing the risk to the public of financial loss and protecting and enhancing the reputation and integrity of Jersey in commercial and financial matters.

An investigation into the fitness and propriety of Mr Francis, in his capacity as a principal person and a former director of HTJL, has taken place and the Commission has concluded that, in all the circumstances, Mr Francis acted with a most serious lack of integrity and his displayed level of incompetence was of the most serious kind.

The Commission has, therefore, concluded that it is necessary and proportionate in all the circumstances of the case that directions are issued under the FS(J)L.

The directions prevent Mr Francis from:

1.5.1 performing any function at all for;

1.5.2 engaging in any employment at all by; and

1.5.3 holding any position at all in the business of any registered person.

…….

2. Background

2.1 On 7 November 2013, the Commission issued a public statement in respect of the findings of its investigations into HTJL. The Commission's investigation focussed on the period from 1 January 2008 to 30 May 2012.

2.2. HTJL was one of a number of related companies bearing the Horizon name ("the Horizon Group") and had a diverse customer base. Whilst some of HTJL's customers were sophisticated ultra-high net worth individuals ("UHNWI"), others were unsophisticated and, indeed, vulnerable individuals.

2.3. HTJL provided trust company business services to a number of private fund structures. These structures were established to provide a number of the

UHNWI customers with the opportunity to invest in alternative asset classes, including shipping, property and media rights.

2.4 A number of the UHNWI customers had financial exposure to a UK media rights company ("the Film Co."). The customers included the Film Co.'s principal shareholder and Chief Executive Officer ("CEO"). This exposure was either by way of direct shareholder interest or by virtue of investing in a media fund ("the Media Fund"): one of HTJL's private in-house fund structures which effectively operated as a joint venture with the Film Co.

2.5 In January 2010, the Film Co.'s AIM listing was suspended due to financial uncertainty. In April 2010, a successful bid was made for the Film Co. by a company Mr Francis claimed to own beneficially ("Bid Co."). A significant factor in the decision to acquire the Film Co. was the protection of the interests of UHNWI customers, a number of whom assisted in financing the bid. The Film Co.'s equity was acquired for one penny and its Convertible Loan Notes ("CLNs") for £0.55 per £1.00 nominal value.

2.6 Subsequent to the acquisition, HTJL, a company devoid of media or film experience, was appointed to administer the Film Co. Directors of HTJL were also appointed as directors of the Film Co. This acquisition and HTJL's administration appointment created numerous conflicts of interest.

2.7 Shortly after the acquisition of the Film Co., a New Zealand Limited Partnership ("Structure X") was created. This structure, which became a focus of the Commission's investigation, was used as a vehicle, funded by investments from HTJL's wider customer base, to purchase the Film Co.'s CLNs from the Bid Co. The CLNs were each sold on for £1.00 despite only recently having been acquired for £0.55.

2.8 In total, £3,445 million was transferred from customer structures and invested into Structure X. The monies were not routed to Structure X but were transferred to Bid Co. and were then used to discharge the Film Co.'s numerous and pressing creditors. In essence, Bid Co. became a financing vehicle to the Film Co. which is currently in liquidation with creditor claims of circa £43 million.

2.9 Concerns over the serious financial position of the Film Co. were first documented by officers of HTJL shortly after the acquisition by Bid Co. Such were these concerns, placing the Film Co. into a company voluntary arrangement was considered only one month after Bid Co.'s acquisition, namely in May 2010.

2.10 Despite the Film Co.'s serious financial difficulties, during 2010 and 2011 investment valuations were sent to customers, in which their investments were recorded at cost and the financial statements of the Media Fund were signed reporting that the assets were not impaired. At no time were the HTJL customers concerned informed about the Film Co.'s serious financial difficulties.

2.11 HTJL's customers have not been able to recover their investments or loans

and it appears that substantial losses have been incurred.

3. Role

3.1 Mr Francis was the CEO of the Horizon Group. He was the driving force behind HTJL. During the period (2008–2012) he increased his shareholding in HTJL to 50.2%. He was a director of HTJL but not throughout the period. As the majority shareholder and by then acting as a shadow director, he was able to direct the affairs of HTJL to a large extent.

3.2 Mr Francis had a particularly close relationship with certain of the UHNWI customers, and was the principal point of contact for the majority of HTJL's customers. He was invariably the originator of decisions to create private fund structures which provided customers with the opportunity of investing in alternative asset classes.

3.3 Mr Francis was the disclosed beneficial owner of Bid Co. and the originator of the plan to refinance the Film Co., at least in part to protect the existing investments held by the Media Fund and certain UHNWI customers. He was a director of the General Partner of the Media Fund and signed its financial statements and letter of representation to the auditors.

3.4 It was upon Mr Francis's instructions that Structure X was established. He also gave instructions to his colleagues, on 20 separate occasions, specifying the customer structure and amount to be invested in Structure X.

4. Summary of Findings

4.1 The Commission has previously concluded that HTJL breached all seven principles of the Codes of Practice for Trust Company Business, including failing to conduct business with integrity, failing to ensure conflicts of interest were managed and failing to act in the best interests of customers. As majority owner of HTJL, a director for part of the period and given his ability to direct the affairs of the company, Mr Francis bears significant responsibility for these failings.

4.2 Mr Francis, as CEO of the Horizon Group and major shareholder of HTJL, shares significant responsibility for the following:

> *4.2.1 a confused and ineffective corporate governance structure;*
>
> *4.2.2 a failure to oversee and control the business of HTJL through the implementation and monitoring of robust systems and controls;*
>
> *4.2.3 a failure to realise a Horizon services company was conducting unauthorised financial services business;*
>
> *4.2.4 a lack of transparency over fees levied to customers; and*

4.2.5 a failure to manage risk and to identify and address issues facing HTJL.

Mr Francis's conduct lacked integrity and competence.

Structure X

4.3 Mr Francis devised Structure X and instructed his colleagues to invest customer monies in the structure. Mr Francis should, therefore, have carefully reviewed the constitutive and key documents. However, Mr Francis failed to undertake a careful review, which would have revealed numerous discrepancies and inconsistencies. Mr Francis's conduct lacked integrity and competence.

4.4 Mr Francis's decision to acquire the Film Co. presented numerous conflicts of interest, for which Mr Francis and his colleagues had total disregard. Such conflicts of interest included, but were not limited to:

4.4.1 HTJL's provision of trust company business services to the Film Co.'s former CEO and principal shareholder;

4.4.2 Bid Co.'s acquisition of the Film Co. was made, at least in part, to protect some of the UHNWI customers, principally those customers who had invested in the Media Fund;

4.4.3 the first ranking charge over the Film Co.'s media rights was in favour of a company controlled by HTJL for the benefit of one of its UHNWI customers;

4.4.4 officers of HTJL acted as directors of the Film Co. and HTJL; and

4.4.5 Mr Francis claimed to be the beneficial owner of Bid Co.

The above conflicts of interest should not have been permitted to arise and became unmanageable. Mr Francis should not have proceeded with the acquisition of the Film Co. solely on the basis of these significant conflicts of interest. This conduct lacked integrity and competence.

4.5 Mr Francis drafted a "Terms Sheet", which he provided to his colleagues and set out his views in respect of how Structure X was to operate as an investment. Referred to in the Terms Sheet was "Headroom": the mechanism, under which customer structures purchasing the Film Co.'s CLNs paid 80% more for the CLNs (the difference between £0.55 and £1.00) than the Bid Co., which Mr Francis held out as being beneficially owned by him. The majority of these customers did not know about this significant price difference. This conduct lacked integrity.

4.6 In providing instructions to invest customer monies in Structure X, Mr

Francis failed to give any meaningful consideration to the risks and appropriateness of the investments for those customers. At the time of the investments, Mr Francis knew serious issues existed in respect of the Film Co., including in respect of its solvency. He was aware the only way the Film Co. remained solvent was through the use of customer monies to discharge its numerous and significant liabilities. Mr Francis's conduct lacked integrity and competence.

4.7 Mr Francis provided false assurances to his colleagues about the existence and extent of his discussions with beneficiaries and shareholders of structures to be invested in Structure X. Mr Francis knew that colleagues had relied upon his assurances. Mr Francis's conduct, and his failure to correct their misunderstandings, despite being afforded the opportunity to do so, lacked integrity.

4.8 Mr Francis acted with wilful disregard to his fiduciary obligations. He issued instructions to his colleagues, which resulted in customers' assets, including those of vulnerable individuals, being used to reduce the risks to which a number of HTJL's UHNWI customers were already exposed. As a result of the conduct of Mr Francis and others, HTJL's customers face the loss of very significant sums of money. This conduct was not in the best interests of the customers. Mr Francis's conduct lacked integrity.

Media Fund

4.9 In 2011, in his capacity as a director of the Media Fund's General Partner, Mr Francis signed the financial statements of the Media Fund, together with a letter of representation. When signing these documents, Mr Francis was on notice of numerous and significant issues. Notwithstanding his concerns, the notes to the financial statements provided confirmation the General Partner was not aware of any circumstances, which undermined the value of the investment. This was demonstrably not the case. Mr Francis's conduct lacked integrity.

……"

64 The Public Statement with respect to the appellant has not been issued pending determination of this appeal. However, the Board also decided to issue Public Statements in respect of other officers of HTJL including Mr Treharne, Mr Noding and Ms McClafferty. The Public Statements in respect to these three individuals were published on 24 th July, 2014.

65 The appellant has exercised his right of appeal under all four statutes (the FS Law, the Banking Business Law, the Collective Investment Funds Law, and the Insurance Business Law) in respect of the directions issued by the Board and the Public Statement. He has also appealed under Article 25C(2) of the FS Law against the Board's decision to issue Public Statements in respect of Mr Treharne, Mr Noding and Ms McClafferty.

Applicable statutes

66 The Commission is responsible for the administration of the financial regulatory laws in force in Jersey including the FS Law, the Banking Business Law, the Collective Investment Funds Law and the Insurance Business Law, each of which establishes the Commission's regulatory role and responsibilities in relation to the relevant type of business.

67 The Commission is established by the Financial Services Commission (Jersey) Law 1998, Article 7 of which sets out the guiding principles that the Commission should have regard to in exercising its statutory functions. These are:–

> ***"(a) the reduction of the risk to the public of financial loss due to dishonesty, incompetence or malpractice by or the financial unsoundness of persons carrying on the business of financial services in or from within Jersey;***
>
> ***(b) the protection and enhancement of the reputation and integrity of Jersey in commercial and financial matters;***
>
> ***(c) the best economic interests of Jersey; and***
>
> ***(d) the need to counter financial crime both in Jersey and elsewhere."***

68 Article 9 of the FS Law provides that, when deciding whether to register or revoke the registration of a person, the Commission must satisfy itself that the person concerned is a fit and proper person to be licensed and that includes information as to:–

> ***"(b) persons employed by or associated with the applicant for the purposes of the applicant's business or principal persons in relation to the applicant…."*** .

69 Article 23 of the FS Law gives the Commission power to take action directly against any individual by way of issuing directions under Article 23 in order to restrict that person's employment. The relevant provisions are as follows:–

> ***"(1) If it appears to the Commission in relation to financial service business that:–***
>
> ***any requirements in relation to the registration of a registered person are no longer satisfied;***
>
> ***it is in the best interests of:–***
>
> ***(i) creditors of a registered person,***
>
> ***(ii) persons with whom a registered person has transacted or***

may transact financial service business (other than trust company business),

(iii) persons who have entered or may enter into agreements for the provision of services to be provided by a registered person when carrying on trust company business,

(iv) persons who have received or may receive the benefit of services to be provided or arranged by the registered person when carrying on trust company business, or

(v) one or more registered persons;

(c) it is desirable to protect the reputation and integrity of Jersey in financial and commercial matters; or

(d) it is in the best economic interests of Jersey,

the Commission may, whenever it considers it necessary, give, by notice in writing, such directions as it may consider appropriate in the circumstances .

Without prejudice to the generality of paragraph (1), a direction under this Article may:…..

require that any individual:–

not perform a specified function (or any function at all) for,

not engage in specified employment (or any new employment at all) by, or

not hold a specified position (or any position at all) in the business of,

a specified registered person (or any registered person at all)…..

A notice of a direction under this Article shall:–

specify the reasons for the giving of the direction."

There are similar powers to issue directions in the other Regulatory Laws.

70 The Commission is also given power to issue Public Statements under Article 25 of the FS Law which is in the following terms so far as relevant:–

"25. Public statements

The Commission may issue:–

(a) a public statement with respect to, or setting out, any direction that the Commission has given under Article …. 23."

Again there are similar powers under the other Regulatory Laws.

71 The Commission has published guidance in relation to its approach towards Public Statements and directions in its document *"Policy on the Commission's Use of Public Statements"*. Paragraph 4 of that publication contains the following:–

> *"4. Public Statement with Respect to a Direction*
>
> *4.1 To the extent that they may be relevant, the factors described in section 2 above will be taken into account in deciding whether or not a direction, or any particular aspect of a direction, given by the Commission should be the subject of a Public Statement.* However, a decision whether or not to publish such a Public Statement is more likely to be based on the need to:–
>
> *4.1.1 protect the interests of:–*
>
> *4.1.1.1 any existing or potential clients or customers of the person to whom the direction was given;*
>
> *4.1.1.2 the general public; or*
>
> *4.1.1.3 other regulated businesses in the island;*
>
> *4.1.2 protect the reputation of Jersey in commercial and financial matters; or*
>
> *4.1.3 counter financial crime in Jersey or elsewhere*.
>
> *4.2 For the reasons given in the previous paragraph, the presumption will be that a Public Statement will usually be issued with respect to any of the following kinds of direction:–*
>
> *4.2.1 a restriction on an individual being employed by, carrying on any function for or holding any position with, a regulated financial services business in Jersey…..*" [Emphasis added]

72 Article 25A of the FS Law imposes certain obligations on the Commission to give notice of its intention to issue a Public Statement. It provides as follows:–

> ***"25A Notice of Public Statement***
>
> ***(1) If a Public Statement identifies any person who is registered, the Commission shall serve notice on the person*** .
>
> ***(2) If a Public Statement identifies any person who is not registered, and at any time before the Commission issues the Public Statement it is reasonably practicable for the Commission to serve notice on the person, the Commission shall do so*** .

(3) A notice under paragraph (1) or (2) shall:–

(a) give the reasons for issuing the statement;

(b) give the proposed or actual date of issue of the statement;

(c) contain a copy of the statement;

(d) give particulars of the right of appeal under Article 25(C) in respect of the statement; and

(e) if the statement is issued in accordance with the decision under Article 25B(3), before the day specified in Article 25B(1) in relation to the statement, give the reasons for issuing it before that day .

(4) Paragraph (3) shall not require the Commission:–

(a) to specify any reason that would in the Commission's opinion involve the disclosure of confidential information the disclosure of which would be prejudicial to a third party; or

(b) to specify the same reasons, or reasons in the same manner, in the case of notices to different persons about the same matter…..

(5) In this Article and Articles 25B and 25C, a reference to the identification of a person in a public statement does not include the identification, in the statement, of the Commission or of any other person in their capacity of exercising functions under this Law."

Rights of Appeal

73 Article 23 of the FS Law confers a right to appeal against the giving of a direction in the following terms:–

"(8) Any person aggrieved by a direction given to the person under paragraph (1)…. may appeal to the Court .

(9) Such an appeal may be made only on the ground that the decision to give the direction….. was unreasonable having regard to all the circumstances of the case" .

74 Article 25C confers a power to appeal against a decision of the Commission to issue a Public Statement in the following terms:–

"(2) A person aggrieved by a decision of the Commission to issue a Public

Statement that identifies the person may appeal to the Court, in accordance with this Article, against the decision .

(3) An appeal under paragraph (2) may be made only on the ground that the decision of the Commission was unreasonable having regard to all the circumstances of the case .

…

(6) On an appeal under this Article, the Court may make such interim or final order as it thinks fit, including an order that the Commission not issue the relevant public statement or, if the public statement has been issued, that the Commission issue a further public statement to the effect set out in the order or stop making the statement available to the public .

75 In *Interface Management Limited v Jersey Financial Services Commission* [2003] JLR 524 the Court said this at paragraph 35 in relation to appeals under the FS Law:–

> ***"It follows that, adapting the test in Taylor, the court will look at three aspects on an appeal.*** First, it will consider whether the decision was one which the decision-maker was empowered to make, i.e. was the decision ultra ***vires?*** Secondly, it will look at the correctness and fairness of the procedure in order to decide whether the proceedings of the decision-maker were in general sufficient and satisfactory. Thirdly, it will look at the merits of the decision and decide whether it considers that the decision was unreasonable."

76 As to what is meant by a decision being unreasonable, this Court in *Anchor Trust Company Limited v Jersey Financial Services Commission* [2005] JLR 428 said at paragraph 13:–

> "13. In our judgment, these authorities confirm that there are at least three possible degrees of 'wrongness' which the Court may find in respect of a decision under appeal. In ascending order of 'wrongness', they are as follows:–
>
> > The decision was wrong in the sense that it is not the decision which the Jurats would themselves have reached.
> >
> > The decision was wrong to such an extent that the Jurats would categorise it as unreasonable.
> >
> > The decision was wrong to such an extent that it goes beyond merely being unreasonable and becomes a decision to which no reasonable decision-maker could have come, i.e. "Wednesbury unreasonable" or "irrational".
>
> 14. On an appeal under the 1998 Law (and any similarly-worded Law) the

Jurats should dismiss the appeal if their conclusion falls within (a) of the preceding paragraph but should allow the appeal if it falls within (b). Contrary to Mr Kelleher's submissions, the decision does not have to be categorised as falling within (c) before an appeal can be successful."

77 Further assistance as to the meaning of unreasonable in this context is to be found in the decision of Bailhache, Bailiff in *Token Limited v Planning and Environment Committee* [2001] JLR 698 at paragraph 9 where he said:–

> ***"The Solicitor General submitted that the decision in Fairview Farm did not entitle the court to find that the Committee's decision was reasonable but quash it because the court had reached an equally reasonable but different decision.*** We agree. The court might think that a Committee's decision is mistaken, but that does not of itself entitle the court to substitute its own decision. The court must form its own view of the merits, but it must reach the conclusion that the Committee's decision is not only mistaken but also unreasonable before it can intervene. There is an element of semantics here but there is, nonetheless, a qualitative difference between a finding that a decision is unreasonable, rather than simply mistaken. To put it another way, there is a margin of appreciation before a decision which the court thinks to be mistaken becomes so wrong that it is, in the view of the court, unreasonable."

78 A helpful recent observation from the Court of Appeal on the question of unreasonableness is to be found in *Minister for Planning and Environment and Others v Hobson* [2014] (2) JLR 57. Having referred to the observation of this Court in *Anchor* (quoted at paragraph 76 above), Pleming JA said this:–

> ***"78. Although we do not support the Deputy Bailiff's reference to 'degrees of wrongness', that view accords with our own. It seems to us helpful not to speak in terms of mistakenness, wrongfulness or, separately, of margins of discretion. In our view, the Royal Court will be able to interfere (a) manifestly if a Wednesbury ground is identified, but also (b) where the decision is unreasonable, not in the sense of being incapable of reasoned justification, not in the sense of being beyond the range of decisions that a reasonable decision maker could reach, but in the sense of being beyond the bounds of reasonable justification in the mind of the Royal Court. An evaluation in the latter manner strikes the balance between respecting the experience of the Minister as planning authority and allowing an aggrieved participant a proper appeal to another respected Island authority, the Jurats, whether alone or with the guidance of the Bailiff***
>
> .
>
> ***79. As part of the evaluation, the Royal Court will have looked at matters at a similar level of thoroughness to that carried out by the Planning Department, doubtless with a much more focused***

approach which comes with appellate submissions. But it is not sufficient for the Royal Court to reach a different view from that of the Minister. It must also have found the decision to be beyond the bounds of reasonable justification, perhaps because, in the mind of the Royal Court, the decision is the result of flawed logic or is supported only by somewhat threadbare reasoning."

79 As to the question of procedure, we endorse the observation of the Royal Court in *Interface* at paragraph 11 where it said:–

> ***"We are in no doubt that the Commission is under a duty to act fairly towards an applicant for registration under the 1998 Law.*** Any decision reached in circumstances in which the Commission has acted unfairly is liable to be quashed. In particular, the applicant is entitled to know the general nature of the case against him (i.e. the matters relied upon by the Executive to suggest that he should be refused registration) and to have an adequate opportunity of responding to those matters. It is the fairness of the procedures as a whole which fall to be considered but clearly what is required by way of fairness from the Executive (in its investigating and recommending role) is not exactly the same as that required by the Board (in its quasi-judicial role). Nevertheless, both must act fairly in their respective roles and the Commission as a whole must act fairly throughout the overall process."

80 These observations are equally applicable in the context of a decision such as the present, namely whether to issue a direction in respect of an individual and to issue a Public Statement.

81 Following the decision in *Interface*, the Commission has developed the DMP. Having considered the DMP as described above, we think the observations of the Court in *Interface* at paragraph 13 are equally applicable to the DMP. Those comments were:–

> ***"13. Taken in the abstract, the procedure established is one which complies with the legal requirements for fairness. It informs the applicant at all material stages of the case he has to meet and gives him an opportunity of convincing the relevant part of the Commission (i.e. the Executive in connection with its recommendation and the Board in connection with its decision) that it should reach a decision favourable to the applicant. However, whether the requirements of fairness are actually met in a particular case will of course depend upon how the system is put into operation."***

82 With reference to the suggestion in *Interface* (quoted at paragraph 79 above) that the Board sits in a 'quasi-judicial' role, the Court of Appeal in *Anchor Trust v JFSC* [2006] JCA 040 qualified this a little at paragraph 46:–

"But the reference to a quasi-judicial function cannot be taken too far. It simply means that, as part of the Board's administrative decision-making function, one stage is treated rather like a judicial process. It does not mean, and should not be read as meaning, that court rules, processes and procedures should be taken as applying to the process as a whole. The 1998 Law makes it abundantly clear that such procedures are neither required nor appropriate until there is an appeal to the Royal Court."

The Grounds of Appeal

83 The appellant filed notices of appeal under each of the Regulatory Laws in similar form on 17 th July 2014 ("the First Appeal"). These were amended slightly in December 2016.

84 In summary, the grounds of appeal (as amended) were as follows:–

Ground 1 — It was unreasonable for the Commission to find that the appellant had acted with a 'most serious lack of integrity' and 'incompetence of the most serious kind' because there was no proper or reasonable basis for the Commission to make eleven specified findings of fact set out in the ground of appeal; alternatively, even if such findings of fact were justified, they did not properly justify the conclusion that the appellant had acted with a most serious lack of integrity and incompetence of the most serious kind.

Ground 2 — The Commission failed to give adequate reasons for its finding as required by the FS Law. In particular, it failed to explain why it had rejected the appellant's explanation of various matters which formed the basis of the criticism in the Public Statement.

Ground 3 — The Commission's decision was vitiated by procedural unfairness. In particular:–

(i) The Commission had predetermined the outcome of the case against the appellant at a time when it was actively seeking further submissions from him and was biased against him.

(ii) The Commission failed to give the appellant adequate time and facilities for the preparation of his response to the allegations made against him.

(iii) The Commission prevented the appellant from accessing relevant documentation which he had requested since at least September 2011.

(iv) The Commission took into account material which was not disclosed to the appellant.

(v) The Commission failed to give the appellant any meaningful

opportunity to challenge or test the evidence given against him.

(vi) The Commission was unduly influenced by the submissions of the Executive which were often inaccurate and failed to take any or adequate notice of contrary submissions and evidence supplied by the appellant and his co-workers in respect of the HTJL report and the individual ICPs.

(vii) The Commission was biased and otherwise acted unfairly in the manner in which the Executive carried out its investigation. In particular, the Executive prejudged the issues which it was under a duty to investigate without affording the appellant an opportunity to put forward his case.

Ground 4 — The directions were a disproportionate sanction to impose on the appellant as they prevented him from working in the financial services industry in Jersey.

85 On 21 st August 2014, the appellant filed a second notice of appeal ("the Second Appeal") in respect of the decision of the Commission to issue Public Statements in respect of Mr Treharne, Mr Noding and Miss McClafferty. Those statements were said to be unreasonable for the same reasons as set out in the grounds of appeal for the First Appeal and the appellant was identified in those Public Statements.

The history of the appeal

86 It is the declared objective of this Court that appeals against decisions of administrative bodies pursuant to Rule 15 of the Royal Court Rules 2004 should be heard promptly — see for example Rule 15/2(5). As can be seen, that has not occurred in this case. The decision of the Commission was taken as long ago as June 2014.

87 The explanation for the delays are essentially twofold. First, the appellant has made numerous interlocutory applications which have taken time to resolve; and secondly, delay has been caused as a result of his ill health.

88 Dealing briefly with the first aspect, it is not necessary to record all the interlocutory applications, but the key ones were as follows. In 2014, the appellant applied for wide ranging discovery to include all the material which the Commission had in its possession after various production orders. That disclosure was to include all the material in respect of the other individuals connected with HTJL in respect of whom Public Statements had been issued. In particular discovery was sought about what they were saying about the appellant. In a judgment dated 23 rd October, 2014, the Master granted discovery of the final version of the proposed Public Statements and the ICPs for the other individuals and also the minutes of the decisions of the Executive and the Board in relation to the other individuals, but rejected the remainder of the application for discovery *UV and W -v- JFSC*

[2014] JRC 202. The appellant appealed to the Royal Court which dismissed his appeal on 23 rd January 2015 *W -v- JFSC* [2015] JRC 017. The Court of Appeal subsequently refused leave to appeal on 26 th March 2015 *W -v- JFSC* [2015] JCA 060.

89 On 15 th December 2014, *W -v- JFSC* [2014] JRC 250, the Master granted a stay of this appeal pending any criminal investigation on the basis of the maxim *"le criminel tient le civil en état"*. However that decision was overturned by the Royal Court on 8 th May 2015 *JFSC -v- W* [2015] JRC 094. The Court of Appeal refused an extension of time to appeal against that decision on 22 nd June 2015 *W -v- JFSC* [2015] JCA 135.

90 On 30 th June 2015, Sinels wrote to the effect that they were no longer instructed because of the appellant's inability to give instructions as a result of illness. On 25 th November 2015 *W -v- JFSC* [2015] JRC 241, the Master granted a stay of the appeal for three months on the basis of the appellant's ill health. A further stay was granted on 10 th March 2016.

91 In due course the appeal was set down for three days commencing 17 th October 2016. On 11 th October, the Master rejected an application for an adjournment on the basis of the appellant's continued ill health but on the 17 th October, in the light of further evidence, he was persuaded to do so as set out in his judgment of 1 st November 2016 *W -v- JFSC* [2016] JRC 199.

92 On 19 th December, 2016, the Master, for reasons set out in a judgment at *W -v- JFSC* [2016] JRC 231A ordered the Commission to file an affidavit providing greater detail of its reasons as set out in paragraph 121 of the judgment. However the Master rejected further applications for wide ranging discovery, save that he ordered the production of communications in 2010 or 2011 between HTJL and the Commission arising out of supervisory visits carried out in the ordinary course of the Commission's supervisory role.

93 It was in these circumstances that the appeal did not come on for hearing until 24 th April. The papers before us included four affidavits from Mr Averty, the former Deputy Chairman of the Commission, two affidavits from Lord Eatwell, the current Chairman, the second and third affidavits of the appellant, and affidavits from Mr Bowen and Mr McKimmon on behalf of the appellant and from Mr Le Marrec and Mr Faudemer on behalf of the Commission.

The First Appeal

94 We turn now to consider the grounds of appeal. Unfortunately, Advocate Sinel's written and oral submissions (and the two affidavits of the appellant) did not follow the format of the Notice of Appeal and did not address sequentially the specific grounds raised in the Notice of Appeal; his submissions were of a more discursive nature. We have done our best to extract from his submissions the points which he made in relation to each specific aspect of

the grounds of appeal; however this has been a time-consuming exercise which has not been entirely straightforward. We consider the grounds of appeal in the same order as they were formulated in the notices of appeal.

Ground 1

95 Ground 1 is in the following terms:–

> *"There was no proper or reasonable basis for the Respondent's conclusion that the appellant had acted with a 'most serious lack of integrity' and serious incompetence*.
>
> *The appellant submits that there was no proper or reasonable basis for the following findings of fact, upon which depended the Respondent's conclusions at paragraphs 1.3 and 5.1 of the Public Statement that the appellant had acted with a 'most serious lack of integrity' and with a serious lack of competence.* These findings were, variously, either incomplete and / or unbalanced and / or inaccurate and / or vague and / or unparticularised. Further or alternatively, if and to the extent of [sic] such findings of fact were justified, they did not properly justify the conclusion that the appellant had acted with a most serious lack of competence or serious lack of integrity……"

The grounds then go on to specify eleven specific findings of fact which are questioned and we shall consider each of these in turn. The reference to a paragraph number is to the paragraph of the Public Statement.

(i) There was no proper or reasonable basis for the finding of fact that "Film Co. is in liquidation with creditor claims of c. £43 million" (para 2.8)

96 Substituting the real names of the various companies for the descriptions used in the Public Statement, paragraph 2.8 says as follows:–

> *"In total, £3.445 million was transferred from customer structures and invested into Paragon.* The monies were not routed to Paragon but were transferred to Almorah and were then used to discharge Handmade's numerous and pressing creditors. In essence, Almorah became a financing vehicle to Handmade which is currently in liquidation with creditor claims of circa £43 million."

The criticism made by the appellant in relation to this paragraph is of the assertion that Handmade was in liquidation with creditor claims of circa £43m.

97 During the course of the proceedings leading up to the decision of the Board, it was asserted more than once by or on behalf of the appellant that Handmade had 'exited liquidation'; see for example the letter from Sinels dated 11 th December 2013. That assertion was incorrect. The Executive checked with the liquidators who confirmed that it

was still in liquidation. Indeed the Court was provided with the annual progress report of the liquidators of Handmade dated 16 th June, 2016, from which it is clear that Handmade remains in liquidation.

98 As to the amount of the creditor claims, the appellant asserts in his second affidavit dated 25 th August, 2016, that there were never verified claims of £43m; the true figure was about £11m. This was consistent with what he said at the Stage 4 meeting of the Board where he had said that the claims were not £43m.

99 The figure contained in the Public Statement was based upon information received from the liquidators in December 2013 and January 2014. The schedule produced by the liquidators at that time did indeed show total creditor claims of £42.93 m.

100 However, when these schedules were produced during the hearing, the Court noted that the email from the liquidators enclosing the schedule referred to claims of some £11.48m having been rejected. On analysing the schedule, it appeared that these claims were included in the figure of £42.93m. It follows that the creditor claims against Handmade at that stage might more accurately have been stated as £31.45m because of those which had been rejected by the liquidators.

101 It was further noted by the Court during the hearing that there might be thought to be an element of double counting in this figure in that, although the CLNs were correctly included (being liabilities of Handmade), the list of creditors appeared to include both the amount claimed by Paragon of £3,445m and the amounts claimed by the underlying Paragon investors. That would be to double count and it suggests that this amount should be further deducted.

102 In our judgment, both these points should have been picked up by the Commission and the lower figure inserted. However we do not think that this avails the appellant. The point being made in this paragraph of the Public Statement was that there were very substantial claims against Handmade. The 2016 progress report of the liquidators confirms that the claims remain at the same level, that the realisation of the assets of Handmade has only come to some £87,500 and that there is no prospect of a dividend to creditors. There is nothing in the papers to which we have been referred to support the appellant's assertion that claims were only in the region of £11 million.

103 Subject therefore to the correction of the amount, we see nothing wrong with this paragraph of the Public Statement. The paragraph is simply laying the ground for the suggestion that Handmade is hopelessly insolvent. That was accurate at the time of the Public Statement and remains accurate even if the exact level of creditor claims is less than £43m. The last sentence of paragraph 2.8 of the Public Statement should therefore be amended to read " *in essence, Bid Co. became a financing vehicle to the Film Co. which is currently in liquidation with creditor claims of circa £31 million, subject to the possibility of*

the liquidators' rejection of what may be certain duplicate claims."

(ii) There was no proper or reasonable basis for the finding of fact that "HTJL customers have sustained substantial losses by virtue of the acquisition of Film Co." (2.11)

104 Paragraph 2.11 of the Public Statement reads:–

> *"HTJL's customers have not been able to recover their investments or loans and it appears that substantial losses have been incurred."*

105 This is an important aspect of the appellant's case. He submits that the Commission misunderstood the position by assuming that, if Handmade was unable to pay its creditors, the Paragon investors would lose their investment because the CLNs would not be repaid. But, he submitted, that ignored the fact that the CLNs were secured on the film library owned by four subsidiaries of Handmade and that there was adequate value in that film library. It followed that even if Handmade was insolvent the Paragon investors were still adequately protected. He further submitted that the valuations given at the time suggested that the value of the film library greatly exceeded the amount owed under the CLNs.

106 To assess the validity of this submission, it is necessary to describe briefly the history of this aspect.

107 The draft ICP sent out on 9 th July, 2013, stated (at paragraph 13.1) that "customers are considered to have lost the totality of the investment made on their behalf". In context, this is clearly a reference to the investors in Paragon i.e. the ordinary investors.

108 In his response of 3 rd October 2013, the appellant disputed this. He stated that the Paragon investors had security over the film library held by four subsidiaries of Handmade and he exhibited a document referring to the Debenture and a valuation dated 31 st July, 2007, from the Salter Group of Los Angeles which placed a value on the film library of some US$137m (with a lowest value of US$100m) and also a review by 'American Appraisal' of December 2009. The appellant asserted in his response that the documents remain representative of the current value of the underlying subsidiaries of Handmade.

109 In support of the assertion that the appellant had believed there to be adequate security for the Paragon investors at the time, we were referred to an email dated 3 rd December, 2010, from the appellant to a number of his HTJL colleagues which contained the following passage (5/2586):–

> *"From our Paragon investors' perspective, they are part of £12m secured investor group.* As most people know Keith, they will also be aware that as part

of our settlement process we have with Patrick, he has taken some unsecured debt Cartier owned. That obviously ranks behind our debt, but he was confident enough on the future to agree that. I would view Handmade's assets as valued at least at £12m, as the library can throw off £1m a year on the back catalogue, ignoring re-make rights. The DiBonaventura deal alone delivers a $3m fee prior to filming. The last formal valuation was in 2007 at $140m and that is certainly too high and optimistic. However if you divide that by 4 and thus apply a 75% sensitivity you still have a value in excess of the bond exposure.

Thus our investors achieve a 12% coupon in a company we have as much knowledge about as is possible. The risk of capital loss is limited due to the underpinning assets so the major risk is timing. If the company failed, it would take months to find a library buyer, but it would not take years."

110 The Executive did not alter the wording referred to in paragraph 107 above when issuing the final ICP on 1 st November, 2013.

111 On 12 th December the appellant wrote to the Commission stating that there was an in principle bid for Paragon's investment i.e. the CLNs. He attached an email from a long standing associate of the appellant, ("the Purchaser") on behalf of a private German fund asserting an in principle agreement to acquire the CLNs from Paragon at 60p in the £1. There was also reference to a *'future £1m recoupment in a Handmade group payment waterfall of re-structured lenders'*. The email also asserted that the matter would only proceed if the appellant was able to assist with the acquisition. It needed his historic knowledge of the structure of transactions concerning Handmade and Paragon.

112 This correspondence was considered by the Review Committee at its meeting on 13 th December 2013, and it is to be noted that the draft Public Statement which subsequently accompanied the recommendation from the Review Committee to the Board referred (at paragraph 4.2) to the fact that customers *"have lost very significant sums"* as compared with the suggestion in the ICP that they had lost the totality of their investment.

113 On 20 th January, 2014, the appellant wrote again complaining that the Review Committee had ignored his submission in relation to there being value in the Paragon bonds. He enclosed a letter from Charles Russell, English solicitors on the same date stating that they were retained by the Purchaser and that a new BVI company (Bid Co) formed by the Purchaser was ready to issue a formal offer (subject to contract) to Paragon on the basis described above i.e. 60p per £1 together with a potential further £1m recoupment. However it remained a condition that the offer would not proceed should the appellant be precluded in any manner from assisting with the acquisition. On 23 rd January, 2014, Sinels repeated (erroneously) that Handmade had exited liquidation and also exhibited a sale agreement whereby the liquidators of Handmade sold its assets (including shares in the four subsidiaries which held the film library) for £87,500.

114 At its Stage 3 meeting on 23 rd January, 2014, the Board considered, amongst other matters, the draft Public Statement prepared by the Review Committee and asked for amendments. The amended version was considered at its adjourned Stage 3 meeting on 6 th February. The draft Public Statement, which was approved and supplied to the appellant, said as follows:–

> *"HTJL's customers have not been able to recover their investments or loans and it appears that substantial losses have been incurred."*

115 On 22 nd April, 2014, Sinels forwarded to the Commission a copy of a letter dated 3 rd April, 2014, containing varied terms of an offer to acquire the CLNs, which remain subject to contract. In this version the Purchaser would pay 30p in the £1 on signing the agreement, 30p in the £1 on 29 th August 2014 and a future potential recoupment of £1m in a waterfall of re-structured lenders. The agreement was again to be subject to the Paragon investors withdrawing any complaints or legal process in relation *inter alia* to the appellant.

116 That remained the position as at the date of the Stage 4 meeting of the Board on 1 st May, 2014. The appellant reiterated at that meeting that Paragon investors would therefore make a recovery. He accepted the deadline for acceptance of the offer had run out but he understood that all eight Paragon investors had accepted the offer.

117 No further information on this topic appears to have been supplied to the Commission prior to its decision on 19 th June, 2014, to issue the Public Statement in the form shown earlier in this judgment which, at paragraph 2.11 states:–

> *"HTJL's customers have not been able to recover their investments or loans and it appears that substantial losses have been incurred."*

118 The Court has been provided with evidence as to events since the Commission's decision to issue the direction and Public Statement in June 2014. We would summarise these events as follows:–

(i) On 9 th July 2015, the appellant's wife forwarded to the Commission an email from Wedlake Bell, solicitors on behalf of a company called Taranau to Mr Bowen who administered the Paragon GP. It appears that Taranau is a vehicle promoted by the Purchaser. That email put forward three possible offers for the CLNs, each of which would require 100% support from the Paragon investors. These were:–

(a) Option A (described as the preferred option). The buyer would pay 70p in the £1 on completion with entitlement to a future potential 30p depending on recoupment in the re-structured company's waterfall of lenders. That option was dependent upon cessation of the Commission's investigations into the appellant.

(b) Option B was 60p in the £1 at closing with a future potential interest of 40p in the waterfall of lenders, but this was dependent on certain due diligence.

(c) Option C was an unconditional payment of 25p in the £1 at closing with no further due diligence.

119 It appears that the Paragon investors went broadly for option B because Mr Bowen's affidavit, filed on behalf of the appellant, exhibits a resolution of the general partner of Paragon on 27 th November 2015 agreeing to sell the CLNs held for the benefit of the Paragon investors on the terms of an agreement attached to the resolution. That agreement provides for a payment of 60p per £1 on completion, a further 10p within ten days of the Jersey Financial Crimes Unit (JFCU) releasing the books and records of Handmade provided that this occurred within ninety days and the possibility of a further 30p provided that a new BVI company administered in Cyprus to be formed by Taranau as purchaser receives further payment in respect of the CLNs. The resolution envisaged that the final agreement would be completed within fourteen days.

120 The Court has not been provided with an executed copy of that agreement, but according to Mr Bowen, the matter did complete and all the Paragon investors have received 60p in the £1. The extra 10p was not forthcoming as the JFCU did not release the required documentation in time. There is no evidence that the investors have received any further funds. It appears that one of the Paragon investors has received back 100% of the capital invested but with no interest. In his second affidavit, the appellant explained that this Paragon investor had threatened the appellant and his wife with criminal complaints if he did not get his money back and accordingly he was treated differently because he was so obdurate and threatened to scupper the agreement.

121 In our judgment, the statement at paragraph 2.11 of the Public Statement cannot be faulted. The Paragon investors had not recovered their investments and had incurred substantial losses. Thus:–

(i) The CLNs had a maturity date of mid-November 2012 (see paragraph 14 above) and were entitled to interest at 12% which was payable upon the maturity date. Interest continued to accrue until repayment.

(ii) It follows that, when the Board was considering the matter in June 2014, repayment of the CLNs was some eighteen months overdue and the company which owed the primary obligation (Handmade) was in liquidation with no prospect of realising further assets. Holders of the CLNs had received no payment towards the outstanding capital or interest.

(iii) Although the appellant had repeatedly asserted that there was value in the CLNs because they were secured on the film library and had put forward a number of possible offers at the instance of the Purchaser, the fact was that, as at the date of consideration by the Board, no purchase of the CLNs had taken place and no formal

agreement for their realisation had been reached. All of these offers had imposed a condition apparently aimed at halting the regulatory action against the appellant.

(iv) Even if it were to be assumed that the latest offer before the Board would come to pass, full repayment was not envisaged. The offer envisaged 30p immediately, 30p on 29 th August 2014 and the possibility of a total of an additional £1m to be shared amongst the CLN holders. The Board was entitled to conclude that this additional sum was somewhat speculative depending as it did on a *'waterfall of re-structured lenders'*. Given that the amount invested via Paragon in CLNs was £3,445m, the Board was entitled to conclude that even if the latest offer were to materialise it would not achieve full repayment of the principal, let alone any allowance for outstanding interest.

122 In those circumstances, it was in our judgment entirely reasonable for the Board to conclude as per paragraph 2.11 of the Public Statement that Paragon investors had not recovered their investments and that they had incurred substantial losses.

123 Although it is not necessary to note what has happened since — because the Board naturally did not consider this — we have been provided with evidence of subsequent events on behalf of the appellant. We have to say that this confirms that the Board cannot be faulted in its conclusion. Thus, far from matters being ready to proceed almost immediately as the appellant seemed to indicate to the Board at its meeting on 1 st May 2014, nothing occurred until November 2015. At that time, as discussed at paras 119 and 120 above, the Paragon investors received 60p in the £1.

124 The appellant asserted at paragraph 29 of his affidavit for this appeal that *'all of the investors of apparent concern to the [Commission] have received back the majority of their funds'*, and at paragraph 58 that they have *'received substantially all their capital back"*. We do not agree that these are accurate assertions. The Paragon investors (bar one) have so far received 60p in the £1 (which is not *'substantially all their capital'*) and they have received nothing in respect of interest. As stated at paragraph 120 above, one investor who threatened to go to the police has received the whole of his capital but without interest. In very round terms, given that payment was not made until November 2015 and the CLNs were issued in November 2009, investors should have received interest for six years at 12% i.e. a total of £1.72 for each CLN (including capital and interest). In fact all but the one investor referred to have only received 60p and this as a result of a purchase by an associate of the appellant. Even if the CLNs had been repaid on time at the maturity date, investors should still have received £1.36 for each CLN. If the interest rate should have increased to 15% after 12 months as envisaged in the 'terms sheet' in respect of the investment in Paragon (see paragraph 21 above), the percentage recovery is even lower.

125 It is further to be noted that there was no evidence before us that anyone sought at any stage to enforce the security upon which the appellant placed such weight. That may be because there were clearly considerable difficulties in the way of enforcement right from the

start. Thus clause 9.2 of the Debenture states that only the trustee under the Debenture may enforce the security and it does not need to do so unless it is indemnified as to the cost of doing so by the holders of the CLNs and is supported by an extraordinary resolution of holders i.e. a majority of three quarters of those who vote. Accordingly, Paragon investors would have had to incur further costs in the hope of seeing some recovery by way of enforcement of the security conferred by the Debenture.

126 The appellant has asserted that it is the Commission's fault that value has not been realised from the film library. He says that this is because the JFCU had possession of the documents in connection with the film library until May 2016 and it was not possible to realise the value in the film library without such documents. However, he has produced no evidence (as opposed to assertion) that this is so and we note that there is no evidence of any realisation of the film library since then or any enforcement under the Debenture.

(iii) There was no proper or reasonable basis for the finding of fact that "the appellant acted as a shadow director even when no longer a director of HTJL" (para 3.1)

127 Paragraph 3.1 of the Public Statement is in the following terms:–

> *"[The appellant] was the CEO of the Horizon Group.* He was the driving force behind HTJL. During the period [2008–2012] he increased his shareholding in HTJL to 50.2%. He was a director of HTJL but not throughout the period. As the majority shareholder and by then acting as a shadow director, he was able to direct the affairs of HTJL to a large extent." (emphasis added)

128 It appears not to be disputed that the appellant was a director of HTJL from shortly after he joined it in 2005 until 13 th May 2009 when he resigned. He was reappointed as a director of HTJL on 9 th February, 2010. He was accordingly only not a director for some nine months. Throughout that time he remained as CEO of the Horizon Group.

129 The sole criticism in this ground of appeal is of the finding that the appellant acted as a shadow director for this nine month period. It has to be said that Advocate Sinel did not develop this specific point in either his written or oral submissions and the only reference to it that we have found in the appellant's affidavit sworn for this appeal is at paragraph 92 where he says simply that the allegation of shadow directorship is incomprehensible as he could not be a shadow director and a director at the same time.

130 We agree that the paragraph is not very clearly worded in that the reference to then acting as a shadow director must in context be a reference back to when the appellant was the majority shareholder. As he only became the majority shareholder in February 2010 (at which time he was reappointed as a director), there does not appear to have been a period when he was a majority shareholder but not a director. We accept of course that you cannot be a shadow director if you are in fact a director. However, the paragraph is obviously

meant to be a suggestion that he acted as a shadow director during the period that he was not a director.

131 We do not see this as a significant point, in that the key actions which are criticised took place when he was a director. Nevertheless, for what it is worth, we find that there is ample evidence upon which the Commission could properly find he was acting as a shadow director during the nine months that he was not actually a director i.e. he was a person in accordance with whose directions or instructions the directors of a company were accustomed to act. He remained the CEO of the Horizon group with the status that this brought and there is no suggestion that his instructions or directions were treated any differently during this period from when he was a director; see by way of example his response to the email dated 28 th May 2009 from Mr Ibbotson referred to at paragraph 140(iv) below.

132 On reading the appellant's skeleton argument and upon hearing Advocate Sinel's submissions, it became clear that the appellant's real criticism of paragraph 3.1 is of the suggestion that the appellant was the driving force behind HTJL and that he was able to direct the affairs of HTJL to a large extent i.e. of other passages in paragraph 3.1. This did not form part of the grounds of appeal but, given the importance placed on it by the appellant (both in his various responses in the course of the DMP and in Advocate Sinel's submissions), we have considered the submission in order to ascertain whether these were reasonable findings for the Board to make.

133 It is right to say that the appellant has consistently objected to this characterisation of his position. As indicated earlier, he did not comment on the HTJL report before its finalisation. That report said at paragraph 3.9:–

> *"There is little doubt [the appellant] was a dominant force at HTJL.* It was not unusual for his 'instructions' to be executed without even the most cursory of enquiries from his colleagues, let alone a substantive challenge. Such obsequious behaviour not only demonstrates a material weakness in the collective behaviour of HTJL's board, but has also led the Investigating Officers to conclude, in part, that HTJL failed to conduct its business with integrity. This is particularly relevant given the number of circumstances when the board was privy to information and documentation that should have triggered a very different, or opposing, outcome."

134 The appellant's role was considered further at paragraph 4.2.2 which concluded at 4.2.2.9:–

> *"We conclude [the appellant] was undoubtedly the dominant force at HTJL, which operated under a culture whereby what [the appellant] said went."*

135 Similar sentiments were contained in the draft ICP at paragraphs 2.3 and 4.

136 In his response of 3rd October, 2013, to the draft ICP, the appellant strongly disagreed with the suggestion that he was the driving force or dominant force or able unilaterally to direct HTJL's affairs. He gave his reasons for that contention.

137 This was responded to by the Executive in their letter of 1st November, 2013. At paragraph 4.1 of their response, they said:–

> *"We note in the ICP that [the appellant] does not accept he had a significant influence over the affairs of HTJL, a point he has repeated in his response.* In our view, our investigation has conclusively demonstrated that [the appellant] was a dominant force at HTJL and that he was, to a large extent, unilaterally able to direct HTJL's affairs. We do not state that [the appellant] unilaterally controlled all of HTJL's affairs. Further we have not, as suggested, 'cherry picked' emails." [Original emphasis]

138 Paragraph 3.1 of the draft Public Statement sent out to the appellant prior to the Stage 4 Board meeting contained similar language to that found in the final version. At the Stage 4 meeting on 1st May the appellant was asked about the assertion that he was a dominant influence and asserted again that this was not correct. Despite that, paragraph 3.1 of the Public Statement remained in the form described above.

139 Advocate Sinel submitted that this was an unreasonable finding. We would summarise his grounds for so arguing as follows (which were also those put forward by the appellant in his various responses described above):–

(i) The appellant's role was that of 'rainmaker' i.e. he was the business getter. He would gain clients and thereafter maintain the relationship with them. He was not responsible for the operations side of the business; that was the responsibility of Mr Treharne who was appointed Chief Operating Officer. The appellant spent most of his time out of the island and frequently did not attend board meetings.

(ii) This reflected what had been agreed in a document dated 1st October 2009. That document stated that the day-to-day management of the business should now rest with an operational board consisting of the Chief Operating Officer (Mr Treharne), the Finance Director (Mrs McDonald) and the Legal Director (Mr Ibbotson). It went on to say that Mr Bellot and the appellant as key individual shareholders should step aside from previous roles and the appellant was to relinquish any day-to-day control and focus on business development.

(iii) Although the appellant was the majority shareholder, there was a shareholder agreement which meant that certain key decisions could only be taken with the agreement of 75% of the shareholders. He therefore did not have absolute control.

(iv) Although he was group CEO, there was always someone above him, namely Mr

Bellot until early 2010 and thereafter Mr Bucknall. Each of them was the Executive Chairman and, for example, the 2010 business plan had a page entitled 'Management Lines' showing the management lines and this showed Mr Bucknall above the appellant.

(v) The appellant did not accept that other directors habitually acted as he requested without consideration. In his response to the draft ICP, he attached at annexes 7 to 11 emails which, he said, showed that his view was not followed on a wide range of matters.

140 In our judgment, essentially for the reasons put forward by Advocate Lacey, there were ample grounds upon which the Board could reasonably reach the view expressed in paragraph 3.1 of the Public Statement as to the appellant's position of dominance. Thus:–

(i) The appellant was the group CEO at all material times. That suggests that he was the chief executive of the group. He was also the majority shareholder of HTJL from February 2010. These two positions alone would inevitably confer enormous authority on him and make it likely that others would be heavily influenced by his views. Advocate Sinel submitted that Mr Bucknall was the 'de facto' owner and controller of HTJL because he had lent the money to the appellant for the appellant to buy Mr Bellot's shares, which took the appellant's position to that of majority shareholder. We do not accept this point. The appellant was the registered shareholder and had the voting power attached to those shares. There was no declaration of trust suggesting he was a nominee for Mr Bucknall. The fact that Mr Bucknall lent him the money is irrelevant. The fact that a bank lends money to a customer to buy shares does not make the bank the 'de facto' owner of those shares.

(ii) It is not disputed that the appellant was the chief business getter (the rainmaker) and was responsible for gaining clients and then maintaining relations with them. Again, this would give him influence with other officers. They would realise that the company's future profitability depended upon the appellant. This is evidenced by a note dated 19 th October, 2010, from the compliance officer to the Board (quoted at paragraph 4.2.2.2 of the HTJL report) which said the following:–

> *"DF has a unique and multi-purpose role throughout Horizon and if he were to leave or become incapacitated it is difficult to see how, in the short term, he could be replaced in many of them.* The fact that he remains perceived as ow(n)ing many of the most remunerative clients would be only one major concern if he decided to branch off on his own. It is only one of the structural weaknesses of the CRM model. On the other hand, the SDB saga highlights the general weaknesses we have without DF's close involvement, where nobody had any real grasp of all the relevant rationale and motivational aspects nor the various technical issues and risks that SDB presented at the outset. From a poor start, our position further deteriorated without DF's guiding hand, illustrating the vacuum of expertise in the administration area for complex business."

(iii) While, as Advocate Sinel points out, the page headed 'Management Lines' in the 2010 business plan shows the group chairman Mr Bucknall above the appellant as group CEO, the structure also shows the finance director Mrs McDonald and the head of risk compliance Mr Noding as reporting to Mr Treharne as Chief Operating Officer with Mr Treharne then reporting to the appellant. Thus the business plan shows the appellant as being above everyone but the Chairman. Given Mr Bucknall's comparative lack of technical experience as compared with the appellant (referred to in paragraph 4.2.3.1 of the HTJL report), we think this document supports rather than contradicts the Board's findings.

(iv) Various contemporary emails support the Commission's findings. For example, on 28 th May 2009, Mr Ibbotson, the legal director, sent an email which included the passage "It has to be recognised that for all of our funds there is one of two driving forces, Gary or David." Gary was Mr Bellot. The email went on to raise concerns over director and signatory arrangements and suggested changes. The appellant (who by this stage was no longer a director of HTJL having resigned on 13 th May) replied by email the same day stating "I am very concerned at the content of several emails today. You may not be happy with the way the business is run, but can I remind you that you are the group legal director, you are not the group commercial director. Commercial decisions are the remit of Gary, Andy, Steve and myself, and I do not expect you to send out emails unilaterally outlining what you think about the board make up. Who asked you to do the review on the board's make up and then fire off an email to all and sundry without even mentioning it to the four of us?"

(v) On 29 th November 2010, Mrs McDonald, the Finance Director, emailed Mr Treharne advising of her resignation. In that email she said:–

> *"DF is a dominant shareholder and CEO of the group.* The culture within Horizon appears to be one of 'what he says goes' and this leaves me feeling very uncomfortable, especially as a fellow director. As you will be aware I have challenged on a number of occasions only to be bullied / coerced into allowing matters to rest".

(vi) Advocate Sinel points out that Mrs McDonald may well have had an agenda against the appellant because her resignation arose out of a failure on her part to calculate ANLA correctly and the appellant had been critical of this, suggesting that she might need to undergo disciplinary measures which would lead to a reprimand. She had subsequently sent an email dated 15 th April, 2011, to Mr Treharne (9/5258) which contained the following:–

> *It would appear that I am to be made a scapegoat over this……again.* That is fine by me, but you may wish to remind DF that I have a whole folder of emails that I am quite willing to march down to the JFSC which would put him, personally, in a very difficult position. Emails that have been sent on the Horizon system and that would make interesting reading to the Commission and various clients. I am fed up with him being able to get away with this treatment of people and I have had enough. Nobody is

> willing to put him in his place. He can say what he wants about me to employees / directors / shareholders of Horizon — but one word to my new employer and I will go to the Commission."

Advocate Sinel argues strongly that she clearly had an axe to grind and that the Commission should therefore have placed little weight on anything she said. We accept that the Commission would need to take this into account, though it was open to the Commission to find that what she said was consistent with the other evidence before it.

(vii) The Commission was entitled to have regard to the manner in which other officers at HTJL acted immediately on the appellant's instructions in relation to payment of monies to Almorah on behalf of Paragon investors. Examples of some of the emails appear later in this judgment.

(viii) The Commission was, in our judgment, entitled to rely on the appellant's own admissions during his interviews with the Executive. In the first interview he is recorded as saying:–

> *"Certainly people internally felt that I was the driving force behind the company, felt that I was the, the bright one, the enigmatic one, however you want to describe it, and again, I never set out to make myself out, I can't think of a more eloquent way of saying it as, as 'Billy Big Balls'; it was never my aim."*

And later in the same interview:–

> "Okay, so just like the perception that you're telling me is that my colleagues in certainly later years and maybe through the whole period felt I was, I was a dominant force. Well in the early years they felt that I was the guy who was driving things forward."

(ix) In the second interview the following exchanges took place:–

> *Q: "That would suggest to me that, notwithstanding the great concerns over what was happening at Horizon at this time and how clients' monies were being applied for investments linked to Handmade, nobody stood up to you because what you said went.* That is also suggested to me, David, that nobody dared stand up to you. What you said went, to the effect, here, the 7 th of June four very different clients are placed into a situation where their monies are used to settle a litigation. Would you like to comment on that for me, please?"
>
> *A: "Yeah, I mean, I'll, I'll try to, Jamie.* I mean, you know, we, at the previous interviews that we had you raised the fact that people believe or are of the view, you know, I'm a dictator in the office, etcetera, and, you know, everybody seems to have an opinion that David's the devil, these days. The, the only thing I can say to that is, when…… I would like to cover two points which I think are relevant. Is when Gary and I reached a

deal in, which was financed in 2010 and completed in 2010. Six months earlier I'd resigned and said, “I'm out of the office”, and everybody wanted me to stay, okay? ‘Cause, believe me, I would have preferred to have gone. Now, why everybody wanted me to stay, I don't know. But clearly there's a difference in terms of their approach today. I think it's fair to say that over a period of eight, nine, ten years in Coutts and in Horizon I had a very large loyal client following and people had had very good investment returns. Now, I don't believe you will find anywhere, a statement from me which is ‘what David says goes’ and that has to be the way that it's run around here, but I think it is fair comment, and did I appreciate it at the time? Well, I don't think anybody's going to believe what I say anyway. So people clearly took my word as, as read, and didn't challenge me, even whether they thought it was a good, bad or indifferent idea. But what other reason……”

Q: “Why would they do that, though, David?”

A: “I believe up until that point it was because of my track record with the clients. Because I'd enjoyed good returns, I'd enjoyed good relationships, we'd never had any complaints, everything had worked very well. And I guess it was a question that they believed that I was always going to get it right. Just to be clear, I didn't believe I was always going to get it right, and people did challenge me at times. There were things that I wanted to do that we didn't do. But I can't explain to you why, if everybody in the office thought that what I wanted to do was a bad idea, why not a single person did anything about it, including Chris. Because Andy and Chris were with, were with each other every day, they had a far closer relationship than I had with either of them. And Chris is not shy in trying to, you know, tell me what I'm supposed to be doing. So I don't understand, Jamie, why that would be the case if everybody thought it was a bad idea, because they have a legal duty to challenge me and they are the guys who signed off on this stuff, not me, okay. You will find lots of emails from me over the years saying, “Let's invest into this, let's invest into that”. And it was then down to others to execute them. But if somebody had come back to me and said, “Look, you know what, none of us want to do this, what are you going to do about that, pal?” there's not a great deal I can do about it. So it's, it's, it's, to me, I think to try and be fair as opposed to just purely defensive, I would say there's an element where it's my track record, my relationship with the clients, there's an element there whereby it's a more convenient story to give that, “We were all too scared to challenge David”. And I think in, in addition to that, they had all insisted that I stay and buy Gary out as opposed to me leaving.”

It is right to say however that elsewhere in the interviews, the appellant denied that he was a dominant force. Nevertheless, these extracts could be said to amount to recognition on his part that the other members of the HTJL team in practice looked to him as the leading light of the company.

(x) Reference can also be made to an email dated 15 th July 2010 from the appellant to Mr Bucknall in which he discusses the way forward in respect of a number of matters and includes the following passage in relation to his position:–

> *"3. Whatever happens with the foregoing, I will continue as CEO until the year end, however I am of the view that it may well be in the interests of the business if thereafter I stand down. Whether I am an unlucky CEO or have made bad judgment calls we can debate, however whilst the business has grown over my tenure it has also had issues and I am the guy at the top. It may be better, therefore, to be able to demonstrate new shiny Horizon that I am replaced. If we do the deal with Symon then I can be a project director or similar. If not, you and the rest of the guys should decide whether you want me there at all, as my ego will not get in the way of what is best for the company….." [Emphasis added]*

(xi) With reference to the document dated 1 st October 2009 referred to by Advocate Sinel, the Commission was in our judgment entitled to find that, whatever the theory or intention may have been as expressed in that document, the situation on the ground was very different and that effectively the document was not in practice being adhered to.

(xii) With reference to the key decisions in relation to Handmade, there was also evidence as to the central role played by the appellant from his own admission in the second interview where at page 89 he said the following:–

> *"A: Can I just add one thing while you're thinking?* I, I understand fully that my career in the financial services sector is finished, okay. I'm not in these meetings to justify what I did, and if it comes across like that it's definitely not the intention. My reputation's completely over, so where I've made mistakes this far, in terms of the Handmade situation particularly and Horizon generally, you will get a straight answer out of me on everything, because I've nothing to either hide, or I've got nothing to gain through this process, in my mind. Former colleagues are looking for a situation where they can continue to work in the industry on the Island, and that's their issue, it's not mine. Unfortunately, I've, to a degree, got them embroiled in this, 'cause it was undoubtedly my initiative to try and sort Handmade out. It wasn't Andy's, it wasn't Sarah's, it wasn't anybody else's, it was mine. Ok, the fact that they've then undertaken various activities which have fallen short in my opinion, thereafter, that's the trigger point to it. So, in terms of where you want to get to with the, the discussion, I cannot, because I know its going to be a reoccurring theme through all of the investment clients, alright, I don't want to make this harder, I want to try and make it as simple as possible for all of us, okay. My judgement was not correct in terms of going into these investments. My colleagues didn't challenge me until it was too late as to whether it was a good thing to do or not, and I don't know whether it's because they were scared or they respected me or a combination thereof, or one turned into the other; I don't

know, they'll have to answer that. But, I can see with the benefit of hindsight, because I get the abusive phone calls and emails on a daily basis from people involved in Paragon, that I've embroiled people who I've known for a long time and mean a lot to me into stuff and I wish I hadn't, okay. And I, I, I, I can't probably put it more candidly at a high level than that. At the detailed level, obviously I am happy to climb into the details of each individual case, but yeah, of course I regret putting people into this, and I can't, unfortunately I can't turn the clock back." [emphasis added]

141 Putting together the material we have seen, we are in no doubt that it was reasonably open to the Board to make the findings which it did in para 3.1 of the Public Statement as to the appellant being the 'driving force' and 'able to direct the affairs of HTJL to a large extent'.

(iv) There was no proper or reasonable basis for the finding of fact that "the appellant was the disclosed beneficial owner of Almorah" (para 3.3)

142 In the HTJL report, it was asserted in a number of places that the appellant was the beneficial owner of Almorah. For example, para 3.1.3 included the following passage:

> *"… following Handmade's share suspension, in January 2010, due to financial uncertainty, [the Appellant] took action to protect the interests of a number of HTJL's UHNWI customers.* With the support of a "concert party" comprising some of HTJL's UHNWI customers, in April 2010 [the Appellant] made a bid for Handmade via Almorah, a newly established private company he personally owned…".

143 In its letter of 1 st November, 2013 commenting on the appellant's observations on the draft ICP, the Executive stated at para 9.1:–

> *"Upon the establishment of Almorah, Mr Francis was the sole beneficial owner and has remained one of the beneficial owners of this company…."*.

144 That passage was objected to by the appellant in his response of 29 th November, 2013, when he said this:–

> *"The investigating officers' dismissal of significant parts of my response as 'not challenging fact' is too simplistic as the accurate portrayal of facts is of paramount importance.* An example of my concern is demonstrated at 9.1 of the 1 November 2013 Response where the Commission have stated that I was the sole beneficial owner of Almorah Services Limited ("Almorah") and remain one of the beneficial owners. Although this is true, the investigating officers failed to recognise that I only became sole shareholder of Almorah to simplify the dealings with the Alternative Investment Market regarding Almorah's acquisition

of Handmade and that this structuring was agreed to by the ultimate underlying investors. My sole ownership of Almorah existed for a short period (no more than 3 months) after which my shareholding reduced to 0.24% which is my current shareholding as evidenced by the share register shown at Annex 6 so, although a current shareholder, my holding is extremely small. The transition from 100% ownership to a minority (0.24%) in under 3 months supports my assertion that I was, in reality, only ever holding the shares in Almorah as nominee for the underlying investors." [Emphasis added]

145 The draft public statement which was sent to the appellant in advance of the Stage 4 board meeting asserted at para 2.5 that Almorah was a *'company beneficially owned by' the Appellant*, at para 3.3. that he was *'the disclosed beneficial owner'* of Almorah and at para 4.4.5 that he was *'the beneficial owner'* of Almorah.

146 There was considerable discussion on this topic at the Stage 4 board meeting on 1 st May 2014. The Court has had the opportunity of reviewing the transcript. There was also correspondence following the Stage 4 board meeting to which we have referred above at paragraphs 55–58.

147 As a result, the final version of the Public Statement was amended. Para 2.5 states that the Appellant *'claimed to own beneficially'* Almorah; para 3.3 refers to him being the *'disclosed beneficial owner'* of Almorah and para 4.4.5 refers to the fact that *he 'claimed to be the beneficial owner'* of Almorah.

148 In our judgment there was ample evidence upon which the Commission could reasonably describe the position in this amended fashion, including the following:–

(i) The published AIM press release in support of the mandatory offer by Almorah for the shares in Handmade dated 29 th April 2010 stated:–

"Almorah is a special purpose vehicle established by David Francis to seek to acquire the entire issued and to be issued share capital of Handmade. …

David Francis holds 629,400 shares (representing 0.27% of the issued share capital of the Company) and has provided and/or procured finance for Almorah to satisfy the cash consideration payable under the Mandatory Offer and the CLM Offer. Since 9 April 2010, Almorah has provided interim finance to Handmade to enable it to continue to trade.

David Francis is currently CEO of Horizon Group which has operations in Cyprus, Switzerland and Jersey. Mr Francis is also the co-founder and a current director of Horyzont Group, which is a property business in western Poland. Horizon Group companies are regulated in Jersey and

> Cyprus, and subject to usual supervision in Switzerland. Horizon Group acts as trustee and/or investment manager for a number of members of the Concert Party, including Cartier. No member of the Concert Party is or will be a shareholder of Almorah nor will they have any involvement in the proposed ongoing management of the Company, save in respect of Satya Production Limited which will continue to hold £3,050,000 CLN and have outstanding a £2,000,000 secured loan to the Company. …"

Reference to *"the Company"* in the second paragraph of the above quotation is defined in the AIM document as being a reference to Handmade.

(ii) In our judgment, the natural interpretation of that document is that the appellant was the beneficial owner of Almorah at that time. To say that Almorah was 'established' by him and to then go on to describe his business experience and to confirm that no member of the Concert Party is or will be a shareholder of Almorah gives the clear impression that the appellant was the man behind and owner of Almorah.

(iii) Indeed, the appellant accepts that that was the case. In his second interview he said in respect of Almorah:–

> *"Well Patrick was aware that when we were making the, the bid, because Chris Bucknall and [MW], all of these people, none of them wanted to be seen as involved in this.* Somebody had to be the fall guy as the, the shareholder. So they were initially structured as loans to me and then I was displayed to the market as the shareholder, 'cause nobody else would…."

(iv) This is entirely consistent with an earlier email from the appellant dated 19 th April 2010 to CQS (one of the financial advisers to the bid) where he said:–

> *"To successfully bid we have to pay over £2.4m to the ordinary shareholders plus costs of circa £400k.* To demonstrate we can do this we have already provided proof of funds to Canaccord and Handmade as attached. I own Almorah 100%." (emphasis added)

(v) On 26 th April 2010, the appellant emailed Mrs Roberts of HTJL and said:–

> *"Can you let Gareth/Nick have confirmation I am the 100% owner of Almorah please… I presume there is a declaration of trust somewhere?* Needs to be done in the morning."

(vi) This confirmation was duly given by Mrs Roberts in an email dated 30 th April 2010 to Mr Donaldson stating:–

> *"Dear Nick,*
>
> *To confirm, as David is the 100% shareholder and beneficial owner of Almorah, he has lent the funds to Almorah on an unsecured interest free*

basis, with no fixed repayment terms."

(vii) The appellant's comments during the Stage 4 board meeting on 4 th May 2014 were to much the same effect. Thus at one stage he said:–

> *"Because of the non-UK nature of the investors in Handmade, i.e. some lived in Jersey, some lived elsewhere, none of them wanted to be associated with a UK company, none of them wanted to be a director and none of them wanted the publicity which Handmade brings.* So in discussion with London Bridge and with Pinsent Masons to comply with AIM rules and to satisfy the requirements of the people putting the money up, it was agreed that I would be put forward as the public face of the bid. In total there were, there was at least four or £5 million injected into Almorah at the outset, so this is pre-Paragon, to allow the bid to take place and to inject funding into the company. And the shares for each of the individual investors was held, I think, by myself, via Declarations of Trust, and that was satisfactory to be able to advise a, that I was the owner but I was not the beneficial owner of the company. I, and to, to be completely clear, I, as part of the four or £5 million that went in, I, I, can't remember the exact figure, I apologise, but it's four years ago. What I can remember is that I put £20,000 in myself of that total sum. That was the only investment I made."

(viii) The statement in the AIM press release document that members of the Concert Party would not become shareholders in Almorah seems to have been somewhat misleading. As the appellant has accepted, it was always the intention that, apart from Mr Meehan, the members of the Concert Party should become shareholders in Almorah.

(ix) As far as can be seen from the material supplied to the Court, the shareholding of Almorah amongst the HNW investors was not established until 15 th August 2010 at which time the appellant sent an email to Mr Bucknall in the following terms:–

> *"I have been working through the Handmade shareholding and would like to suggest the following in order that the final structure can now be put to bed*.
>
> *Assuming that a deal goes ahead with Charles, we should not need to raise any further funds.* As such, we can act with some certainty, so I would propose the following:–
>
> Handmade Equity, via the New Zealand Partnership Structure
>
> New Money
>
> *[The email then set out the names of various HNW investors and two others together with the percentage shareholding which was to be allocated to them.* This included 0.25% for the appellant personally]

_____ _____

Total 60.4%

Soft Money

Old Co Shareholders 15% (split between you, myself, [4 named investors] and a couple of other smaller)

You for funding 5%

Almorah Management 10%

_____ _____

Total 90.4%

I would suggest the residual is held in a company controlled by you and myself. Depending on what happens in terms of values, the shipping fund etc. we then allocate as deemed appropriate……".

Although there is no specific reference to shares in Almorah, it is clear that this is what is being referred to, as Almorah by this stage owned approximately 95% of the shares in Handmade. This email suggests that there was an element of discretion resting with the appellant and Mr Bucknall as to exactly how the shares in Almorah were to be allocated amongst the HNW investors.

(x) The Court was not referred to any material which indicated when these suggestions were put into effect, other than a shareholder list of Almorah as at 29 th February 2012 (annexed to Mr Bowen's affidavit of 24 th August 2016) which seems to suggest that the appellant held 0.49% of the shares at that date. Mr Bowen was the managing director of Horizon Suisse at the time of these events. At paragraph 22 of his affidavit, having confirmed that Horizon Suisse set up Almorah for the specific purpose of making a bid for Handmade, he states:–

"Mr David Francis owned the company upon incorporation. Within a matter of days his shareholding had reduced to 0.25 per cent of the same."

We do not think that his reference to, a matter of days, can be accurate. The Court was not referred to any document suggesting any change in the ownership structure of Almorah until the email of 15 th August 2010 referred to in the previous sub-paragraph. The only evidence put forward by Mr Bowen relates to the shareholding structure as at February 2012. The clear inference from the email of 15 th August 2010 is that the shareholding structure in Almorah had not been finalised prior to that time.

149 We accept that, as the appellant asserts, it was always intended that the HNW investors in Handmade should (with the exception of Mr Meehan) become shareholders in Almorah and it was further intended that the appellant's own continuing percentage interest would

be very small. However, the fact remains that he was put forward in public documents as the owner and was the sole owner of Almorah until, it would appear, sometime after August 2010. We acknowledge Advocate Sinel's point that the email of 26 th April refers to declarations of trust but no such declarations of trust have ever been produced or found. Furthermore, the email of 15 th August, 2010, suggests that the intended shareholding position was very uncertain and fluid until then, so could not have been the subject of declarations of trust in relation to fixed percentages. The Board was correct to amend the original wording of the Public Statement because this gave the impression that the appellant was the 100% beneficial owner and that it was intended that this should be so. However, the amended wording in the final Public Statement cannot, in our judgment, be faulted. The evidence before the Board was to the effect that, as set out above, the appellant *'claimed to own Almorah beneficially'*, and was *'the disclosed beneficial owner'*. This was the position at the time of the offer and was also the position when ordinary investors first had their money invested in CLNs via Paragon in June 2010.

(v) There was no proper or reasonable basis for the finding of fact in respect of the failings of corporate governance identified at para 4.2 of the public statement.

150 Paragraph 4.2 is in the following terms:–

> *"Mr Francis, as CEO of the Horizon Group and major shareholder of HTJL shares significant responsibility for the following:–*
>
> > *4.2.1 A confused and ineffective corporate governance structure;*
> >
> > *4.2.2 A failure to oversee and control the business of HTJL through the implementation and monitoring of robust systems and control;*
> >
> > *4.2.3 A failure to realise a Horizon services company was conducting unauthorised financial services business;*
> >
> > *4.2.4 A lack of transparency over fees levied to customers; and*
> >
> > *4.2.5 A failure to manage risk and to identify and address issues facing HTJL.*
>
> *Mr Francis's conduct lacked integrity and competence."*

151 This summary of failings is derived from the HTJL report. Although given the opportunity to do so, the appellant did not comment on the draft HTJL report, which was finalised on 1 st July 2013. It is clear from the second affidavit of Lord Eatwell (Chairman of the Commission) that the DMPs in respect of all of the key individuals of HTJL started from the basis of the findings in the HTJL report.

152 The failings (amongst others) listed at para 4.2 of the Public Statement were listed in the

draft ICP for the appellant. Although in his response, the appellant said that he did not accept these failings, he did not explain why. Nor did the submissions made on his behalf to the Court go into any detail as to why it was unreasonable for the Board to find that the listed failings existed. For example, in his written skeleton, Advocate Sinel confined himself to saying at para 168:–

> *"Paragraphs 4.1 and 4.2 of the Proposed Public Statement indicate that the appellant is responsible for all the dreadful things, whatever they might be, at HTJL of which he was a shadow, i.e. hidden director.* The worst example of pejorative un-particularisation is at paragraph 4.2.4. "A lack of transparency over fees levied to customers". This connotes dishonesty and deceit of (sic) being practiced (sic) upon customers."

153 In our judgment, given the terms of the HTJL report and the two interviews with the appellant, to relevant passages of which we have been referred by Advocate Lacey, it was reasonable for the Board to conclude that these failings existed.

154 Although it is not specifically stated in the grounds of appeal, the thrust of what the appellant (in his affidavit) and Advocate Sinel (in his submissions) complained of was that an unfair proportion of the blame for such failings had been placed by the Board upon the appellant. However, what para 4.2 says is that the appellant, as CEO of the Horizon Group and major shareholder of HTJL ' *shares significant responsibility'* for the failings. It does not say that he was solely responsible. The appellant himself at page 14 of the first interview, when asked about the principle of collective responsibility replied:–

> *"What's the easiest way to put it?* I, I'm on the board, so I'm, I'm as responsible as all of my other board directors for the decisions taken. Whether I was involved in it at the time or, or not, I'm culpable and I accept that. And if there is anything done that I disagreed with or subsequently became concerned about, I should take action over it."

155 As well as being a director of HTJL at the material time, the appellant was group CEO and, from February 2010, the majority shareholder. Given those matters, together with the finding already referred to as to the appellant's position of dominance, it was in our judgment entirely reasonable for the Board to make the finding at para 4.2 in the terms which it did, namely that he shared significant responsibility for the listed failings.

(vi) There was no proper or reasonable basis for the finding of fact that it was the appellant's sole decision to acquire Handmade (para 4.4)

156 The relevant part of paragraph 4.4 of the Public Statement is in the following terms:–

> *"Mr Francis's decision to acquire [Handmade] presented numerous conflicts of interest, for which Mr Francis and his colleagues had total disregard.* Such

conflicts of interest included, but were not limited to…..".

157 The challenge within these grounds seems to relate to the narrow question of whether the appellant was the sole decision maker in relation to the acquisition of Handmade. The Board asserts that that is not what the paragraph is saying. It is not drafted so as to attribute the decision to acquire Handmade solely to the appellant.

158 When the appellant was questioned about this paragraph during the Stage 4 board meeting the following exchange took place:–

> *Q: You, you, you didn't answer the question though, who took the decision [to acquire Handmade through Almorah]*
>
> *A: Well, ultimately it would have been myself in consultation or in discussion with the investors in the, board of Horizon*.

Shortly afterwards the appellant said:–

> *"So the parties, even if there is 'some question marks around what was or was not discussed in Paragon, nobody at any point has disputed the fact that there were active decisions taken to invest into, into Handmade by the major investors at the time.* And they took those decisions, and I was put forward as the front person being the only person who was stupid enough to allow his name to go into the public domain."

159 The appellant was the person at HTJL who managed the relationships with the HNW investors. Whilst clearly those investors had to take the decision to acquire Handmade through Almorah, there was ample evidence before the Board to the effect that the appellant was the key player at HTJL in developing and taking forward the proposal. Indeed, in the emphasised passage quoted at para 140(xii) above, the appellant confirmed that, so far as his colleagues at HTJL were concerned, it was his decision alone. We do not consider paragraph 4.4 to be unreasonable in its terms. We do not find that the Board was asserting that the appellant was solely responsible for the decision to acquire Handmade. The decision was made by him and the relevant HNW investors but he was the person from HTJL who was responsible for the decision.

(vii) There was no proper or reasonable basis for the implied conclusion in paragraph 4.5 of the Public Statement that the difference in price to the CLNs of Handmade (£1 as against 55p) was unjustified and that the appellant had an insidious motive.

160 Paragraph 4.5 of the Public Statement is in the following terms:–

> *"Mr Francis drafted a "Terms Sheet", which he provided to his colleagues and set out his views in respect of how Paragon was to operate as an investment.* Referred to in the Terms Sheet was "Headroom": the mechanism, under which

customer structures purchasing Handmade's CLNs paid 80% more for the CLNs (the difference between £0.55 and £1.00) than Almorah, which Mr Francis held out as being beneficially owned by him. The majority of these customers did not know about this significant price difference. This conduct lacked integrity."

161 The background to this paragraph is that Almorah acquired the CLNs for 55p per CLN in the period leading up to the close of the AIM mandatory offer on the 4 th June 2010. The first Paragon investment was made on 7 th June 2010 and this was at a price of £1 per CLN. At that time the appellant was the sole shareholder in Almorah although, as discussed earlier, it was intended that some of the HNW investors who owned shares in Handmade would become shareholders in Almorah.

162 In his second affidavit, the appellant asserts as follows:–

"102. Paragraph 4.5 of the proposed Public Statement is again misleading and pejorative and inaccurate as ever. The acquisition of the film company's CLNs at 55p in the £1 was at a time when Handmade Ltd had just been suspended and there was a lot of work to do to put matters on an even keel. The other reasons the CLNs came at 55p in the £1 was because the vendor (consisting of three holders) had acquired 70% of the CLNs through a natural resources fund outside its constitutive documentation.

103. The par value of the bonds i.e. the redemption value, the value at which they would have ordinarily been listed and traded was one pound in the pound and at that price it was a good investment. It was designed as a win / win for those all involved. As stated above had the [Commission] not interfered in the exploitation of the film library the Paragon bond holders would have received their coupon and the return of all their capital. We had in fact anticipated selling Handmade Ltd on within a short period of time. Advocate Wendy Benjamin of Applebys drew up a Heads of Terms for sale in December 2010. Again the actions of the [Commission] prevented us and indeed prevented any possibility of it for five years."

104. The way the Review Committee and indeed the [Commission] has always presented this has been on the basis that vulnerable clients' funds were being used to provide an instant profit for other clients. There was no on sale by one set of clients to another."

163 As can be seen from the ground of appeal, the appellant's complaint is in respect of the alleged implication that the price differential was unjustified and that the appellant had an insidious motive. In his first affidavit Lord Eatwell, on behalf of the Commission, said at paragraph 75:–

"It is not accepted that paragraph 4.5 makes the implied conclusions suggested. The focus was on the failure to notify the clients of the significant price

difference, not the justification or otherwise of the price difference itself."

164 We agree the natural interpretation of paragraph 4.5 is that it is criticising the lack of disclosure. Given that the Board has made it clear that it was not focusing on the justification for the price difference but merely the issue of disclosure, we do not think it necessary to consider the former aspect further.

165 The appellant does not address the question of disclosure in either his second or third affidavit, nor does Advocate Sinel in his written submissions. When he addressed the point in his oral submissions, the Court put to him that the gravamen of what the Board was concerned about was the failure to disclose the mark up in the price in the light of the fact that the appellant and the HNW investors had an interest in Almorah. Advocate Sinel conceded that perhaps the conflict could have been better documented and better disclosed but asserted that it was not dishonest.

166 In our judgment it was reasonable for the Board to conclude that the majority of the ordinary customers did not know about the significant price difference. The ICP set out extracts from the statements of three of the ordinary investors indicating that they knew nothing of the Paragon investment. We were not referred to any document or other evidence showing that the Paragon investors were informed that Almorah had purchased the CLNs at 55p. Furthermore, we were referred by Advocate Lacey to the first interview with the appellant. At page 156, when asked whether disclosure to the Paragon investors should have been made, the appellant answered:–

> *"The bonds, well, the bonds were sold on the basis, I mean, if I can give two, two questions, I am, I'm not going to do a Jeremy Paxman, Michael Howard session, I'll give you a straight answer.* The bonds were sold to the Horizon clients on the basis they would get a coupon and the capital wasn't at risk. And as I say, I appreciate there's a, there's a division of views in relation to the latter point. Is there, should we have disclosed that they were acquired, we paid the seller 55p and they were sold on at a pound, yes, I think we should have disclosed that."

Shortly afterwards, the following exchange took place:–

> *"Q: And, and what I am asking you is the conflict of interest, do you agree that there's a conflict of interest between looking after one client's interest in one way, at 55p, then selling that asset onto another class of client at a pound?* It's a straightforward question. Is there a conflict of interest?
>
> *A: I think there is a conflict of interest, yes."*

When pressed on whether the underlying clients knew that the bonds had been purchased by Almorah at 55p, the appellant replied 'some of them would have known, some of them probably not'. Later in the same interview the following exchange took place at page 160:–

Q: "What has happened here, David, is that Handmade utilised the difference, that was used as working capital by Handmade."

A: "Correct."

Q: "What did not happen was that disclosure was made to the clients that were investing at a, at a pound."

A: "That I totally accept."

Q: "And by virtue of that, Horizon ends up treating one set of clients very differently to another."

A: "Well, if you consider Handmade having shareholders as a client……yes."

167 We discuss later in this judgment the meaning of *'lack of integrity'* but in our view the Board was fully entitled to conclude that the failure to disclose the price differential amounted to a lack of integrity. Indeed, any other conclusion would have been surprising. This was a case where the appellant had a personal interest in Almorah, whether initially as the sole registered shareholder or subsequently as a small shareholder. Almorah had acquired the CLNs for 55p and was now selling them to Paragon investors for £1. We appreciate that the money from the Paragon investors was used to pay the pressing debts of Handmade rather than being retained by Almorah, but as a technical matter, Almorah was lending the proceeds received to Handmade and was becoming a creditor of Handmade in the sum of £1 for each £1 invested through Paragon, albeit that, because of Handmade's insolvency, Almorah made no recovery in the long term. In these circumstances there was a clear and evident conflict of interest between the Paragon investors (advised by the appellant) on the one hand and the appellant and the HNW investors (as shareholders of Almorah) on the other. Indeed, this was accepted by the appellant during the interview referred to above. This conflict of interest and the notional benefit received by Almorah as a result of the price differential should obviously have been disclosed to the Paragon investors and the failure to do so lacked integrity.

(viii) There was no proper or reasonable basis for the finding of fact that 'the appellant failed to give meaningful consideration to risks or the appropriateness of the investments and was fully aware of Handmade's financial problems at the relevant time' (para 4.6)

(x) There was no proper or reasonable basis for the finding of fact that 'the appellant acted with wilful disregard to his fiduciary obligations and used vulnerable customers' funds to reduce the risks to other investors, causing them to face the loss of significant sums of money' (para 4.8)

168 We take these two paragraphs of Ground 1 together as they appear to us to be closely linked. Paragraphs 4.6 and 4.8 of the Public Statement are in the following terms:–

> *"4.6 In providing instructions to invest customer monies in Paragon, Mr Francis failed to give any meaningful consideration to the risks and the appropriateness of the investments for those customers.* At the time of the investments, Mr Francis knew serious issues existed in respect of Handmade, including in respect of its solvency. He was aware the only way Handmade remained solvent was through the use of customer monies to discharge its numerous and significant liabilities. Mr Francis's conduct lacked integrity and competence.
>
> *4.8 Mr Francis acted with wilful disregard to his fiduciary obligations.* He issued instructions to his colleagues, which resulted in customers' assets, including those of vulnerable individuals, being used to reduce the risks to which a number of HTJL's UHNWI customers were already exposed. As a result of the conduct of Mr Francis and others, HTJL's customers faced the loss of very significant sums of money. This conduct was not in the best interest of the customers. Mr Francis's conduct lacked integrity."

169 The appellant has at all times strongly denied the allegations in these two paragraphs. Whilst he acknowledges that he was aware that Handmade had financial difficulties at the time of the Paragon investments, he considered investment in the CLNs to be a relatively safe investment (because the CLNs were secured on the film library which he believed had a value comfortably in excess of the liabilities under the CLNs) and the interest rate offered was considerably better than that which could be obtained elsewhere. He has also maintained that careful consideration was given to the suitability of investment in Paragon in relation to each ordinary investor. So, for example, the appellant said the following in his second affidavit — this was of course filed after the Board's decision but it is an accurate reflection of the responses that he was making during the DMP:–

> *"82. [Handmade] was now believed to be stable and the point of the Paragon bonds was to provide the bond holder with a coupon and capital security in return for funds to be injected into Handmade Limited. It was preferable from the bond holder's position for Handmade Limited to be healthy but they were not exposed to risk of the well-being of Handmade Limited because their security came as a result of the pledging of the share / assets of four underlying companies which were not insolvent and owned the film libraries…..*
>
> *96. The decision to put client monies into the Paragon bonds was taken by the Board of Horizon Trust well in advance of the actual acquisition; people will always watch films even in times of financial uncertainty. The investment was to be secured over the assets themselves directly, the rate of return was attractive, and provided another level of diversification. The investment world was going through highly volatile times, and this was a prudent investment. IP rights provide an income and are usually easily convertible and retain their intrinsic value. As a colleague of mine put it in 2010, investors were galloping on to equities, we had investors losing their shirts on mainstream (such as Close Brothers and Standard Bank) products."*

170 As to the suggestion (referred to below) that the money was taken from the Paragon investors simply as a method of providing funds for Handmade, the appellant responded as follows during the second interview (at page 121):–

> *Q: "….I'm quite confident in saying this to you, David, based on what I see, and what others have said to me, there's an urgent need for cash to pay off some of Handmade's creditors. It is that fact that promotes you considering which client structures to liquidate, to enter and invest in Paragon, or put the monies in Paragon anyway, and notwithstanding that never really happened. So, in essence, what I am saying to you is that the driver here isn't a good investment. The driver is a need to pay off creditors, and there's a pattern throughout all of this, David, not just this particular scenario here, but the previous transactions and indeed those subsequent that we'll go on to discuss. Do you accept that the decision to place clients' monies into Paragon was driven by a need to pay off Handmade's creditors?"*
>
> *A: "Of course it was."*
>
> *Q: "Do you further accept that little, if any, consideration, bespoke consideration, was given by you or indeed your colleagues to whether this was a suitable investment, and I'll use that word loosely, for any of the clients in question?"*
>
> *A: "Well, there's two different groups there, there's myself and my, and my colleagues.* In relation to myself, there is, there was logic in my thinking as to why, which clients went into this and which parts of their existing portfolio were liquidated to meet it. So I did give it careful thought as to what I was doing in relation to it."
>
> *Q: "A matter of hours, David, you've given this careful thought.* You receive an email from Sarah Roberts. You respond an hour or so later giving instructions. Those instructions won't work because there's not enough in a particular structure you first identify. Therefore, were using a different money. Are you still maintaining that you gave this very careful consideration?"
>
> *A: "I am, Jamie, because when we had the cashflows presented to us, we knew what cash was going to be needed, and when it was going to be needed.* Now there's one or two ways we could have handled Paragon or a vehicle like Paragon. We could have raised 3.4 million at the start in order that there was cash sitting there ready for it to be paid out as and when needed. Or it could be put in to meet cash flow requirements. I decided to go down the, the second route because, a, I didn't want to commit a whole pile of client cash just in case problems then came up. And in addition to that, I didn't want anyone involved with running Handmade to think it was easy money. However, at the outset, there's an email on the file from myself to Simon Harrison-White, saying to Simon that I have got concerns about the market because of the, the melt down that was taking place, and of the £5 or £6 million that we were managing for [clients B & I], 95% of it were in bonds, and we agreed that we would use alternatives for a portion of that. Now, those alternatives haven't worked, but it

was, it was never a question that it was 'ok, we need money so who can we take it from?'. It was thought out beforehand, but it's fair to, it's fair to say that I was rushing around the world like a headless chickenand quite frequently I would frustrate everybody because they couldn't get hold of me and timelines would slip. So I, I can clearly see how it looks, and you are reaching a different conclusion. I have to accept and understand that."

Q: "I'm not reaching that conclusion, I am confident in putting to you, let me just be clear, that there is a very different interpretation that one could make from this."

A: "I fully agree with you and I've left myself completely wide open to….".

171 The Board has not accepted the appellant's assertions. It has concluded that the position is as described in paragraphs 4.6 and 4.8 of the Public Statement as set out above. The question for this Court is to whether the Board acted reasonably in so concluding and therefore in rejecting the appellant's version of events.

172 In this connection, Advocate Lacey took us in some detail through various contemporaneous documents at the time of the investments into Paragon and the explanations given by the appellant at interview. She helpfully provided a seventeen page document summarising the matters to which she referred the Court. We do not think it is necessary to lengthen this already long judgment by quoting from all the documents to which we were referred. However, we shall mention some so as to give a flavour of the submissions to us. Suffice it to say that, having considered the material referred to by Advocate Lacey together with the other documents referred to by the parties, we have no hesitation in concluding that the findings of the Board in paragraphs 4.6 and 4.8 are entirely reasonable.

173 It is to be recalled that, despite the £17m fundraising in November 2009, the shares in Handmade (which were listed on AIM) were again suspended in January 2010 because of the company's financial position. It is clear from the emails to which we have been referred that the financial position was such that the appellant and his HNW investors felt the best way forward was to bid for Handmade. Thus on 19 th April, 2010, in an email to CQS, the financial advisor, the appellant refers to the amount needed for a successful bid and that a further £5 million would have to be put at risk on top of the funds already at risk. He went on to say *"In order to make this happen we really need to move quickly as the company is burning cash at an alarming rate…."*. On 23 rd April, he wrote to Mr Nick Donaldson, a member of another firm of financial advisors stating:–

"Further to our earlier telephone conversation I am happy to expand on my relationship with the individuals who have indicated they will support our bid, in an attempt to rescue Handmade."

174 After he then lists a number of individuals, who were essentially the HNW investors, he

continued:–

> *"Most of these individuals also know each other and given the dire situation the company has found itself in, all of them confirm they would support my bid for the company and my attempts to avoid it going into administrative receivership, which clearly has been a strong possibility for several weeks now.* All are aware of my intentions, and all are happy to confirm this if asked to do so……".

175 Almorah then acquired the shares in Handmade owned by Cartier (Mr Meehan's vehicle) which compelled it to make a mandatory offer for the remaining shares, which was made on 29 th April 2010 in the terms of the AIM press release to which we have already referred.

176 On 30 th April the appellant sent an email to a number of the HTJL directors and the financial advisors stating:–

> *"My intention in the short term is to finance the company via a new SPV that will lend into the company to give us some security in this very uncertain situation.* That will take time and in due course we hope to introduce a capital structure that puts the company on to a firmer financial footing, as challenging as that sounds today".

As already stated, the Paragon partnership deed was executed on 4 th May.

177 It is clear that the appellant was becoming aware that the financial position in Handmade was even worse than thought. Thus on 10 th May, the appellant emailed David Ravden, a director of Handmade, to say:–

> *"I am happy to meet in due course but I think we should leave it a few weeks.* Having now got control of Handmade, Keith and I have been able to see what has gone on and all I can say at this stage is that we are both very aggrieved and feel personally let down primarily. The actions in the company have a material impact on our lives David and we have been completely misled, as have others I have now met with and they will not be letting this rest. There are a lot of very disgruntled people and institutions out there.
>
> *As such it is best we spend our time sorting this mess out, calm down a bit and then we can meet for a sensible discussion."*

178 There are emails to like effect on 24 th and 30 th May. On 2 nd June the appellant indicated to his colleagues "I will now work on the bond injections as the structures in Swiss are being worked on, per attached". This is clearly a reference to the Paragon structure.

179 On 7 th June, immediately following completion of the AIM offer for the Handmade shares

and CLNs, the appellant emailed a number of colleagues and included the following passage:–

> *"To be clear, I think funding provided by both Horizon and Keith has been mis-appropriated by previous management on an extensive scale.* Funding provided for specific film projects has been taken into company reserves and that is the only way Handmade has traded over the past few years. People have varying degrees of responsibility for this ranging from the perpetrators through to being complicit in assisting, through to not taking sufficient interest in line with expected duties. I am in no mood to brush any of this under any carpet and thus far it is Almorah that has bailed this situation out and taken all the financial pain."

The same email reported that the appellant and Mr Treharne had managed to settle a dispute between Handmade and the Actor and this was duly minuted by Almorah on 7 th June. It required an immediate payment by Handmade of US$ 1.25m.

180 On the same day the appellant emailed Mrs Roberts (with copies with Mr Treharne and Miss McClafferty) asking her to make the first transfers of ordinary client monies into the Paragon structure as follows:–

> *"Pending Geneva being ready to go with the bond structures can you make the following transfers:–*
>
> *1. [C Ltd] £250k*
>
> *2. [The E Trust] £250k*
>
> *3. [Mr & Mrs C] £400k*
>
> *4. [The L Trust] £250k*
>
> *These should all be book-kept as 'Paragon 12%'*.
>
> *In addition we should move over £500k for Stan which will be in the equity structure*.
>
> *From these initial funds we should move $1.25m to Joe Taylor's account TOMORROW (June 8 th) please."*

The reference to a payment to Joe Taylor's account was the amount required for a first payment pursuant to the settlement with the Actor, which liability was guaranteed personally by the appellant. The above email was sent at 23.24 on 7 th June and at 12.40 on 8 th June Mrs Roberts gave instructions for the transfers.

181 A total of £900,000 (rather than the £1,150,000 requested by the appellant) was transferred because C Ltd did not have sufficient liquid cash for the requested payment of

£250,000 at that time. On 9th June, a colleague asked Mrs Roberts for information so that he could get the minutes prepared. Mrs Roberts replied on 10 th June as follows:–

> *"I've attached the term sheet — basically the entities are going into the Bond element of this transaction — not the equity investment, which will generate 12% return.* The Bond will be secured on Handmade library assets. I will chase Swiss for subscription form and you will get structure chart later today — as it has had to be revised following last week's settlements."

182 On 12 th June 2010, the appellant wrote a further email making it clear that Mr Meehan had committed fraud and that gross misrepresentations had been made to the investors when Handmade had raised money in 2009. The email contained the phrase "to make this go away is going to take very serious amounts of money".

183 We were shown the minutes of the meeting of Y Ltd (one of the Paragon investors) dated 14 th June 2010 which approved the investment of £400,000. Mr Nicholls and Mr McKimmon were present and the material part reads as follows:–

> *"The Chairman advised the Board that an opportunity has arisen to invest into an investment vehicle ("Paragon") which will provide funding to complete the acquisition of the share capital of Handmade Plc and all its subsidiaries*.
>
> *Presented to the Board for review was a term sheet for the investment and it was noted that the investment would be via a bond structure which will pay a fixed coupon of 12% in year 1, increasing to 15% after twelve months through to maturity.* The estimated life of the bond is expected to be eighteen months. A copy of the bond term sheet is attached and forms an integral part of this minute.
>
> *It was recommended to the Board that an investment of £400,000 would provide good returns in the current environment, whilst ensuring that the holdings within the investment portfolio remain diverse*.
>
> *After a lengthy debate, IT WAS HEREBY RESOLVED to approve the investment of £400,000 into Paragon and to authorise……"*

Broadly similar resolutions were signed for all the various investments into Paragon by the entities administered by HTJL on behalf of the ordinary investors, both on this and on subsequent occasions.

184 On 23 rd June at 18.09, Mrs Roberts emailed the appellant and others listing some of the amounts required for Handmade and making it clear that in the next four weeks a further £5.5m would be required and in a follow up email shortly afterwards, she expressed concern about insolvent trading. In response, the appellant emailed at 19.05 that he intended to go for a creditor's voluntary arrangement (cva). A later email from the appellant at 19.53 the same day said "There is too much money needed unless creditors are more practical."

185 On 1 st July, 2010, Mr Treharne sent an email to Mrs McDonald and Mrs Roberts saying that, as part of their search of the Handmade system, they had uncovered an email from the previous CEO stating that they (i.e. the previous management) had kept the business of Handmade afloat by using Horizon and other monies not for the purpose of getting films to be made but to fund overheads and also stating that there were no revenues and that the forecast *'were and still are bulls***'*. On 14 th July, Horizon (Suisse) emailed HTJL seeking clarification about the structure. On the same day Mrs Roberts responded with a structure chart and it has to be said that this does not appear to accord with what has actually happened, in that the assets ultimately held by Paragon investors are the CLNs themselves. It is clear that there was complete confusion as to what Paragon investors were in fact getting for their money, not least because the terms of the proposed Paragon bond in the term sheet were not the same as the terms of the CLNs. Thus, although according to the minutes quoted at para 182 above, investments were made on the basis that the interest rate would increase to 15% after 12 months, this did not happen because it was the CLNs which were acquired and they only carried interest at 12%.

186 On 15 th July, Mrs Roberts asked that C Ltd's Paragon investment of £250,000 be made. On 22 nd July, the administrator responded that C Ltd only had £230,000 and Mrs Roberts approved an investment of this lesser amount.

187 On 23 rd July there was a meeting attended by the appellant and Mr Treharne and others at which a discussion took place as to the possibility of a cva in order to provide a moratorium in respect of creditors. There was a need to bring in £1 million before the end of the month.

188 On 5 th August the sixth Paragon investment of £100,000 was made on behalf of the T Trust.

189 On the 6 th September 2010, the appellant emailed Mr Whiting, Mr McKimmon and Mr Noding together with others summarising much of what had occurred and reiterating that he had been insisting for weeks that Mr Meehan should be removed as a client because of his dishonesty. He also pointed out that the Media Fund, due to the actions of Mr Meehan and one of his Handmade colleagues, had had several million pounds used for the general trading losses of Handmade.

190 On 7 th September 2010, the appellant met with Mrs Q, the owner of C Ltd. There was a discussion about the portfolio. We have been referred to the 'Call Note' summarising the discussion. It is noteworthy that there is no mention in the discussion of Paragon or Handmade or disclosure of any interests which the appellant had. It is true that the Media Fund is shown as an investment in the valuation as is Paragon in the sum of £230,000 under the heading *'Private Equity'*. But no explanation is contained in the valuation beyond

these bare details. The Media Fund is shown as constituting 21.52% of the portfolio and Paragon as 7.62%. In the Call Note Mrs Q confirms that she is happy to leave investment decisions to *'us'* (by which presumably is meant HTJL) and says that her main concern is to ensure she always has sufficient money to meet her living expenses.

191 On 13 th September the appellant met with Mr R who is the ultimate client in respect of Y Ltd. Again the 'Call Report' of the meeting discloses no mention by the appellant of the investment in Paragon.

192 A particular telling series of exchanges took place in October 2010. These were as follows:–

(i) On 13 th October in an email headed ' *Handmade — cash*', Mrs Roberts emailed the appellant to say "Despite chasing the income from distributors, they are stalling and we are now late on making payments — most particularly Sullivan & Cromwell, who are a couple of days overdue and have now chased. I understand you were getting more funding — can you update please?…"

(ii) That email was sent at 09.25. At 11.11, the appellant *replies* "Sarah, transfer a further £100k from E/G Trust and a further £100k from L's Trust. Thanks".

(iii) Mrs Roberts passes this on to the administrator Shirley Watkins who replies at 12.37 to both the appellant and Mrs Roberts "There is not enough cash to invest a further £100k in Paragon for the E or G Trusts. HIJL balances attached for info."

(iv) On 18 th October at 10.50 the appellant replies in an email headed ' *Re Handmade — cash URGENT*' saying " *What are we holding in the S Trust, and can I have a list of bonds if (sic) we are invested in."*

(v) Mrs Watkins responds at 11.18 the same day giving the necessary information about the S Trust assets.

(vi) The appellant replies at 13.11 saying "Can you take the income in the S Trust £11k plus the funds in G Trust £inc of £18k and £8k. We should tell HIJL to sell the £65k TOTAL bond today and invest all this in Paragon. Is urgent. Thanks."

(vii) Mrs Watkins replies at 13.34 to the appellant saying "As the income in the S Trust is used to pay the loan interest to client B — and the income in the G Trust is split between N and R — would it not be easier to sell bonds in the G Trust and raise the £100k — what do you think? Don't shout at me."

(viii) The response from the appellant of 18 th October at 13.37 is "OK sell the one I outline plus Rabobank 2014 £50k nominal."

193 On 29 th November, the appellant emailed HTJL to say "We need to release £200k from

the Y Ltd bond portfolio back to HTJL. This should then be invested via Paragon tomorrow…..". This was duly actioned the same day although Mr McKimmon queried it in an email at 18.49 asking whether the beneficial owner was aware of the additional £200,000 investment into Paragon to which the appellant replied "Odd question but yes, I chatted with J over the weekend and will be following up by email. Thanks".

194 On 11 th January 2011, the appellant sent an email summarising the current position which contained the following passages:–

> *"It is fair to say that we are up to our eyeballs and more at the moment, and under tremendous cash flow pressure.* Lots of potential, maybe, but there is a need to deal with the here and now as well…..
>
> *There is no doubt that a cash flow neutral company and some tangible progress would make us feel a bit happier.* Going to bed every night on a knife edge like we have been for the past 9 months is no fun. On the basis this is loss making and no fun, it has to change otherwise there are ways we can lose money but at least enjoy it……. Go to the pub every day as an example. However, maybe there is the ability to build back up again once we go through this period."

195 The same day the appellant sent an email to Mr Treharne and others at HTJL headed "*Handmade cash flow*":–

> *"I have now managed to have discussions with a few people on Handmade.* I am waiting on Symon to come back to me and have asked him to put £500k as a six month loan.
>
> *Meantime, we should move the following through the bond structure:–*
>
> *(1) the T Trust £150k*
>
> *(2) L Trust £150k*
>
> *(3) R Trust 2005 £150k*
>
> *(4) Y Ltd £150k*.
>
> *I believe Symon will support thus that will give us a further £1.1m initially to stabilise matters….*
>
> *(9) The foregoing cash will not meet all liabilities so we will still be annoying some people.* Obviously we are also reliant on Cannacord coming up with some cash for us, or selling a bit of Time Bandits via Guy or raising debt finance or a deal with John or a sale etc. Thus I think we should work on the basis in this interim period that a list of proposed payments is circulated on a specific day, we all agree or otherwise on what payments are suggested and then one day a week we make payments. We need really tight control over the next few months…."

Reference to the *'bond structure'* is clearly a reference to Paragon. The requested payments from these four ordinary investors were duly made on 18 th, 20 th and 21 st January.

196 The final Paragon payments of £100,000 from two of the ordinary investors were made on 6 th and 11 th April 2011, bringing the total invested through Paragon by the eight ordinary investors to £3.445m by means of twenty payments spread between 7 th June 2010 and 11 th April 2011.

197 We were also referred to various emails in April 2011 between Horizon Suisse and HTJL which show that there was complete confusion as to the nature of the investment in Paragon and how it was secured. There was confusion as to the interest rate and when it would be payable from and what the security was i.e. was it a charge over the CLNs? Horizon Suisse considered that because of the constant restructuring of how the security would be provided and to whom it would be allocated, there was currently no security held by Paragon.

198 In our judgment, there was ample evidence upon which the Board could reasonably conclude that the two paragraphs in the Public Statement fairly reflect the position. It is clear from the documents that Handmade was in a worse financial position than was originally envisaged by the appellant and his fellow investors in Handmade and that there was a desperate need for cash in order to keep it afloat. It is also clear that the appellant regularly asked for cash from Paragon investors as a matter of urgency in order to meet the pressing cash flow requirements of Handmade. Although he has asserted that he gave careful consideration to the suitability of the investment, we have not been referred to a single document which supports that assertion. Even where there are Call Notes of meetings with Paragon investors, there is no record of any discussion as to the suitability of Paragon as an investment. It is true that the minutes approving each investment do approve the investment but they are in a bland and fairly standard form which do not address any of the real issues such as the dire financial position of Handmade and whether it is prudent to invest in CLNs issued by such an entity merely in reliance upon the security over the film library. The events of October 2010 in particular are very hard to reconcile with a studied consideration of the best interests of the Paragon investors. The documents disclose a desperate search for cash by the appellant with the decision being to take it from wherever it can be obtained. Ultimately the Board had to decide whether it accepted what the appellant had to say. In our judgment it acted perfectly reasonably in rejecting his explanations and concluding that the position was as set out in paragraphs 4.6 and 4.8 of the Public Statement.

(ix) There was no proper or reasonable basis for the finding of fact that 'the appellant provided false assurances to colleagues as to his discussions with the beneficiaries and shareholders whose assets were to be invested (para 4.7)

199 Para 4.7 of the Public Statement is in the following terms:–

> *"Mr Francis provided false assurances to his colleagues about the existence and extent of his discussions with beneficiaries and shareholders of structures to be invested in Paragon.* Mr Francis knew that colleagues had relied upon his assurances. Mr Francis's conduct, and his failure to correct their misunderstandings, despite being afforded the opportunity to do so, lacked integrity."

200 Para 9.6 of the HTJL report was in the following terms:–

> *"9.6 Lack of Candour with colleagues*
>
> *9.6.1 There were a number of occasions when Mr Francis misled or lied to his colleagues in connection with investments made by customer structures into Paragon.* By way of example:–
>
> *9.6.1. 1 On Monday 29 November 2010, Mr McKimmon sent the following email to Mr Francis in connection with a proposed £200,000 investment into Paragon by Y Ltd*
>
> *[The HTJL report then sets out the email from Mr McKimmon and the appellant's response quoted at para 193 above].*
>
> *9.6.1.2 In connection with the above, and having spoken to Mr and Mrs C, we are of the view that Mr Francis did not have any conversation with Mr and Mrs C over the weekend of 27/28 November 2010.*
>
> *9.6.1.3 HTJL as trustee of the R Trust invested into Paragon in two tranches; £100,000 on 10 November 2010 and £150,000 on 20 January 2011.* Whilst there was a general understanding at HTJL that no investments of this nature would be made without first having spoken to the customer, we are of the view that, on these occasions, no such conversations ever took place. R, in submitting his complaint, is categoric; he would not have approved any investment into Paragon."

201 The evidence in support of the assertions in this section of the HTJL report would appear to be based upon the statements of complaint from Mr M (on behalf of Mrs Q), Mr and Mrs C and Mr R together with the appellant's responses in the second interview (see pages 90–91, 133–139, 144 and 158–160 of this interview).

202 The draft ICP contained the following at section 16:–

> *"Mr Francis's assertion he discussed the Paragon investment with the underlying customers.*
>
> *16.1 A number of Mr Francis's colleagues have sought to place reliance*

on Mr Francis having spoken with the underlying customer about the investment into Paragon. Indeed, on occasions Mr Francis was asked by his colleagues to confirm he had discussed Paragon with the underlying client before the requisite transfer was made. Mr Francis's position in respect of this issue is as follows:–

> *"….. Let me answer it in this way, in order that there's total clarity on this, I did discuss it with clients. Did I discuss it in enough detail with clients in terms of 'these are all of the details in terms of what we're doing, these are the risks, these are the issues, these are the conflicts of interests?' Absolutely not….. I can't for a moment say that I was clear with everybody in terms of all of the background to the situation, in line with the codes of practice…. I've got shortcomings there."*

16.2 The Investigating Officers conclude that Mr Francis did not discuss Paragon with each and every underlying customer in question, for the following reasons:–

16.2.1 'Call Notes', which is the name provided by HTJL to the document recording discussions / meetings with customers, make no reference to Paragon having been discussed with, at the very least, those customers associated with the following structures: C Ltd, the R Trust and Y Ltd.

16.2.2 Mr Francis's instructions to invest were not made within a timeframe which would have permitted him to discuss the investment with the underlying customers in question. Many of these customers are not resident in, or spend considerable time outside, the Island.

16.2.3 The Investigating Officers have spoken to and have recorded witness statements from a number of the underlying customers in question. Below is a summary of the witnesses' comments about the investment in Paragon:– [there then follow extracts from the statements of Mr and Mrs C, Mr M and Mr R].

16.2.4 The Investigating Officers consider the above statements, when considered in light of the points made at 16.2.1 and 16.2.2 above, are sufficient to conclude the investment into Paragon was never discussed with the above three complainants."

203 In his response of 3 rd October 2013, the appellant took issue with these assertions. He stated that in respect of Y Ltd and the R Trust, tax issues applied which explained why there were no Call Notes. He said he had emails evidencing that matters were discussed with Mrs Q in relation to C Ltd. He asserted in relation to 16.2.2:–

> *"I was operating under a discretionary mandate and had, at least, a monthly level of contact with clients.* The discussions were generally had before (although occasionally after) investments were made into Paragon but clients

were always made aware of their investments."

204 He then went on to comment on the three particular complainants and asserted that he had discussed all tactical changes with Mr C many times by phone and this included Paragon but he pointed out that Mr and Mrs C were often not interested in the fine detail and were happy to follow his judgment. He said that Paragon was explained to Mrs Q, just like every other investment and there was not, nor had ever been any reckless disregard for her needs. In relation to Mr R, he also disputed Mr R's recollection.

205 In their response of 1 st November 2013, the Executive indicated they were not going to make any change to the ICP. In particular they said that they did not understand the appellant's reference to there being no Call Notes in respect of Y Ltd and the R Trust due to tax issues as there were Call Notes in respect of those structures; it was simply that none of them mentioned Paragon. They also said they had reviewed all relevant emails in their possession and they had not found any indicating the appellant had informed Mrs Q of the investment in Paragon for C Ltd. The Executive concluded at 16.2.4:–

> *"As noted above, we have carefully considered [the appellant's] comments.* Our conclusion, however, remains as recorded in this paragraph. We note the three complainants are not known to each other and each of the three complainants provided statements completely independently of one another."

206 Paragraph 4.7 was discussed at the Stage 4 Board Meeting and we have read the transcript of the discussion. The appellant reaffirmed that he had discussed Paragon with Mrs Q and that he also spoke to Mr C on the telephone about the Paragon investment. As to Mr R, he asserted that Mr R appeared to be saying two different things. He was saying that he recalled having a discussion about investing into Handmade with the appellant in the presence of a Mr Evans and making it clear that he did not wish to invest, then saying that the investment in Paragon had not been discussed with him. On this aspect, we have read Mr R's statement and we do not see the conflict to which the appellant refers. Mr R says at paragraph 11 of his statement that the appellant spoke to him at a meeting on 8 th February 2010 of the fact that he was attempting to put a group together to acquire Handmade, a film company, and that he felt that various Horizon clients would provide finance. The appellant had said that he was thinking of suggesting that such an investment in Handmade should be made by the R Trust but Mr R said he would not be interested in investing because he considered it too risky and that it was not something he knew anything about. We do not see that as being inconsistent with the fact that Mr R said he first learned that £250,000 had been invested in Paragon in March 2012, when he was informed of this by the successor trustee to HTJL.

207 As to whether it was reasonably open to the Board to find that the appellant had not discussed the Paragon investment with these particular three clients, it was in our judgment reasonable for the Board to have so found. The three complainants have each apparently independently said that they were not consulted about the Paragon investment.

Conversely, the appellant has not been able to point to any document supporting his assertion that he did consult with them and, where there are Call Notes, they disclose no reference to Paragon. We do not follow the appellant's suggestion that for UK tax reasons there should apparently be no reference to the possibility of investing in Paragon in such Call Notes. Faced with the evidence of three complainants on the one part and the unsupported assertions of the appellant on the other, we consider it reasonable for the Board to have concluded that, contrary to what he said, the appellant had not consulted or informed these complainants about the proposed investment in Paragon. The Board was also entitled to have regard to the extraordinary speed with which the investments were made and the urgency expressed on the part of the appellant.

208 The paragraph in the Public Statement goes on to say that he *'provided* false *assurances to his colleagues'*. The inference from this is that it happened on more than one occasion. The only specific incident referred to in the HTJL report is the assurance contained in the email from the appellant dated 29 th November 2010 in connection with speaking to Mr C (set out at para 193 above). However, we were also referred to the email dated 3 rd December 2010 from the appellant to his colleagues at HTJL in which he said " *hence the reason why I have been happy to recommend and discuss the Paragon investment opportunity with clients."* This clearly infers that he has spoken to the clients about the Paragon investment and is informing his colleagues that he has done so. In summary, we consider that the Board acted reasonably in reaching the conclusions set out at para 4.7.

(xi) There was no proper or reasonable basis for the finding of fact that "the appellant wilfully signed the financial statements of the Media Fund knowing that they did not present an accurate picture" (para 4.9)

209 Para 4.9 of the Public Statement is in the following terms:–

> *"In 2011, in his capacity as director of the Media Fund's General Partner, Mr Francis signed the financial statements of the Media Fund, together with a letter of representation.* When signing these documents, Mr Francis was on notice of numerous and significant issues. Notwithstanding his concerns, the notes to the financial statements provided confirmation the General Partner was not aware of any circumstances which undermined the value of the investment. This was demonstrably not the case. Mr Francis's conduct lacked integrity."

Whereas all the other criticisms by the Commission are directed to the appellant's conduct in relation to the Paragon investors, this criticism relates primarily to the HNW investors as it was predominately they who had invested in the Media Fund.

210 The appellant asserts that this is wholly wrong and unfair. Para 109 of his second affidavit states:–

> *"Paragraph 4.9 of the proposed Public Statement is like its predecessors, mischievous, misleading and incorrect.* The Media Fund was not invested in

Handmade Limited shares or debts. The accounts were prepared by reputable professional accountants specialising in that field and they were correct and to the best of my knowledge they are correct. It is my understanding that no accounts have been produced post the 2009 accounts I signed. The [Commission] has not confirmed whether they have received or reviewed such further accounts during the course of their investigation. No shareholder in the Media Fund has ever complained about the accounts or anything else. Seven of the eight Media Fund investors were also investors in Paragon and / or Almorah so would have been aware of the situation in any case. The eighth investor was a client of JTC who was also aware of the situation."

211 Advocate Sinel's skeleton argument said this:–

"Paragraph 4.9 of the proposed Public Statement is mischievous like its fellows. The Media Fund had not invested in Handmade Limited by way of equity or debt acquisition. The accounts were professionally prepared and no complaint being (sic) heard in relation to same."

212 The accounts of the Media Fund for the year ended 31 st December, 2009, were prepared in 2011. On 23 rd May, 2011 the appellant and Mrs Roberts, on behalf of the General Partner, signed a letter of representation to the auditors of the Media Fund which letter included the following confirmations:–

"1. The accounts are free of material errors and emissions (sic)…..

4. We have reviewed each of the businesses the partnership has advanced loans for film finance, and it is our opinion, based on the latest information available to us, that each of the loans is fairly stated at full value without impairment and should be recoverable in full……

7. There have been no events since the balance sheet date which necessitate revision of the figures included in the accounts. Should further material events occur which may necessitate revision of the figures included in the accounts, we will advise you accordingly…."

213 The accounts of the Media Fund showed net assets of £11,288,735 of which loans for film finance comprised £11,064,069. The note to the account stated in relation to these loans that they were stated at cost and that "the General Partner is not aware of any circumstances which undermines the value of the investment and accordingly does not consider any impairment of the investments has arisen."

214 By this date, the appellant and others at HTJL were aware that monies from the Media Fund intended for film finance loans had in fact been syphoned off by Mr Meehan and used for general expenses of Handmade. Thus:–

(i) In an email of 9 th June, 2010, to Mr Meehan, the appellant said, *inter alia*, the following:–

> *"Further to our discussion on Sunday, we are carrying out a full investigation with access to the Handmade systems as to the use of funds provided by the Horizon Media Fund….*
>
> *Documentation and information made available to us indicates a VERY serious situation in line with what happened with Charlotte Doyle monies from Keith.* If you are able to add any explanation to this, we would welcome your comments by email.
>
> *I regret the need to write like this very much after our long history, however you will appreciate that both David and yourself were in fiduciary positions on the Media Fund advisory board and indeed the Plc board.* Thus you were fully aware of the reasons the funds were invested, and were also the people responsible for ensuring they were used for only the stated purpose the other end. As the legitimate costs incurred on the individual projects fall far short of the funds invested, in some cases, this leads to obvious questions and analysis…..
>
> *I would recommend that you take the opportunity at this juncture to consider this situation very carefully as the Fund [clearly, in context, the Media Fund] will want recompense….*
>
> *We have also now seen the documentation relating to the proposed disciplinary action against you and others.* This suggests that investors were DELIBERATELY mis-led last year when the funds were raised. …"

(ii) On 1 st July 2010 Mr Treharne (who together with Mrs McDonald had been appointed a director of Handmade) sent an email to Mrs McDonald and Mrs Roberts which included the following:–

> *"Horizon's link of course has been that Handmade were / are our JV partner in relation to the Horizon Media Fund.* Through this, clients have invested in 5 films — two I believe were as gap financing on production, with funds being used as pre-production finance on the other three. The finances of the company indicate that Handmade has been seriously loss making for some time — it is also clear from talking to third parties including lawyers, accountants etc. that they have been misled by the management of the company. In one such discussion, BDO have stated that they may be looking to restate the group's balance sheet from c£22m to 'what might be a negative asset position'. For what it's worth, I have attached a note I typed up after my first trip to the Handmade offices in London adds a little more info — since then, we have been able to get access to the Handmade system although only yesterday to all email folders etc…..

> *In our ongoing search of the Handmade system, we have uncovered the attached email.* To say I am staggered is an understatement but similarly, as a Director, I feel I must flag this and seek advice about action to take. In short this is an email from the then CEO to the Chairman stating that they had previously kept the business afloat by using Horizon and other monies — clearly not for the purpose of getting films made, but to fund overhead — but even worse, they state there were no revenues and the forecasts 'were and still are bulls***'."

(iii) On the 6 th September 2010 the appellant sent an email to colleagues at HTJL summarising the history of the Handmade matter which included the following:–

> *"At this juncture, the following serious issues exist:–*
>
> *1. The Horizon Media Fund, due to the actions of Meehan and Ravden, has several million pounds used for the general trading losses of Handmade which must be returned. Patrick was the architect of this scam."*

(iv) On 12 th October 2010, Mr McKimmon sent an email to others, including the appellant, on the subject of the loans made by the Media Fund and whether they were recoverable. Relevant parts read:–

> *"As you will be aware the Media Fund has invested / loaned monies to the various SPVs detailed below and are part of the Almorah Services Limited structure.* Following the acquisition of Handmade Plc by Almorah Services Limited there have been a number of comments made as regards the quality and security of the loans. In particular that some of the monies were not used for the agreed purpose and may have been applied to meet 'other' business expenses. Having written to the directors of the SPVs, they have been unable to provide any reassurances that these loans remain serviceable / secure.
>
> *As GP to the investment, we have a responsibility to investors to administer these assets and amongst other matters provide regular reporting and NAV calculations.* I am attaching the last investor letter however, this has not been issued, as before doing so we need to substantiate the NAV and be satisfied as to the soundness of the underlying assets. As mentioned the directors of the various SPVs have been unable to answer the questions raised and I would therefore appreciate your comments and in particular an answer to:–
>
> > *1. Whether these loans were used for the stated purpose, if not then how were the monies applied?*
> >
> > *2. Does each company still have the ability to service the interest on the loan and ultimately make repayment in accordance with the facility letter?*

3. Are any of the companies in breach of the loan covenants?"

He then went on to make detailed comments about loans to particular companies for particular film projects.

(v) In the second interview with the appellant, the following exchange took place at page 7:–

Q: "What I would like to understand from you is what, in your view, the fraud comprises?"

A: "OK. There are probably a number of different areas but if I just try and break it down…."

Q: "Please do."

A: "…. into a few simple ones. So, if you take the Media Funds to commence with, the, the investment board of the Media Fund was made up of two non-industry people, myself and Gary Bellot, and two industry people being Patrick Meehan and Guy Collins. What is now apparent is that of the 8.75 million invested through the Media Fund, approximately, and I can only go approximate because it hasn't gone, got forensic, but approximately 50% of that funding was spent for the general purposes of Handmade and not on the actual films in question. And Mr Meehan and Mr Collins were acting in a fiduciary capacity here in Jersey and they were also acting in a fiduciary capacity with the public company in London, and knowingly misused those funds."

Q: "OK, so that's area one."

A: "Yeah."

Q: "Before we move on from area one, could I ask you when this became apparentto you?"

A: "The, the misuse of the funds?"

Q: "Yes, please."

A: "I'm going to be guessing, Jamie, and on saying that, but it's likely, 'cause it waswhen the first set of audits were completed after we took over 'cause as part of that we got spreadsheets outlining where the money had been spent, so it's at some point during 2011. I mean, we, we had growing suspicions, but up until that point it hadn't been audited, so would appear to be that."

Q: "Ok, and who else at Horizon would have known this? I mean, clearly we can see in the board minutes, as we have discussed with you in your first interview, that continuing reference to allegations…."

A: "Yeah."

Q: "….but that, it would appear from what you are saying, David, that this certainly crystallised into something more than an allegation in 2011, is that correct?"

A: "Correct."

215 When the appellant was questioned in the second interview about having signed the 2009 accounts of the Media Fund despite his knowledge of these difficulties, the following exchanges took place from page 199 onwards.

Q: "And I, I have highlighted some, some matters in that letter [the letter of representation] which suggest that a review has been undertaken of the loans, that everything looks, on the face of it, David, to be hunky-dory, everything seems to be alright."

A: "Yeah."

Q: "Would you like to comment on that?"

A: "Well I can't, I'm sure if you've got it, I did sign it. I mean, as you know, there's, you will find very little in the office where I did sign, so I guess I've been set up for a fool here by Sarah or the rest of the guys. But yeah, I mean, in terms of the confirmations we've provided there, then, you know, I would have question marks over what the funds were used for within Handmade. I mean, at that time, I'm not sure whether we actually established that or not, but…."

Q: "I think you had."

A: "Yes. Okay. But whether they were, we were taking the view at the time whether any of them were recoverable or not, will probably be a different matter because I, I, I think there's two distinct points here at least in my small mind. First is the, the cash on three of films had undoubtedly been missed used (sic) some degree. We had two completed films and we still had the security over the, the three films that hadn't been made. So whether I, whether we, we certainly viewed the fact some of the money had been misused, but I still had the view and I've probably still got the view today, that there's the ability to recover some of the funds.

Q: "That, that, that as maybe that, that there is a possibility, however remote, that ultimately there may be an opportunity to recover some or all of the funds.

A: "Yeah".

Q: "But the fact remains that certainly by the time of September 2010, you had grave concerns that were documented on a number of occasion about how monies were used. Notwithstanding those concerns, there were occasions after, certainly in 2010 right through into 2011, where a number of invested (sic)

reports were issued. And not once were there, was there any reference to there being any concerns. And indeed in the documents that you have in front of you which accompanied the accounts of the Fund, up to 2009, once again, it appears that everything's all right."

A: "Well, in, in, in terms of the….. well, it's the signing off. I mean, I'm just trying to get clear in my own mind, is this confirming the position as at December 2009 or….?"

Q: "I think it's only fair to say that it, it, when, when accounts are signed for a period, they normally refer to material events afterwards and I can tell you now that there is no reference to any events after that date."

A: "Because this, this would have been presented to me to sign probably by Sarah, I would suspect, and I mean, I'm going back in time, I can't even recall signing it, but my expectation would have been that I would have asked well 'what are we actually confirming here? Are we confirming just for 2009?'. I'm sure it would have been presented to me as, well, this excuses me signing it, but well this is just to, formalities completely accounts for that period, and if there are any issues, it, we will pick it up on the subsequent audit."

Q: "David, on reflection, should [you] have signed it?"

A: "No, absolutely not, Jamie. I, I that I'm not trying to, I'm just, I'm shocked to, to read it. I'm disappointed to read it, and it's got my signature on it because I can look back go to my colleagues for not having done this properly and not having done that properly. But that's got my signature on it, so I, I suspect it is the occasion where something's been put under my nose, I've been convinced to sign it. I've gone along and done it when I shouldn't have."

Q: "But indeed I, I, I think that the, we've already mentioned that the, the valuations were, were significantly overstated. But here in, and this is only last year, this is May of last year, here is a situation that has been portrayed that there is nothing untoward whatsoever."

A: "Okay, I mean, that, that, that's obviously in relation to the, the fund. I mean, I, I, I suspect I would have taken the view that, as of 2009, were the loans in danger of not being recoverable, we have the security in place, we had two of the films made and we were still undertaking the research as to what value there was in those titles or not."

Q: "And notwithstanding that document that is only last year, there have been a number of investor reports that have gone out. Not one of those investor reports in 2010 or 2011 have made reference to any underlying concerns as to the recoverability of the loans, well, not until very recently anyway, with the more, most recent EGMs."

A: "Okay, well, I mean, they, they clearly should state that, and I haven't been the author of any of these reports as far as I'm aware, unless you tell me

differently. But, I can't recall the circumstances around which Sarah would have asked me to sign it. But I would agree with you that, looking at it now, it's not a fair or accurate reflection of the concerns that we had at the time."

216 In his response to the draft ICP the appellant sought to blame his colleagues. Thus his response was as follows:–

> *"8.4 I am not a qualified accountant and primarily drew comfort from signing the 2009 accounts on the basis that the accounts had been prepared by well-regarded external auditors who were familiar with the film industry and were also aware of the underlying issues in Handmade.* I also felt that Tim McKimmon and Sarah Roberts were close to the Media Fund and that they were to flag any significant issues at the time that they presented the accounts for signing. Both Tim and Sarah are experienced people and, whilst not accountants, they do hold some accounting qualifications. On this basis alone, I felt that there were sufficient checks and balances in place to ensure the accounts I signed were accurate at the time. In addition quarterly reports were prepared and sent out by Tim McKimmon and Sarah Roberts and therefore I felt that investors would be aware of any issues given this periodic (quarterly) reporting. Finally, I understood that issues would be picked up in the 2010 accounts and therefore I did not, at the time, feel that material misrepresentations were being made.
>
> *8.5 As a director on many companies I was routinely presented with documents and accounts to sign, often as the last signatory.* I could not personally check every agreement and set of accounts in detail otherwise I would have been unable to fulfil my role. The fact that such documents were presented by senior colleagues was sufficient to me to indicate that all checks and balances had been carried out and the allegation that this demonstrates a lack of integrity is unjust on its own basis. However, it is noteworthy that the investigating officers have formed an opinion of my integrity before they have had the benefit of my reply. This is further evidence of prejudice on the part of the Commission."

217 In the Executive's response to these comments of 1 st November 2013 it was pointed out that the appellant's comments did not address the fact that the appellant had made numerous, serious allegations about what had transpired with the monies raised by the Media Fund including fraud. The Executive revised paragraph 8.4 of the draft ICP to read:–

> *"Given the numerous and serious allegations made by HTJL in connection with the misappropriation of funds from the Media Fund, none of which appear to have been reviewed or investigated to anyone's satisfaction, we are of the opinion that material misrepresentations were made in the Letter of Representation and in the notes to the 2009 accounts.* During his second interview, in December 2012, Mr Francis stated he remained of a very strong

view that fraud had been committed and provided his reasons. Given his concerns, we would have expected Mr Francis, and indeed any other director with similar concerns, to have undertaken a most thorough review of the Media Fund accounts prior to signing them."

The Executive also pointed out that reliance on colleagues was not considered sufficient to discharge the obligations upon the appellant in signing the accounts, particularly given his real concerns over fraud.

218 As already mentioned, at the stage 4 interview, the Board took the appellant through the draft public statement paragraph by paragraph and asked for his comments on each paragraph. In relation to paragraph 4.9, the appellant essentially made the same points as he had made in his response to the ICP. We think his stance is fairly encapsulated in the following extract:–

> *"Q: And, the issue was when signing these documents Mr Francis was on notice of numerous and significant issues, and you were responding to that particular point*.
>
> *A: Yes, I just wanted to elaborate, if you like, or attempt to explain my actions through, through a couple of points, so as, as I was just starting.* Routinely within the company I would be asked to sign documents whenever I was in Jersey. I would tend to come back to quite a large bundle on my desk, and I would work through them, but I was always the last person to, to sign the document, generally. In relation to the Media Fund specifically, often in trust companies, accounts are done internally for, for clients. But here given the, specialist nature of the, the Media Fund, the accounts were actually prepared by a third party auditor called Martin Greene Ravden, MGR, who were a specialist media fund practice based in North London….Now, MGR produced these accounts which had been signed by my colleagues before they were put, put in front of me. I did have a discussion with Mr McKimmon and Mrs Roberts in relation to the Media Fund on several occasions <u>because clearly the value was not at par against what had been invested</u> and there were regular reports which were sent out to the Media Fund investors. Now, in relation to signing the accounts, the, the response I was given was "we're dealing with historic accounts, and all of the investors are aware of the issues in Handmade because they are all investors in there anyway", which was 80% correct, not 100% correct, "… and in addition, David, everyone has been sent a copy of the quarterly report, which is far more up to date and covers the issues that we are dealing with, and that …." you know "… the films haven't been made. So don't create problems, don't kick up a fuss, please sign the accounts because it's been dealt with elsewhere." That was the basis upon which I signed them. You will see similar exchanges on the companies where I would challenge the accounts that had been put in front of me, and I did sign them. When the facts presented in the cold light of day, then should I have been more forceful, should I have been stronger? Clearly yes…".[Emphasis added]

219 He went on to say that although it might be argued that he perhaps had more knowledge than the auditor so should have suggested they be more conservative in the valuation, the fact was that they were specialist auditors.

220 In his affidavits for this appeal, the appellant appears to be suggesting that there was no need to draw attention to post balance sheet date events in relation to Handmade because the Media Fund did not own shares in or debt instruments issued by Handmade. However, as the documents referred to above make clear, that was not the concern. The concern was that money intended by the Media Fund to be invested by way of loans to various companies in order to make films had been diverted to Handmade and there were real grounds for thinking that Handmade would not be in a position to repay those monies. In our judgment, any person signing the accounts of the Media Fund who was aware of the diversion of funds and the financial difficulties of Handmade would be duty bound to raise this as a material post balance sheet date event and ensure that it was properly considered and disclosed. The evidence is overwhelming that the appellant was aware of the diversion of funds and of the insolvency of Handmade. He is not entitled to rely on any default by his colleagues or the auditors in order to excuse himself given his state of knowledge and heavy involvement in the whole Handmade matter. It was his duty as a signatory of the accounts to satisfy himself that the accounts and the statements within them were accurate. Nor does the fact that, as asserted in paragraph 109 of the appellant's second affidavit, the investors in the Media Fund were already aware of the position relieve the appellant from his duty of fair and proper disclosure pursuant to the letter of representation and the notes to the accounts. In summary, we do not consider the appellant's criticism of paragraph 4.9 as being well founded.

Ground 1 — general

221 For the reasons we have given, it follows that, subject to the minor qualifications we have referred to, we consider that, contrary to the appellant's submission, there were proper and reasonable grounds for the 11 findings of fact which were challenged in Ground 1 of the Notice of Appeal.

222 However that leaves over the alternative submission which is that, even if such findings of fact were justified, they did not justify the key conclusion of the Board that the appellant had acted with ‘a most serious lack of integrity and had displayed incompetence of the most serious kind’. We shall return to that issue after we have considered Grounds 2 and 3.

Ground 2

223 Ground 2 of the Notice of Appeal is in the following terms (substituting ‘the Commission’ for ‘the Respondent’ which was the expression used in the Notice of Appeal):–

“The Commission failed to give adequate reasons for its findings and failed

properly or at all to take into account matters put forward on behalf of the appellant during the investigation.

This overall ground is elaborated in four paragraphs as follows:–

> *"6. The Commission's decision is unlawful (and therefore unreasonable) because it failed to give adequate reasons for its findings and/or of its reasons for rejecting the submissions advanced to it by the appellant during the investigation.*
>
> *7. There is a statutory obligation on the Commission under the Laws to give reasons for directions … The covering letter sent to the appellant with the Directions and the Public Statement stated "the reasons for giving the directions are contained in the public statement issued under the FSJL". The Commission was, accordingly, under a duty to provide reasons which were proper, intelligible and adequate. Its reasons needed to be such that a reader would understand why the matter was decided as it was and what conclusions the Commission reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved. Its reasons needed to be such that they did not give rise to a substantial doubt as to whether the Commission erred in law, for example by failing to take into account matters advanced by the appellant, or by misunderstanding some relevant issue or by failing to reach a rational decision on relevant grounds. Its reasons failed to meet this standard.*
>
> *8. The Public Statement is manifestly flawed and inadequate, and goes further than is required to fulfil the Commission's statutory duties. At no point does the Public Statement make <u>any</u> reference to any of the factual submissions (both written and oral) which were made by the appellant during the investigative process, nor does it give any reasons why or upon what basis these were rejected by the Commission (assuming that the Commission took them into account during the decision making process) or provide a proper explanation of why the Commission reached the conclusions that it did on important matters that were in issue between it and the appellant in relation to his professional character and abilities, and failed to explain properly what its conclusions were on essential issues.*
>
> *9. By way of example, the Public Statement does not:– (i) explain why the structural/corporate issues identified in para 4.2 (many of which were not the fault of the appellant's and which were for the most part vague and unparticularised) give rise to a conclusion that the appellant lacked competence and, in particular, that he lacked integrity; (ii) provide reasons why the Commission rejected the appellant's cogent explanation for the 55p/£1 price differential on the CLNs; (iii) provide reasons why the Commission rejected the appellant's evidence that he had discussed the Handmade investments with investors, or specified which investors here were being referred to; (iv) explain why it did not accept the appellant's*

explanation as to the circumstances in which he signed the Media Fund accounts including that investors had already been informed of the relevant financial issues."

224 There was no real dispute between the parties as to the law concerning the provision of reasons. In the first place, Article 23(5) of the FS Law provides that notice of a direction given under Article 25(1) " ***shall specify the reasons for the giving of the direction***." Secondly, Article 25A(3)(a) provides that notice of an intention to issue a public statement shall " ***give the reasons for issuing the statement"***. The common law also imposes a duty on the Commission to give reasons for a decision of the nature taken in this case.

225 What is more difficult is to determine the level of reasoning required. A helpful recent authoritative statement of the position in England and Wales in the context of appeals against decisions by planning inspectors is to be found in the unanimous decision of the House of Lords (delivered by Lord Brown) in the case of *South Bucks District Council -v- Porter* [2004] 1 WLR 1953 where at paragraph 36 Lord Brown said this:–

> ***"The reasons for a decision must be intelligible and they must be adequate.*** They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. … Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

226 We would refer also to the observation of Sir Thomas Bingham MR in the case of *Clarke Homes Limited -v- Secretary of State for the Environment* [1993] 66P&CR 263 at 271–272 (which was quoted with approval by Lord Brown in the *South Bucks* case) at paragraph 33:–

> ***"I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why.*** This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

227 We were also referred to the helpful summary of the position in De Smith, Judicial Review (7th Edition) at paras 7–085 to 7–113 which we have carefully considered. We think it necessary only to cite an extract from para 7–103 which is as follows:–

> ***"7–103 Some general guidance on the standard of reasons required may also be derived from a consideration of the purposes served by a duty to give reasons.*** Thus, reasons should be sufficiently detailed as to make quite clear to the parties — and especially the losing party — why the decision-maker decided as it did, and to avoid the impression that the decision was based upon extraneous considerations, rather than the matters raised at the hearing. … The reasons should refer to the main issues in the dispute, but need not necessarily deal with every material consideration. Brevity is an administrative virtue, and elliptical reasons may be perfectly comprehensible when considered against the background of the arguments at the hearing. …"

228 The adequacy of reasons provided by the Commission has been considered in two Jersey cases. In *Interface Management Limited -v- Jersey Financial Services Commission* [2003] JLR 524 the Commission rejected an application by Interface to be registered to carry on trust business. Amongst other matters, the Court considered the statutory duty under Article 10(2) of the FS Law to provide reasons for a decision to refuse registration. At para 64, the court said this:–

> ***"… the purpose of art.10(2) is to enable the applicant to know exactly why he is refused a licence and to decide whether he has grounds upon which to appeal.*** The statement must therefore be in satisfactory form and in sufficient detail to achieve this purpose. (See De Smith, Woolf and Jowell, Judicial Review of Administrative Action, para 9–049, at 465–466 (1995)). The applicant is entitled to know which matters relied upon by the Executive were accepted by the Board and which were not. To the extent that findings of fact were necessary to the Board's decision, those findings should be stated. So, for example, where a ground of decision is that the applicant has failed to comply with Codes of Practice, the statement under art.10(2) should set out which provisions of the Codes of Practice were breached and the exact respects in which they were breached. Where financial resources are said to be inadequate, sufficient detail must be given so that it can be understood in what respect this was so. Where the "span of control" is said to be insufficient, the statement should explain how this is so. Where, as here, the issue is whether the applicant should be granted registration conditional upon proposed changes to cure the various deficiencies, the statement must set out why the Board has decided that that would not be appropriate."

229 In that case, the Court found that the initial statement of reasons was inadequate but that this had been rectified by the subsequent disclosure of the minutes of the meeting of the Board at which the decision had been taken. The Court nevertheless found that the reasons did not go into as much detail as had been suggested in the passage at para 64

but concluded that no prejudice had been caused as, at the hearing of the appeal, all parties had had no difficulty in identifying exactly what was being referred to by the Board. The Court went on at para 71 to say that it would have been helpful for the Board to have given their reasons in rather more detail but concluded that nevertheless the Board's reasons emerged with sufficient clarity.

230 *Anchor Trust Company Limited -v- Jersey Financial Services Commission* [2005] JLR 428 was also concerned with an application for registration as a trust company which was refused. One of the points taken on appeal to the Royal Court was that the Commission had given inadequate reasons for its decision. We would refer to the following passages from the judgment:–

> ***"112. The level of reasoning required will vary substantially according to the nature of the decision under review and we accept that a decision to refuse registration of a trust company under the 1998 Law is likely to require a greater level of detail than a decision to refuse a sex shop. However, the essential test remains the same, namely, that the reasons should carry sufficient information to enable the applicant to understand why he has failed*** .
>
> ***113. Mr Scholefield submits that the letter of reasons explains how the Board has reached its decision but not why. He argues that it is silent as to why the Board preferred the views of the Executive and the inspector to those of Anchor. In our judgment, this submission requires too much. The Board is not sitting as a judge to give a reasoned judgment. We consider that the reasons set out in the Board's letter fulfil the requirements imposed by art.11(2) and those of fairness. Anyone reading that letter can understand exactly why Anchor has been refused registration. The Board states the findings of fact which it has made and explains the material upon which it has reached those findings (e.g. which passage in the Inspector's report). It then goes on to relate those findings of fact to the criteria for refusal specified in art.9(3) of the 1998 Law. We do not think that an administrative body such as the Commission is under a duty to descend into the level of detail suggested by Mr Scholefield and explain in relation to each finding of fact exactly why it has chosen the view of the Executive or the Inspector rather than that of Anchor. As we say, one must stand back, look at the letter and ask whether the recipient of the letter would know why the Board refused the application. In our judgment, the letter explains why very clearly."***

Although the decision of the Royal Court was appealed, the decision was upheld and there appears to have been no criticism of this passage in the Royal Court's judgment.

231 In this case, as mentioned at paragraph 92 above, the appellant applied to the Master for an order that the Commission be directed to provide further and better reasons for its

decision. The Master rejected a number of Advocate Sinel's submissions in this respect but acceded to them in respect of the matters listed in paragraph 121 of his judgment. As a result, Lord Eatwell, as the current Chairman of the Commission, swore a further affidavit dated 2 nd February, 2017. This gave more detailed reasoning in certain respects but in other respects said that, by reason of the passage of time, no improvement could be made on what was said in the Public Statement. Lord Eatwell emphasised at paragraphs 6 and 43 that the Board was conscious that it should not seek to alter or give any new or supplemental reasons for its decision.

232 In his submissions to this Court, Advocate Sinel emphasised the caution with which additions to original reasons should be allowed or taken into account and referred in particular to the principles stated in *R -v- Westminster City Council Ex p Ermakov* [1996] 2 All ER 302 at 315–316. We acknowledge the force of the principle there set out but where, as here, it is the appellant who has sought a further statement of reasons and that has been granted by the Court, it seems to us only right that the Court should be able to take into account the reasons as supplemented provided it is satisfied (as we are here) that the body concerned has not sought to invent new or different reasons to justify its decision. Accordingly, when considering the adequacy of the reasons in this case, we have considered both the Public Statement and the second affidavit of Lord Eatwell (albeit that in many respects the latter has not added to the former).

233 We propose to consider separately the reasons in support of the decision to issue a direction and those in support of the decision to issue the Public Statement. In relation to the former, Advocate Sinel submitted that the reasons of the Board as contained in the Public Statement and Lord Eatwell's second affidavit were not adequate for the purposes described in the authorities to which we referred above. To give a few examples, (in addition to the four listed in the Grounds of Appeal and described at para 223 above):–

(i) As to paragraphs 2.10 and 2.11, which HTJL customers were being referred to here? Was it the HNW investors, the Paragon investors or both?

(ii) As to paragraph 3.1, why was the appellant the ‘driving force’? Indeed what was a driving force?

(iii) As to paragraph 4.3, what were the documents referred to and what were the ‘numerous discrepancies and inconsistencies’?

(iv) As to paragraph 4.6 what was the evidence that justified the finding in the first sentence? The paragraph completely ignored the fact that the Paragon investment was secured on the film library.

234 We have to say that the reasons for the Board's decision to issue a direction are not put forward in a particularly satisfactory way. In our judgment, this is because of the Board's approach of putting the reasons for its decision in the Public Statement. The Master criticised this approach at paragraph 113 of his judgment and we entirely agree with his

comments; indeed we draw upon his language when expressing our own view.

235 The reason why it is an unsatisfactory approach is because a public statement and the statement of reasons for the issuing of a direction serve two different purposes. A public statement is ultimately to notify the public of what has occurred and to alert them not to deal with the person or entity who is the subject of the public statement. Inevitably, such statements need to be reasonably concise and they are likely only to contain an outline or summary of the matters which have led to the direction. A public statement which was expanded to give full and detailed reasons would rapidly become completely unwieldy.

236 The obligation to give reasons for a direction fulfils a different function. It is so that the person affected by the direction knows why the direction has been issued so he can decide whether he has grounds for appeal or not. The Master encouraged the Commission to reflect on its current practice. We would go further. We would firmly advise the Commission to change its practice. In future, it should keep completely separate on the one hand any public statement and, on the other, the reasons which it is required to provide for its decision to issue the direction which is the subject of the public statement. The public statement can continue to be fairly concise. The reasons should be such as to clearly and unarguably fulfil the requirements described earlier in this judgment if the Commission is to avoid future challenges on the basis of inadequacy of reasons.

237 In the circumstances, we can understand why the Master directed the Commission to give further details of its reasoning in certain respects. We have carefully read his judgment. However, he reached his decision at an interlocutory stage and without the full knowledge of the matter. We have heard full argument and it is our task to decide whether any inadequacy in the reasons is such that, as Advocate Sinel submits, the decision of the Board to issue a direction in the terms which it did should be overturned on that ground alone.

238 We accept that, as required by Article 23(5), the Commission gave some reasons in the public statement for its decision to issue the direction. The question is whether they were adequate to comply with requirements of the law. We have come to the conclusion that, although the reasoning of the Board could have been better and, in examination terms, could perhaps be categorised as a bare pass rather than any higher grade, the reasoning set out in the Public Statement augmented by Lord Eatwell's second affidavit is not inadequate to the extent that the decision to issue a direction should be quashed on that ground alone.

239 In particular, we refer to the observation of Lord Brown (quoted at para 225 above) that " ***decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced"*** and to the passage in De Smith that " ***elliptical reasons may be perfectly comprehensible when considered against the background of the arguments at the hearing"***. The appellant had undergone two lengthy interviews at which he was

questioned about the matters which were worrying the Commission and which found their way into the Public Statement; he had seen the HTJL report, the ICP and had made comments thereon and he had seen the draft Public Statement and had had the opportunity of making submissions to the Board at the Stage 4 meeting In our judgment, it must have been perfectly obvious to him what the criticisms of the Board and the Public Statement were directed towards and the facts and matters upon which it relied in concluding that he had acted with a most serious lack of integrity and a most serious level of incompetence. In particular, we have read carefully the transcript of the Stage 4 Board meeting. It is to be recalled that during that meeting, the appellant was taken to each paragraph of the Public Statement in turn and asked for his comments. In our judgment, that transcript does not suggest that he did not understand what the various paragraphs meant or what was being said against him.

240 We accept that some of the paragraphs of the Public Statement are not as clear as they might be. For example, paras 2.10 and 2.11 refer simply to *'HTJL customers'*. The uninformed reader would not be able to tell from this whether the paragraphs were referring to the HNW investors, the Paragon investors or both. However, for those familiar with the background — as the appellant was — it is clear which investors are being referred to. Almost all of the investors in the Media Fund were HNW investors. Accordingly the reference in para 2.10 can only be to them. Furthermore, the Commission has been clear throughout that it is the losses of the Paragon investors with which it is concerned. Accordingly it is clear to the informed reader that the reference in para 2.11 must be to the Paragon investors.

241 The essential criticism of both the appellant and Advocate Sinel is that the Board did not accept his explanations. We have dealt at length under Ground 1 with the evidence which the Board relied upon for its rejection of the appellant's submissions. As Advocate Sinel made his oral submissions, it became ever clearer that his key objection was that the Board had not given reasons for choosing to reject the appellant's evidence in certain key areas. For the reasons set out in the *Anchor* judgment in the passage referred to earlier, we do not consider that the Board's failure to explain this leads to their reasons being so inadequate as to result in their decision being quashed. As the Court of Appeal emphasised in the *Anchor* case in the passage quoted at para 82 above, the Board is not to be treated as if it were a court. Its reasons do not therefore have to descend into the level of detail which one might expect to find in a judgment.

242 However, we think it would have been preferable for the Board to have touched upon this, at any rate in respect of the key matters relied upon and pressed so strongly by the appellant. It is clear and was indeed clear at all stages in the process that the appellant objected strongly to the suggestion that he was the driving force; disputed the suggestion that the Paragon investors had lost much of their investment because (in his opinion) there was value in the CLNs; and considered that the Commission had misunderstood his position in relation to ownership of Almorah. Given the importance which the appellant clearly placed on these issues, it would have been preferable for the Board to have explained why they did not accept what he was saying on these points.

243 Nevertheless, one of the key purposes of the provision of reasons is to enable a person to know whether he has grounds for appeal. Furthermore, as Lord Brown said in his judgment, "' ***a reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision"***.

244 In our judgment, the appellant has mounted a forceful appeal and, just as he appeared to understand and to be able to comment on the individual paragraphs of the Public Statement at the Stage 4 Board meeting, so he has been able to argue his appeal in relation to the Board's decision to issue the direction. Accordingly, despite the criticism of some of the individual paragraphs of the reasons in the Public Statement which can validly be made, we do not find the reasons to be inadequate to the extent that the decision to issue the direction should be quashed on that ground alone. If one stands back and looks at the Public Statement, it is in our judgment clear what facts have been found by the Board and from which they conclude that there has been a most serious lack of integrity and most serious incompetence. Even if, contrary to our view, the reasons are regarded as being inadequate to the required extent, we do not consider that the appellant has been substantially prejudiced by any inadequacy in the reasons.

245 It follows that we do not accept the validity of Ground 2 in relation to the decision to issue the direction.

246 There is however the separate matter of reasons for issuing the Public Statement. As stated at para 69 above, Article 25A(3)(a) required the notice to the appellant of the intention to issue the Public Statement to give the reasons for issuing that statement. That notice was given by means of the letter dated 19 th June, 2014 from the Deputy Chairman notifying the appellant of the Board's decision to make the direction and to issue the Public Statement. The Master found at paragraph 11 of his judgment of 14 th December, 2016, that neither the letter itself nor the enclosed minutes of the meetings of the Board on 1 st May, 5 th May and 5 th June, nor the Public Statement itself contained any reasons for the decision to issue a public statement and that the Commission was therefore in breach of Article 25A.

247 At the request of the appellant, the Master directed the Board to provide reasons for its decision to issue the Public Statement. In his second affidavit, sworn in response to the Master's judgment, Lord Eatwell dealt with this aspect at paragraphs 10–15. He referred to the published guidance issued by the Commission in relation to public statements (described at para 71 above). He referred in particular to the passage at para 4.2 (which we have emphasised at para 71) which stated that the presumption would be that a public statement would usually be issued where there was a direction imposing a restriction on an individual being employed by or carrying on or holding any position in a regulated financial services business. He suggested that in paragraphs 1.1 and 1.2 of the Public Statement (quoted at para 63 above) the Commission did give the reasons for its decision to issue the Public Statement. He referred also to the passage in the letter of 19 th June which, having

referred to the fact that the Board had concluded the appellant acted with a most serious lack of integrity and a most serious level of incompetence, went on to say:–

> *"The Board, therefore, considered it necessary, reasonable and appropriate to give directions that place restrictions on your role within the finance industry in Jersey.* The Board further concluded that it was necessary, reasonable and appropriate to issue a public statement in respect of the directions."

248 Lord Eatwell went on to say at para 14 in his affidavit:–

> *"The Board considered that the presumption in favour of issuing a public statement in the appellant's case should apply.* It believed that in Mr Francis' case, publishing the public statement, as it had been drafted, would "support its objectives of reducing the risk to the public of financial loss and protecting and enhancing the reputation and integrity of Jersey in commercial and financial matters". As such, the reasons for the issuance of the public statement were contained within the public statement and the covering letter."

249 When discussing the adequacy of reasons, para 7–102 of De Smith contains the passage " ***it will not suffice to merely recite a general formula or restate a statutory-prescribed conclusion***", although the note goes on to say that this may be sufficient where the decision involves a clear application of an existing policy because " ***the reason is the policy"***.

250 We do not consider the manner in which the Board expressed its reasons for issuing the Public Statement as being very satisfactory. However, paragraph 1.2 of the Public Statement makes clear that the Commission's actions (which having regard to paragraph 1.1 include its decision to issue the Public Statement) are done so as to support its objectives of reducing the risk to the public of financial loss and protecting and enhancing the reputation and integrity of Jersey in commercial and financial matters. This can be combined with Lord Eatwell's assertion in his second affidavit that the Board considered that the presumption in favour of issuing a public statement should apply. Given the reasons for the presumption described in the guidance note (set out at para 71 above) and the fact that this was a case where the appellant was being prohibited from engaging in any form of financial services business, it was almost inevitable that a public statement should be issued in accordance with the presumption. As the note in De Smith referred to in the preceding paragraph makes clear, a general formula by way of reasons may be sufficient where the decision involves a clear application of an existing policy because " ***the reason is the policy"***.

251 We find that to be the position here. The guidance note sets out why the presumption applies and those are the reasons given in para 1.2 of the Public Statement. We have not found this entirely straightforward but on balance we conclude that it is not appropriate to quash the decision to issue the Public Statement on the grounds that the reasons for issuing it were inadequate. However, we strongly advise the Board to be more specific in

future. It should make clear that it has considered the question of issuing a public statement separately from the question of issuing a direction. Where the presumption is potentially applicable, the Board should make clear that it has considered whether there are any grounds for dis-applying the presumption and why (if it be the case) it has concluded that it should not be dis-applied (e.g. the public need to know that a named individual is prohibited from engaging in financial service business in order to protect the interests of potential clients etc. by alerting them to the prohibition.

Ground 3

252 Ground 3 contends that the Commission's decision is vitiated by procedural unfairness. In particular it is said that the decision is unlawful as being contrary to common law principles of procedural fairness and/or the guarantees contained in Article 6 European Convention on Human Rights (ECHR). There then follow seven specific allegations of procedural unfairness which we shall consider in turn. We do not think that the reference to Article 6 ECHR adds anything in this case and Advocate Sinel did not point to any particular respect in which it did. In our judgment, the principles of fairness established by the common law when coupled with the right of appeal to this Court are sufficient to comply with Article 6.

(i) Predetermination when seeking further information

253 Sub-paragraph (i) of Ground 3 is in the following terms:–

> *"The Commission (via its Board) had pre-determined the outcome of the case against the appellant at a time when it was actively seeking further submissions from him and was biased against him.* The appellant met the Commission's Board on 1 st May 2014 for the stage 4 meeting under the Commission's Decision Making Process. The appellant made submissions and answered questions. On 2 nd May 2014 the Commission wrote requesting supplemental submissions in relation to Almorah Services Limited. An initial deadline of 8 th May 2014 was given for the receipt of these submissions. This was subsequently extended to 20 th May 2014 at the appellant's request. In a letter dated 29 th May 2014 the Commission represented that 'other than the stage 3 'minded-to' decision, the Board has yet (sic) reached no decision, as yet, in relation to the final determination of the position concerning your client'. However, with its decision on 19 th June 2014, the Commission disclosed a minute of a meeting of the Board on 5 th May 2014 entitled 'final decision of the Board — meeting held on 5 th May 2014' which showed that on the date the Board concluded that the appellant had acted with a serious lack of integrity and had displayed serious incompetence so that the proposed direction should be given. A minute of a Board meeting held on 5 th June 2014 records that 'the Board agreed that, further to its findings and decision arrived at concerning [the appellant] …'. It follows therefore that (a) the statements made by the

Commission on 29 th May 2014 that no decision had been reached were untrue; (b) the matter had been determined against the appellant even before he had completed his submissions to the Commission, and the decision-maker was therefore biased against the appellant."

254 The events relevant to this sub-paragraph of Ground 3 are set out at paras 54–58 above. In short, the Board recorded on 1 st May, after the Stage 4 meeting, that it was satisfied at this stage that the appellant had failed to act with integrity and competence. However the Board held over the final decision until a later date in order to ensure consistency in approach, proportionality and overall fairness having regard to the fact that the Stage 4 meetings concerning other HTJL principal and key persons were still to be held.

255 There then followed correspondence in which the Board sought further information about the beneficial ownership of Almorah as described at para 57 above.

256 On 20 th May, Advocate Sinel wrote to Mr Averty, the Deputy Chairman, asking the Commission to clarify:–

> *"(i) whether or not it has met in relation to any of the Horizon individuals; and*
>
> *(ii) whether or not any decisions have yet been made but not published; and*
>
> *(iii) whether the Commission will be making all of its decisions at the same time relative to Horizon individuals; and*
>
> *(iv) if the answer to the above is in the negative, why is this and which individuals are to be treated differently, if so why; and*
>
> *(v) what the exact timetable is in relation to our client and the other Horizon individuals."*

257 It was in response to this letter that Mr Averty wrote on 29 th May with the passage quoted at para 57 and which for ease of reference we repeat:–

> *"In response to the Second Letter, I can confirm that, other than the Stage 3 'minded-to' decision, the Board has reached no decision, as yet, in relation to the final determination of the position concerning your client.* The Board is meeting again on 5 June 2014 to consider the matter further. I should then be in a position to write advising of the Board's decision later that month."

The letter then went on to say that the Board would have regard only to the documents etc. in relation to a particular individual and that he could not provide information about other individuals as this was confidential. The final paragraph went on to say:–

> *"As explained above, the Board is meeting on 5 June 2014 to reach its final determination in respect of the position of your client.* It is a matter for your client to decide whether to supply written submissions beyond the recent correspondence and existing documentation concerning Almorah before the Board prior to that meeting. The documentation before the Board includes previous submissions filed by [the appellant]. All documentation will be given careful consideration by the Board prior to arriving at its final decision."

258 On 5 th June, the Board considered the matter further in light of the material received from Sinels on the issue of the ownership of Almorah and amended the Public Statement to change references to the appellant being the beneficial owner of the company to references that he claimed to be the beneficial owner or was held out as being the beneficial owner.

259 Advocate Sinel is extremely critical of the Deputy Chairman's letter of 29 th May. He says it was untrue because at its meeting on 5 th May, as shown by the minutes quoted at para 56 above, the Board had reached *"a decision in relation to the final determination"* of the appellant's position because it had decided at that meeting that he had acted with a most serious lack of integrity and his displayed level of incompetence was of a most serious kind such that the proposed direction should be issued prohibiting the appellant from performing any function etc. in the financial services business. He goes on to submit that, as a result of having made that decision on 5 th May, the Board was biased because it had made its decision before receipt of the further submissions on the ownership of Almorah which the Board had requested.

260 Advocate Lacey submitted that the Deputy Chairman's letter was not untrue or misleading. She referred us to a letter dated 11 th July, 2014, from Advocate Sinel to the Deputy Chairman in which he raised the alleged inconsistency between the letter of 29 th May and the minutes of the Board meetings on 1 st May, 5 th May and 5 th June and also to the Deputy Chairman's response of 16 th July which included the following:–

> *"The final determination of the Board's decision in respect of your client was arrived at on 5 June 2014.* Given all the circumstances of the case, in order to arrive at the final determination the Stage Four process caused the Board to meet on three separate occasions as follows:–
>
> > *(i) to make factual findings in respect of your client (the "1 May 2014 Meeting"); then*
> >
> > *(ii) to proceed to consider the appropriate level of sanction according to the previous findings and what the Board considered was necessary, reasonable and proportionate in all the circumstances of the case (the "5 May 2014 Meeting"); and then*
> >
> > *(iii) finally, on 5 June 2014, to agree and approve the records of the 1 May and 5 May Meetings and, by reference to those approved records, to*

review, finalise and agree the content of the Public Statement to be issued… and thereby the directions under the Regulatory Laws (the "Final Determination").

In the circumstances, my letter of 29 May correctly stated "the Board has reached no decision, as yet, in relation to the final determination of the position of your client. The Board is meeting again on 5 June 2014 to consider the matter further. I should then be in a position to write advising of the Board's decision later that month." In the circumstances, it was only after 5 June 2014 that I was in a position to write on behalf of the Board concerning the outcome of Stage Four of the DMP and the Final Determination.

I do confirm that the only additional information concerning [the appellant] placed before the Board after 1 May 2014 until the Final Determination on 5 June 2014 comprised the correspondence between us in clarifying the ownership of Almorah Services Limited."

261 We think that the letter of 29 th May was unfortunately worded and was capable of giving a misleading impression. We accept that, in a strict sense, a final determination had not yet been made because the terms of the Public Statement were still capable of being varied in the light of further information concerning ownership of Almorah. However, the fact remains that at its meeting on 5 th May, the Board had determined the level of culpability (most serious lack of integrity and incompetence of the most serious kind), had determined that the proposed direction should be issued prohibiting the appellant from holding any position in a financial services business, and had agreed the terms of the proposed Public Statement other than in relation to any further changes concerning Almorah. If the letter had simply contained the passage quoted in the Deputy Chairman's letter of 16 th July, it might have been more accurate. However, the letter of 29 th May had included the words " *other than the Stage 3 minded-to decision, the Board has reached no decision…etc."* We think that was rather misleading. It gives the impression that nothing had been determined since the Stage 3 minded-to decision, whereas in fact the Board had made the decisions recorded in the 5 th May meeting, albeit that no absolutely final determination had been made pending clarification as to whether there should be any amendment to the wording of the Public Statement concerning Almorah.

262 The public, the financial services industry and those under investigation are entitled to expect the highest standards of accuracy and fairness from the Commission. We do not think that the letter of 29 th May lived up to these standards. However, the issue for us is not whether the letter gave a misleading impression but whether this in any way invalidates or raises questions in relation to the fairness of the procedure. In this respect, we accept Advocate Lacey's submission that it does not. The only outstanding matter as at 25 th May was the question of the ownership of Almorah. The Board remained open minded on that and indeed, following receipt of the information, it amended the wording in the draft Public Statement about the ownership of Almorah. All the other findings of fact remained unaltered and it cannot realistically be suggested that the further information concerning Almorah

might have altered the outcome of the Board's conclusion as to the appellant's level of integrity or competence. Accordingly, notwithstanding the unsatisfactory wording of the letter of 29 th May and the potentially misleading impression which it gave, we do not find that this leads to a finding of bias or closed mindedness on the part of the Board.

(ii) The Commission failed to give the appellant adequate time and facilities for the preparation of his response to the allegations made against him. In particular, the appellant was given insufficient time to respond to the ICP and insufficient time to prepare for the hearing before the Board on 1st May 2014.

263 The second sentence of sub-paragraph (ii) of Ground 3 refers to two specific occasions but the first sentence is in general terms. We propose therefore to consider the complaint in relation to the four key occasions when the appellant was invited to respond to the allegations against him, namely the first and second interviews, the draft HTJL report, the draft ICP and the Stage Four Board meeting.

(a) The first and second interviews

264 As to the first interview (Corporate Governance and Compliance) the appellant was issued with a notice on 22 nd May, 2012 requiring his attendance for interview on 19 th June, 2012. On 23 rd May he was supplied with the bundle of documents which would be referred to in the interview. He duly attended for two days on 19 th/20 th June and was sent a transcript of the interview on 16 th August.

265 As to the second interview (Conduct of Business), he was notified on 31 st October 2012 of the requirement to attend for interview on 21 st/22 nd November and was supplied with the relevant interview bundle of documents on 5 th November. The interviews in fact did not take place until 4 th/5 th December and he was sent a transcript of that interview on 1 st March 2013.

266 Advocate Sinel did not elaborate this ground of appeal in relation to either the first or second interviews during his submissions. The appellant, in his second affidavit, having made the general allegation in paragraph 10 that he had been greatly hindered in responding to the Commission as a result of, amongst other factors, " *an absence of resource and time in which to respond"*, made the following specific references to the interviews:–

> *"48. I was interviewed by the Commission on 4 and 5 December 2012. I have already pointed out the disadvantages under which I laboured over my erstwhile colleagues. In advance of the interviews I was given a pack of documentation which had been selected by the Commission for the purposes of its agenda. It runs only to 3 files. I had almost no opportunity to gather documentation and*

information with which to defend myself and many areas were of a complex and technical nature which was misrepresented by the Commission and where I needed time and resource in order to put the facts correctly. I assumed I was there to assist the Commission, instead I was being set up for a palpably false public statement.

[62] As can be seen I had clearly expressed my desire to be briefed by a lawyer ahead of the interviews with the Commission in order to ensure I received a fair hearing. The Commission however ploughed on with interviewing me and others.

[111] My questioning during interview was designed by at least Mr Biddle to put me in a corner and I was isolated. I had inadequate access to documentation, inadequate notice of the topics for interview and presented with selected documentation by the Commission, documentation which was of a complex and technical nature drafted by legal professionals and advisors. I was not afforded additional time to review the documentation. I was not comfortable answering questions that had been sprung on me without notice. Due to the complex and technical nature of the documentation the Commission should have afforded me the opportunity and/or right to have an appropriate lawyer present at the time of the interview. I would have needed to refer to technical specialists to be able to answer the questions being put to me correctly. … I refer to pages 712–716 and of my desire for legal representation at the time of being interviewed by the Commission. I would also like to add here that Mr Biddle had previously been a litigation lawyer and thus I feel that I was already put at a disadvantage during the interview."

267 Both covering letters from the Executive giving notice of the requirement to attend for interview specified the appellant's right to have legal representation during the course of the interview and invited him to confirm his lawyer's identity in advance of the interview. In relation to the second interview, although the appellant indicated in an email of 12 th November, 2012, that he did not intend to bring anyone with him to the meeting, he then sent an email to Mr Biddle on 27 th November saying that he had decided "to appoint a London based lawyer to act for me going forward". He went on to say that he was happy to remain committed to the meetings in December although he would be unable to brief his lawyer in sufficient time. The Court has not been referred to any evidence to suggest that the appellant requested the second interview to be postponed until he was able to brief a lawyer and indeed the appellant has not made any such assertion. Furthermore, the transcripts of the two interviews show that on each occasion, at the beginning of the interview, the appellant indicated that he was happy to continue without legal representation and was informed that his right to legal advice was ongoing and that therefore should he need legal advice at any time, the interview would be halted to allow him access to his legal adviser. Furthermore, at the end of the first interview the appellant, when asked whether he had any comment as to the manner in which the interview had been conducted, replied that it was perfectly fair and fine. Similarly, at the conclusion of the second interview he expressed his appreciation of the courtesy the questioners had shown

and of the fairness in the questioning. We therefore do not accept the validity of the criticisms which the appellant now makes in the extracts quoted in the preceding paragraph.

268 In our judgment, there are no grounds for criticism of inadequate time or facilities in relation to the interviews. The appellant received all the documents on which the Executive was going to rely at the same time as he was summoned for interview. In relation to the first interview, he had approximately 4 weeks' notice; in relation to the second interview he had approximately 5 weeks. We regard this as sufficient and we can see no unfairness in the manner in which these interviews were conducted. Indeed we were not referred to any point in the interview where the appellant complained about lack of time. It is true that he apparently did not have access at that stage to HTJL's records as he was no longer a director but that alone cannot render these interview processes unfair. It must be a not uncommon position that a former officer of a company no longer has access to the company's own records when being interviewed.

(b) HTJL report

269 The timeline in respect of the finalisation of this report is described at paragraphs 34–38 above. In short, the draft HTJL report was sent out to the directors and other individuals for comment on 14 th May, 2013. Comments were requested by no later than 6 th June. Although all the other individuals apparently complied with the timetable, the appellant did not do so. The appellant and Sinels both wrote (on 4 th and 6 th June respectively) saying the timescale was unreasonably short and that the appellant would provide his comments as soon as Sinels had had the chance to properly review the documentation. The deadline was extended to 7 th June but Sinels pointed out on 8 th June that Advocate Sinel was out of the office until 17 th June and the matter would be put in front of him on his return. However, no response was received and on 25 th June, the Commission emailed Sinels to say that should the appellant fail to respond with comments by close of business on 28 th June, the Executive would proceed on the basis that he had no such comments. No comments were received and accordingly the Executive finalised the report on 1 st July.

270 We think that the original deadline of 6 th June imposed by the Executive was unduly limited. Although the annexes to the draft report (apart from the transcript of the appellant's interviews) had apparently been in the interview bundles and were not therefore new documents, the matter was complex. Given the potentially serious consequences for directors of a company being investigated in this manner, we think the Executive must hold a fair balance between the need to press on with reasonable despatch and the need to give individuals a fair opportunity to consider matters which they may not have thought about for a while. However, the report was in fact not finalised by the Executive until 1 st July which was approximately six weeks after the report was sent out. At that stage the appellant and Sinels had not reverted with any firm timetable and we do not think that it was unfair or unreasonable for the Executive then to finalise the report. In our judgment, it was the fault of

the appellant that the Executive was left in the dark at this stage as to when the appellant might respond.

271 We have noted from the papers that the draft version of the HTJL report sent out for comment did not include Section 3, namely the Executive Summary. That section was still to be written. We consider that this was wrong and should not be repeated on future occasions. Consultees should have been made aware of what the Executive proposed to say in this section so as to be able to comment. However, we do not think that it assists the appellant in this case for two reasons. First, he chose not to comment prior to finalisation of the report and therefore was not prejudiced. He subsequently received the final report with Section 3 included and had the opportunity of commenting on that if he so wished as part of his DMP. Secondly, the Executive Summary does not appear to us to include any new material but merely summarises the rest of the report, which had been circulated for comment.

(c) Draft ICP

272 The timeline in relation to the draft ICP is described at paragraphs 39–45 above. In short, the draft ICP was sent on 9 th July with a request that comments be provided by 31 st July. Again, we think that this was too short. However, this deadline was not maintained. There followed various exchanges with Sinels when requests were made by Sinels for disclosure of transcripts of the interviews with all the other named individuals but this was rejected by the Executive and subsequently by Advocate Lacey on their behalf. In due course an unsigned version of the appellant's response was sent on 16 th September and the signed response dated 3 rd October was provided to the Executive under cover of a letter from Sinels dated 4 th October.

273 This complaint was not elaborated by Advocate Sinel in his written or oral submissions. In our judgment, the period from 9 th July to the beginning of October was ample time to respond to the draft ICP and we see no ground for criticism of the Commission in this respect.

(d) The Stage 4 Board meeting

274 As indicated at paras 51–53 above, the Commission wrote to Sinels on 12 th February 2014 to say that the Stage 4 meeting of the Board would be held on 2 nd April. The appellant was requested to provide any written representations to the Board by 7 th March and this he did. On 25 th February the Commission supplied Sinels with a CD containing all the documents which were to be before the Board. The meeting was in fact put off at the request of Advocate Sinel who was unable to attend on the original date and the meeting took place on 1 st May 2014. No reference was made by the appellant or his advocate during that meeting about any concerns over any inadequacy in time in which to prepare for

the Stage 4 meeting. This complaint in the Notice of Appeal was not elaborated in the written or oral submissions before the Court.

275 In our judgment there is no substance in this complaint. The appellant had over 2 months to prepare for this meeting and there was no unfairness in the timetable or procedure adopted.

(iii) The Commission prevented the appellant from accessing relevant documentation which he had requested since at least September 2011.

(iv) The Commission took into account material which was not disclosed to the appellant.

276 We propose to consider these two sub-paragraphs together as they seem to us to be closely linked.

277 As set out at para 88 above, Advocate Sinel has consistently submitted that he needs to have access to all material which was before the Commission including, for example, all the HTJL documents supplied to the Executive following issue of production notices. He has also sought the transcripts of what the other directors and officers of HTJL said in their interviews and in response to draft documents such as the draft HTJL report, their draft individual ICP's etc. In his judgment of 23 rd October 2014, the Master refused to order the disclosure requested other than in respect of certain documents as set out at paragraph 36 of his judgment. Specifically, he refused to order disclosure of the interview transcripts and his decision was upheld by the Royal Court with leave to appeal to the Court of Appeal being refused.

278 It was not entirely clear in relation to these two sub-paragraphs of Ground 3 what 'relevant documentation' and 'material' was being referred to. However, as Advocate Sinel developed his submissions, it became clear that he was focussing on the interview transcripts with the other directors and officers; and we accept that since 11 th July, 2013 he has repeatedly asked for such transcripts during the course of the DMP in respect of the appellant.

279 In support of his submission, he pointed out that the Board had seen these transcripts because they formed part of the appendices to the HTJL report, whereas each individual person had only received the transcripts of his or her own interview. Furthermore, it was clear that the Board had relied upon these transcripts when considering the case against the appellant. Thus the Deputy Chairman, Mr Averty, put it to the appellant during the Stage 4 Boarding meeting "the evidence from many of your colleagues that we've interviewed is that you, you were the dominant force and I find it very difficult to reconcile that with your view that actually all you did was get the business in."

280 Advocate Sinel referred us to what the Royal Court said at para 11 in *Interface* (quoted at para 79 above) and also to the decision of the Privy Council in *Kanda -v- Government of the Federation of Malaya* [1962] AC 322. In that case an Inspector had been dismissed for misconduct and the adjudicating officer who sat to enquire into the charge against the inspector had read the report of a board of inquiry which contained 'a most damming indictment against Inspector Kanda as "an unscrupulous scoundrel, who had suborned witnesses, both police and civilian, to commit ***perjury"***. The board report had unanimously concluded that the Inspector was *'the villain of the peace'*. Although the adjudicating officer had read this report, Inspector Kanda had not seen it or had an opportunity of dealing with it. The Privy Council considered that this amounted to a breach of the rules of natural justice which required that a person be given a reasonable opportunity of being heard. Delivering the opinion of the Privy Council, Lord Denning said this at 337:–

> ***"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him.*** He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them. …" .

Advocate Sinel submitted that application of that principle to the facts of this case meant that it was unfair if the appellant did not see all the interview transcripts so as to know what was being said against him.

281 However, we do not consider that the rules of fairness require that all the evidence before the decision maker has to be disclosed in every case. Much depends upon the nature of the decision. We are concerned here with a decision of the regulator of financial service business. Given the requirement for confidentiality (referred to in more detail below) it would render much of the work of the Commission impracticable if all information provided to it had invariably to be disclosed to persons subject to regulatory action. Furthermore, we do not think that the law requires it. The observations of the Privy Council were made in the context of the facts of that particular case. However, the general requirement of fairness is more flexible and fact specific. A statement of general application is to be found in the observation of Lord Mustill in the decision of the House of Lords in *R -v- Secretary of State for the Home Department, Ex P Doody* where at 560, he listed the usual requirements of fairness in relation to administrative decisions and included the following two principles:–

> ***"5. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both*** .
>
> ***[6] Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."*** [Emphasis added] .

282 The only matter to which we have been referred where it is suggested that what the others said in interview may have been relevant to the findings against the appellant is the suggestion that he was the dominant influence at HTJL, as alluded to by the Deputy Chairman in the Stage 4 interview. In our judgment, the gist of this allegation was put fairly and squarely to the appellant and he was given ample opportunity to contradict it. Thus it was raised with him in the first and second interviews and he gave his response at some length. The HTJL report raised fairly and squarely the issue of the appellant being the dominant influence and the appellant had the opportunity of rebutting it. The allegation that he was the driving force was also put fairly and squarely in the draft ICP and was responded to fully by the appellant in his response of 3 rd October 2013, explaining why he strongly disagreed with that statement. In its response of 1 st November, the Executive explained why they did not accept the appellant's submissions in this regard (see for example section 4.1). The appellant made further submissions in this regard in his second response of 29 th November 2013. Finally, the matter was explored at the Stage 4 Board meeting and, as already indicated, the Deputy Chairman put the point specifically to the appellant.

283 In our judgment, the gist of the allegation that the appellant was a dominant influence (which no doubt may have originated from the comments of others in their interviews) was put fairly and squarely to the appellant and he had a full opportunity to deal with the point. We do not consider that fairness required that the underlying interviews themselves be disclosed to the appellant, particularly given the requirements for confidentiality.

284 Advocate Lacey, on behalf of the Commission, submitted that there was a strong public interest in preserving the confidentiality of information supplied to the Commission by individuals, whether voluntarily or under compulsion (as in this case). She referred to the English case of *Real Estate Opportunities Limited -v- Aberdeen Asset Managers Jersey Limited* [2007] Bus LR 971 where the Court of Appeal so held in relation to the equivalent statutory provision in England to Article 37 of the FS Law. Thus Arden LJ said the following at paras 30–33:–

> ***"30. … The obvious purpose of section 348 is to protect confidential information that has found its way into the FSA's hands. The information may have been volunteered. Alternatively it may have been given to the FSA in pursuance of a request made by the FSA in exercise of its statutory functions. Once the information has reached the FSA's hands, the FSA is restricted from disclosing it to third parties and must use one of the gateways available to it in section 349 or regulations made thereunder. The prohibition on disclosure extends to persons who obtain the information directly or indirectly from the FSA. If they wish to disclose it, they must have the consents set out in section 348(1) or bring themselves within one of the gateways available to them under section 349, or regulations made thereunder*** .

[31] What is the apparent object of preserving confidentiality in information provided to the FSA? The preservation of confidentiality appears to serve a number of purposes. First, it ensures respect for the private life of the person who was the subject of information: if none of the gateways provided by section 349 is available, neither the FSA nor a secondary recipient can disclose the information without obtaining the consent of the subject of the information: section 348(1). Disclosure in those circumstances without such consent might involve a violation of article 8 (respect for private and family life) of the Convention for the Protection of Human Rights and Fundamental Freedoms. Secondly, restrictions on the disclosure of confidential information in the financial markets are likely to assist in the process of regulation because of the encouragement that it is likely to give to people in the market to disclose timeously information which may be of importance to the regulator for the purpose of exercising its regulatory functions. As the judge accepted, the position of the FSA may in this respect be compared to the position of the Bank of England under the Banking Act 1987, of which Lord Woolf MR, giving the judgment of the Court of Appeal in *Barings Plc -v- Coopers & Lybrand* [2000] 1 WLR 2353, ***para 16, said:***

> ***"The maintenance of confidentiality under Part V of the 1987 Act for information provided to the Bank is plainly of great importance.*** Protecting those who provide information to the Bank encourages voluntary disclosure from institutions, third parties and whistle blowers, any of whom might otherwise be unwilling to divulge material. The Bank is of the view that, absent such protection, it would be deprived of the raw material it requires for effective supervision."

[32] In *In re Galileo Group Ltd* [1999] Ch 100, ***110, Lightman J made the point that confidentiality enhances candour in favour of other regulators:***

> ***"The maintenance of confidentiality as provided in section 82 is of vital importance to the discharge by the bank of its supervisory responsibilities under the 1987 Act.*** Confidentiality is vitally important to encourage the maximum free flow of information from supervised institutions and third parties whether such disclosure is obligatory or voluntary."

[33] Accordingly, there are strong reasons for restricting disclosure of information provided to a regulator. The case can be taken of a whistleblower. A whistleblower is more likely to be willing to disclose information to the regulator if he is assured that the fact that he provided it will remain confidential."

285 We respectfully agree with the above views and we accept that there is a strong public

interest in preserving the confidentiality of information supplied to the Commission and the preservation of such confidentiality is a matter for the Commission properly to take into account when deciding whether it should disclose information which has been provided to it. We accept that it would have been open to the Commission to have supplied the whole of the transcripts of the interviews to the appellant because such disclosure would have been for the purposes of assisting the Commission to discharge its functions. However, in our judgment, the Commission is entitled to hold a balance between the public interest in encouraging full disclosure by and the cooperation of those being interviewed (by respecting the confidentiality of what they say) and the need to act fairly towards another person who is subject to regulatory action where reliance may be placed in part on what is said in interview by others. In our judgment, the Commission acted in a proportionate and reasonable manner on this occasion by ensuring that the gist of what was said against the appellant by the others was put to him without disclosing the full transcript of the interviews (which would no doubt include much other material which was not relevant to the appellant).

286 In summary, we do not consider that the Commission's refusal to supply the interview transcripts or other documents sought by the appellant or the fact that the interview transcripts were available to the Board has led to unfairness. It is to be recalled that the appellant was supplied with every document which was supplied to the Board in connection with its consideration of his case other than the interview transcripts.

(v) The Commission failed to give the appellant any meaningful opportunity to challenge or test the evidence against him.

287 We have to say that this sub-paragraph was not specifically developed in argument. In our judgment, it is unsustainable. The appellant was given the following opportunities of challenging what was being said against him:–

(i) He underwent two lengthy interviews at which the concerns of the Executive were put to him.

(ii) He was invited to comment on the draft HTJL report.

(iii) He was given the opportunity of commenting on the draft ICP and did so both on 3 rd October and again on 29 th November 2013.

(iv) Further submissions were made on his behalf on 12 th December for placing before the Review Committee.

(v) There was a further submission from Sinels dated 21 st January for placing before the Board at its Stage 3 meeting.

(vi) Following the Stage 3 meeting, the appellant was provided with the draft Public Statement and invited to comment on it, which he did. This was placed before the

Board for its Stage 4 meeting.

(vii) At the Stage 4 meeting on 1 st May 2014, the appellant and his advocate attended and were given the opportunity of making submissions and responding paragraph by paragraph to the draft Public Statement.

(viii) Following the Stage 4 meeting, the appellant was given the opportunity of making further submissions in relation to the ownership of Almorah and these submissions resulted in amendment to the terms of the Public Statement.

288 In those circumstances, we do not see how it can realistically be argued that the appellant did not have a meaningful opportunity to challenge the case against him. If this sub-paragraph is meant to suggest that the appellant should have had the opportunity to test the evidence against him by being able to question relevant witnesses, we can only say that this was not suggested during the hearing and is not required in the case of a decision by a body such as the Commission. As the Court of Appeal made clear in *Anchor*, the Board is not to be treated as a court with all the protections which the judicial process brings into play; see the quotation from *Anchor* at para 82 above.

(vi) The Commission was unduly influenced by the submissions of the Executive which were often pejorative and inaccurate and failed to take any or adequate notice of contrary submissions and evidence supplied by the appellant and his co-workers in respect of the HTJL report and their ICPs.

289 This seems essentially to be a submission that the Board simply took what the Executive said as gospel and did not exercise its own judgment and give a fair consideration to the submissions made by or on behalf of the appellant. We do not accept that this is so. On the contrary, subject only to the point discussed below concerning the meeting of 1 st May 2014, we think the evidence shows clearly that the Board took its duties seriously and exercised its own judgment. Simply by way of example, we would point to the following:–

(i) The ICP prepared by the Executive concluded at para 11.4 that Paragon was a sham. This was not a finding which was made by the Board and nothing in the Public Statement suggests that Paragon was a sham.

(ii) At the Stage 3 meeting of the Board on 23 rd January 2014, the Executive presented a draft Public Statement. The Board was clearly not happy with the draft and required numerous amendments to be made. A further draft incorporating these amendments was presented at the adjourned Stage 3 meeting of the Board on 6 th February 2014 but even then the Board was still not happy and required further amendments. We have seen the difference between the draft Public Statement presented by the Executive and the draft sent out with the ‘minded-to’ letter. It is clear from this that the Board was not simply accepting what was being asserted by the Executive.

(iii) We have read the transcript of the Stage 4 Board meeting at which the appellant made a statement and was then questioned by Commissioners and taken through the draft Public Statement paragraph by paragraph. Our reading of that transcript is that it discloses Commissioners who were in good faith seeking to ascertain whether what was in the draft Public Statement did or did not stand up to analysis and were genuinely concerned to hear the appellant's comments. That is supported by the fact that they further amended the wording in relation to Almorah following the submissions from Sinels after the Stage 4 meeting.

290 Our one concern relates to what occurred immediately after the appellant and the Executive left the Stage 4 meeting. Not unnaturally, Advocate Sinel placed great weight upon the fact that, according to the minutes, during the space of a minute, the Board decided to maintain its 'minded-to' conclusion that the appellant had failed to act with integrity and competence. Advocate Sinel submitted that this showed that the Board was simply going through the motions at the Stage 4 meeting without any intention of approaching the matter with an open mind. They had just heard submissions and discussion lasting over 3 $^{1}/_{2}$ hours but had reached a decision in one minute. We have not received any evidence from the Board as to what was said at this meeting apart from the minutes but, in the time available, the meeting can in reality have consisted of little more than perhaps the Chairman asking the other members whether anything they had heard had caused them to change their provisional view, expressed in the 'minded-to' letter', that the appellant had shown a lack of integrity and competence and the other members confirming that they had not.

291 We have been troubled by this aspect of the matter. We can well understand the appellant drawing the conclusion that he did not receive a fair crack of the whip. We have carefully considered whether this aspect of the meeting leads us to conclude that, contrary to the clear impression which we derive from the transcript of the Stage 4 meeting and the other material before us, the Board was in reality just going through the motions.

292 Ultimately we have concluded that, despite the unfortunate terms of this meeting, we remain satisfied that the Board was considering the matter in good faith with an open mind. Our reasons for so concluding are:–

(i) Members of the Court are familiar with some occasions where, as a case progresses, the answer becomes clearer and clearer so that, by the time the Court rises, the answer is known by each individual member even before the discussion takes place. Thus it is possible that, even though one approaches the matter with an entirely open mind, the answer may be clear by the time the tribunal rises.

(ii) The members of the Board had just spent over 3 hours listening to the appellant's explanations and his comments about each paragraph of the Public Statement. We can well envisage that, even approaching the matter with an open mind, they may have formed a clear view on the overall issue of integrity and competence by the end

of the meeting.

(iii) All that was confirmed at this short meeting was that they remained of the overall view that he had displayed a lack of integrity and competence as suggested in the 'minded-to' letter. There was no consideration or discussion at this meeting of individual aspects which led to that overall conclusion.

(iv) Such discussion took place at the meeting on 5 th June and this led not only to revisions of the Public Statement but, more significantly, to a conclusion that the appellant had shown a most serious lack of integrity (rather than just a lack of integrity) and had displayed incompetence of the most serious kind (rather than just incompetence). The decision on 1 st May was therefore very much a provisional decision which in our judgment could properly be reached in an overall sense by persons with an open mind listening to what had occurred in the previous 3 1/2 hours.

293 It follows that we do not consider that the existence of this decision leads us to conclude that the Board was not acting fairly or was only going through the motions. However we cannot leave this without expressing our concern at the fact that the Board proceeded in this way. Although we have concluded that it does not lead to a conclusion that the Board did not have an open mind, we can understand the appellant forming a different view. Perception is important and we hope never to see a recurrence of a decision being taken in this way. In our judgment, no decision should have been taken immediately after the Stage 4 Board meeting if the members of the Board only had such a limited time to devote to it. The matter should have been adjourned to the next Board meeting.

(vii) The Commission was biased and otherwise acted unfairly in the manner in which the Executive carried out its investigation. In particular, the Executive prejudged the issues which it was under a duty to investigate without affording the appellant an opportunity to put forward his case.

294 We were not told which specific matters the appellant was relying upon in support of this particular sub-paragraph of Ground 3. However it seems to us that the following matters which were raised by Advocate Sinel can conveniently be considered under this heading, albeit that they are of course also to be considered in the wider context of whether the procedure as a whole was unfair.

(a) The Debenture

295 We consider first the issue of the Debenture. It is to be recalled that, as described in para 15 above, the CLNs were secured over the film library owned by four of Handmade's subsidiaries by way of a floating charge. That charge was constituted by the Debenture dated 18 th November, 2009, at the time of the fundraising of £17m.

296 It is accepted that a copy of the Debenture was sent to the Executive by Miss McClafferty of HTJL on 11 th July, 2012, but it is also accepted by the Commission that it was placed on the file and was not in the minds of the Executive thereafter. Thus it was not referred to in the interviews with the appellant or the other officers of HTJL, the HTJL report, the ICP or in any of the papers placed before the Board. Lord Eatwell accepted at para 61 of his first affidavit that the Debenture did not appear to have been included within the bundles for the interviews with the appellant or considered by the Executive. It was only on 22 nd February, 2017, that Advocate Lacey wrote to say that, following a further search, a copy of the Debenture had been located, having been sent to the Executive by Miss McClafferty in July 2012.

297 Advocate Sinel argued that this failure by the Executive completely undermined the decision of the Board. The appellant had repeatedly asserted that the Paragon investors had security over the film library which had a value in excess of the amounts due under the CLNs, but this had been ignored by the Executive, no doubt because they had forgotten or had never appreciated the existence of the Debenture. It meant that their questioning of all relevant parties during the interviews was on a false basis insofar as security was concerned. Ignorance of the existence of the Debenture might well account for the view expressed in the ICP by the Executive that 'Paragon was a sham'.

298 It is indeed highly unsatisfactory that the Executive appears to have been unaware of the fact that a copy of the Debenture was in its possession and that as a result it was not included in the interview bundle or referred to subsequently. However, we do not accept Advocate Sinel's submissions that this undermines the whole basis of the Board's decision for the following reasons:–

(i) Nowhere in the Public Statement does the Board find, either expressly or by implication, that the CLNs were unsecured.

(ii) Section 7 of the HTJL report deals with the criticisms of the Paragon structure. Again, there is no suggestion that the CLNs were not secured. The criticism relates to the fact that, amongst other things, there was considerable uncertainty as to what the Paragon investors were getting for their investment because of the conflict between the 'terms sheet' and the CLNs. There was also criticism of the fact that the CLNs had not been transferred from the name of Almorah into the name of the Paragon general partner until 10 th August 2011 and that this only occurred because of a query the previous day from the Executive seeking a detailed explanation of the security attached to the Paragon investment and confirmation that such security had been verified. Thus, at no time from when clients' monies were invested in Paragon (June 2010 — April 2011) until 10 th August 2011 did Paragon have any title to the CLNs; and it was of course only the CLNs which conferred any security over the film library.

(iii) That was essentially the criticism repeated in the ICP. We would quote the following two paragraphs:–

> "11.2 Mr Francis could not explain the discrepancy between the convertible loan notes issued by Handmade, which had a fixed term of three years (November 2009 — November 2012) having a fixed interest of 12% whereas the investments in Paragon were said to attract an interest rate of 12% for the first 12 months rising to 15% thereafter. Mr Francis accepts that he was not sure whether he had ever established whether Paragon could pay, or force Handmade to pay, the difference. Mr Francis further accepts that he must take responsibility for such a discrepancy.
>
> 11.3 Mr Francis accepted during interview that a number of key documents associated with Paragon, namely the limited partnership agreement, terms sheet, subscription agreement, and the minutes and resolutions associated with the customer structures investing into Paragon were wholly deficient and did not withstand any meaningful scrutiny".

It was these defects which lead the Executive to conclude that Paragon was a sham but it is to be noted that the criticism relates entirely to the Paragon structure, not to the validity of the CLNs or whether they were secured.

(iv) In short, we do not see that the Board's decision was in any way affected or influenced by the fact that the Executive had placed the Debenture on the file and then forgotten about it.

(b) Article 37

299 Secondly, Advocate Sinel referred to 'intimidatory' behaviour by the Executive towards the appellant. This relates to the fact that, according to the appellant, the Executive prevented him from speaking to any of his colleagues during the course of the various investigations by a spurious reliance upon the terms of Article 37 of the FS Law.

300 That submission requires us to consider the terms of Article 37, which is in the following terms:–

> ***"37 Restricted Information***
>
> ***(1) Subject to paragraph (2) and to Article 38, a person who receives information relating to the business or other affairs of any person:–***
>
> ***(a) under or for the purposes of this Law; or***
>
> ***(b) directly or indirectly from a person who has so received it,***
>
> ***shall be guilty of an offence and liable to imprisonment for a***

term not exceeding 2 years or a fine, or both, if he or she discloses the information without the consent of the person to whom it relates and (where sub-paragraph (b) applies) the person from whom it was received .

(2) This Article does not apply to information which at the time of the disclosure is or has already been made available to the public from other sources… .

38 Permitted Disclosures

Article 37 does not preclude the disclosure of information:–

…

by or to any person in any case in which disclosure is for the purpose of enabling or assisting any of the following:–

(i) the Commission or any person acting on its behalf …

to discharge the Commission's functions or that person's functions under this Law or under any other enactment .

…

(e) with a view to the investigation of a suspected offence, or institution of, or otherwise for the purposes of, any criminal proceedings, whether under this Law or not;

(f) in connection with any other proceedings arising out of this Law. …"

301 What is the effect of this provision in relation to the various information and documents supplied by the Commission to the appellant during the course of the investigation? Was he prevented from disclosing them to his former colleagues?

302 The starting point is that information supplied to the Commission about the business and affairs of HTJL, whether in documentary form or in the form of answers given by witnesses in interview, is restricted information in the hands of the Commission, which may only disclose such information pursuant to one of the gateways set out in Article 38. Disclosure by the Commission to the appellant clearly falls within the gateway at Article 38(1)(b)(i) as it was done for the purposes of assisting the Commission to discharge its functions. The question is how that information falls to be considered in the hands of the appellant.

303 Advocate Sinel argues that the appellant was free to disclose any information provided to him by the Commission in relation to the affairs of HTJL to his fellow directors. He bases that submission on two grounds.

304 First, he submits that, as the appellant was a director of HTJL, he could not be considered as a different person for the purposes of Article 37 and is not therefore caught by Article 37 at all. We cannot accept that interpretation. Whilst under ordinary rules of attribution a company is in general deemed to have notice of anything of which any of its directors obtains knowledge in the course of his duties (see Arden LJ at para 49 in *Real Estate Opportunities Limited -v- Aberdeen Asset Managers (Jersey) Limited* [2007] Bus LR 971) the reverse is not true. Furthermore, the interviews with the other directors related not only to the business and affairs of HTJL but also to the business and affairs of those directors being interviewed.

305 Secondly, he submits that any disclosure by the appellant to his fellow directors would fall within the gateway at Article 38(f) in that it would be *'in connection with any other proceedings arising out of this Law'*. He submits that the regulatory actions being carried out at the time by the Commission were *'proceedings'* arising out of the FS Law. In support, he referred to the definition of *'proceedings'* in the Concise Oxford English Dictionary which included *'an event or series of activities with a set procedure'*. We reject this submission. There is no definition of *'proceedings'* in the FS Law but sub-paragraph (e) of Article 38(1) (set out at para 300 above) refers to *'criminal proceedings'*. In context this is clearly a reference to proceedings before a criminal court because the same sub-paragraph distinguishes that from an investigation. As *'proceedings'* clearly refers to proceedings brought before a court in sub-paragraph (e), it follows in our judgment that the reference in the next following sub-paragraph to *'any other proceedings'* must be read in the same way and the expression *'proceedings'* refers to proceedings before a court. Accordingly this gateway covers disclosure during the progress of this appeal. However, in our judgment, there were no proceedings in place prior to the institution of this appeal and accordingly the appellant could not bring himself within the gateway at Article 38(1)(f).

306 However, we agree with Advocate Sinel's further submission that, a person only 'receives' information for the purposes of Article 37 if it is information which he did not previously know. Not only is that the natural meaning of the word but any other construction would lead to absurd results. Thus, if A is aware of an event at company X, he is free to disclose it as he chooses (subject only to any other legal restriction such as a contractual duty of confidentiality arising out of employment etc.). It would be nonsensical if, having been free to disclose it, he then becomes prohibited from doing so merely because the Commission, having been told about the event, then tells him about it.

307 Support for this interpretation can be obtained from the English case of *Re Galileo Group Limited* [1999] Ch 100. That involved an interpretation of Section 82 of the Banking Act 1987 which, so far as material, was in similar terms to Article 37 and prohibited a person who received information relating to the business or other affairs of any person, or any person who obtained such information directly or indirectly from a person who had so received it, from disclosing that information further without relevant consents etc. Lightman J held at 111:–

"Section 82 of the Act of 1987 does not preclude a primary or secondary recipient from disclosing information which he already knew before he received or obtained the embargoed information or indeed which he has received independent of this source thereafter."

308 Real Estate Opportunities (supra) was concerned with the interpretation of Section 348 of the Financial Services and Markets Act 2000. The provisions of that section are written in a slightly different form from Article 37 (although their effect is the same) and are as follows:–

> ***"(1) Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of:–***
>
> > ***(a) the person from whom the primary recipient obtained the information; and***
> >
> > ***(b) if different, the person to whom it relates*** .
>
> ***(2) In this part 'confidential information' means information which***
>
> > ***(a) relates to the business or other affairs of any person;***
> >
> > ***(b) was received by the primary recipient for the purposes of, or in the discharge of, any functions of the Authority …"*** .

The Court of Appeal held that, if a person has information before the Financial Service Authority provides it to him, he does not 'obtain' that information from the FSA and thus he is not barred from making disclosure by Section 348.

309 We note that in both the English cases, the relevant statute used the word 'obtains' or 'obtaining' in relation to the secondary recipient whereas Article 37 uses the word 'receives'. However we do not think that anything turns on that and we think that, in the particular context of the English and Jersey statutes, the words 'obtain' and 'receive' are used in the same sense.

310 It follows that, insofar as documents containing information were provided to the appellant by the Commission during the course of its investigation, the information within those documents only fell within Article 37 (so that the appellant could not disclose that information to anyone else) if the information was not previously known to the appellant. Inevitably, in the context of this case, this meant that much of what was said in the interviews or in the documents such as the HTJL report and the ICP would already have been known to the appellant and he would have been free to discuss it with anyone he chose. Conversely, some of the information might have been new to him and made known to him for the first time by the Commission during the course of the interviews or in the documents we have referred to. In relation to such information, the appellant would commit a criminal offence by disclosing it without the relevant consents unless he could take

advantage of one of the gateways.

311 Advocate Sinel submits that the appellant was misled as to his ability to confer, for example, with his fellow directors of HTJL by reason of what the Executive said to him. The Executive put it in different ways at different times:–

We should add that on each and every occasion, the Executive also made it clear that this did not prevent the appellant from seeking legal advice in relation to these matters.

(i) When calling him for the second interview, the letter of 26 th November 2012 said:–

> *"You should treat the enclosed notice and the contents of this letter as confidential.* Any information disclosed to you pursuant to the notice and during the course of this investigation is restricted information and disclosure of it may result in the commission of an offence under Article 37 of the Law."

(ii) At the outset of the second interview Mr Biddle said:–

> *"You should treat this interview and the matters we discuss as confidential, and any information that we disclose to you during the course of the investigation is restricted information and disclosure of it may result in the commission of an offence under Article 37 of the Law."*

(iii) When sending him a copy of the transcript of the second interview on 1 st March 2013, the covering letter from the Executive said:–

> ***"I draw your attention to the provisions of Article 37 of the Law (Restricted Information).*** The Commission deems the enclosures are restricted information and therefore they should not be disclosed to any third party without the Commission's prior written consent."

(iv) The letter from the Executive dated 14 th May enclosing a draft of the HTJL report for comment said:–

> ***"We consider the draft report contains both restricted and confidential information.*** Disclosure of the Draft Report may result in the commission of an offence under Article 37 of the Law."

(v) Similar wording was used in the letter of 9 th July 2013 supplying the draft ICP.

312 In our judgment, the wording used by the Executive at (iii) above was clearly incorrect and, during the course of her submissions, Advocate Lacey accepted that this was so. The wording asserts in effect that the enclosure (in this case the transcript of the second interview) should not be disclosed to any third party without the Commission's consent because of the provisions of Article 37. In our judgment the wording at (iv) and (v) was also

potentially misleading. It states that, in the Commission's view, disclosure of the document in question (which in context would naturally be taken to extend to any part of it) could result in the commission of an offence under Article 37. That was far too wide. As we have just stated, a criminal offence would only be committed by the appellant if he disclosed something in the document which he had not known previously.

313 Advocate Lacey submitted that the wording in (i) and (ii) was accurate in that it limited the implication of a criminal offence to information 'disclosed to you … during the course of the investigation'. In context, she submitted, this must mean information which was new to the appellant as otherwise it would not be 'disclosed' to him.

314 Whilst, as a matter of strict analysis, this may be true, we do not think that is the way it would be taken by most people undergoing the worrying process of an investigation into their conduct. The last thing they would wish to do would be to run the risk of a criminal prosecution for wrongful disclosure and we can well understand such persons taking this warning to cover anything communicated to them by the Commission during the course of the investigation whether or not it was something they knew already. We therefore advise the Commission to develop a standard form of wording which is used on every occasion so as to ensure consistency and to ensure that that wording is much more specific, so as to make clear that there is no prohibition under Article 37 on a person disclosing to others information he already knows even though that information is also communicated to him by the Commission.

315 However, the issue for us in the present case is whether this wording on the part of the Commission rendered the procedure unfair. We unhesitatingly reject Advocate Sinel's description of this conduct as 'intimidatory'. We accept that it was an error made in good faith by the Executive. The appellant asserts that he would have wished to discuss the matter with others such as Mr McKimmon. The question is whether his misapprehension that he could not have such discussions may have prejudiced him.

316 Advocate Sinel made it clear that he had always taken the view that there was no prohibition on discussion. On this basis he could no doubt have advised the appellant that he was free to have discussions with his fellow directors. However, he said that Mr McKimmon had only recently been willing to swear an affidavit because of his (Mr McKimmon's) fear of committing an offence as a result of the similar warnings given to him by the Executive. We have of course read Mr McKimmon's affidavit. We do not find that it has assisted our consideration of the appellant's case and the appellant has not been specific about what he would have wished to discuss with his fellow directors and why his inability to do so has prejudiced him. It is more in the way of a general assertion that this is something he would have liked to have done.

317 We can understand that general wish but, before concluding that the Executive's error has led to unfairness, we need to be satisfied that there is a real risk of prejudice having occurred. On the information available to us, we are unable to conclude that there is such a

risk and accordingly we do not find that the Executive's error has led to unfairness.

(c) File note of the Executive

318 Next, Advocate Sinel referred to a memo dated 7 th May, 2013 from Kerry Petulla, a senior investigator in the enforcement department of the Executive, to Mr Faudemer, Director of Enforcement and to the acting Director of the Trust Company Business Division enclosing a draft investigation report with a recommendation that a DMP be initiated in respect of HTJL. Attached to that was a file note recording Mr Faudemer's decision following his consideration of the draft investigation report. The file note contains the following two passages:–

> *"Given the serious and systemic breaches identified in the report there is an overwhelming public interest in this case proceeding through the DMP, and subject to the approval of the Review Committee being placed before the Board of Commissioners.* I have discounted the prospect of entering into settlement negotiations with the company or individuals due to the severity of the breaches and the on-going risks posed by the individuals.
>
> *The report also highlights potentially very significant criminal conduct on the part of several individuals, some of whom continue to work in the finance industry in Jersey and overseas.* We are aware that the police and Law Officers' Department are currently assessing the case and once the report has been maxwellised it should be shared on an intelligence basis with the police and Attorney General without delay."

319 This document only emerged by reason of Mr Faudemer's affidavit which was sworn on 23 rd March, 2017 in response to the third affidavit of the appellant. Advocate Sinel submits that it shows the Executive was biased in that it considered that criminal behaviour had been exhibited.

320 We have to say that we can see nothing wrong with either the memo or the file note. It is clearly part of the Commission's role to consider whether there is potentially evidence of criminal conduct and, if so, to refer the matter to the police or the Law Officer's Department. That is what Mr Faudemer's memo is saying. The fact that this possibility was recognised cannot possibly mean that the Executive is thereafter to be treated as being biased or to have predetermined matters, as otherwise it would never be able to continue with regulatory investigations in cases where it considered that there might possibly be criminal conduct. As the Court said at paragraph 46 of its judgment in *Interface* in connection with an investigation by the Executive "inevitably, in such a situation, there is scope for a perception on the part of the person being investigated that the investigator is being over-zealous or has made up his mind….". In any event, neither the memo nor the file note were matters which were before the Board.

(d) The unsigned Board minute

321 Next, Advocate Sinel referred to the manner in which the Executive had used the alleged minutes of a board meeting of HTJL held on 18 th July 2011. This followed on a meeting with members of the Executive at which the Executive had reported on some of their findings. An extract from the minutes was set out at paragraph 4.2.4.1 of the HTJL report. It refers to the Commission considering that the appellant had an overriding influence over the business and other criticisms of the way in which HTJL had operated. The minutes concluded by saying:–

> *"This was the most difficult criticism for the directors to come to terms with and to decide on how to address it effectively.* The fact that it could not be denied did not make the position any easier."

The minutes then went on to say that the appellant had agreed to resign.

322 It is to be noted that the minute is not signed. It was put to the appellant during the first interview and he was asked about it at pages 195–199 of the interview. He made clear that he had never seen the alleged minute until the interview bundle was provided to him and he did not accept that it was an accurate record of any meeting which he had attended. He would certainly not have approved such minute. Having heard what he had to say the interview continued:–

> *"Q: Okay. Before I read this minute to you or parts of it, David, we'd already agreed about the compliance function and the state of affairs at HTJL*.
>
> *A: Yeah*.
>
> *Q: That is independent of this minute.* I recognise that it's not signed, I've heard what you have to say about it, and it's important that you know that our actions would be based on our discussions rather than seeking to rely on a minute that isn't signed and that you have seen for the first time when the bundle was produced to you.
>
> *A: Yeah*.
>
> *Q: It is important that you are clear about that, David."*

323 Given that assurance by Mr Biddle, it is very surprising that the Executive quoted from the alleged minute in the HTJL report and did not make clear that it was unsigned and that its authenticity was challenged by the appellant. All the Executive said about it at paragraph 4.2.4.2 of the HTJL report was:–

> ***"The Commission's findings were, therefore, accepted by the board.*** However, some individuals explained in interview that the minute was a summary of the points raised by the Commission rather than an admission to all of the facts. Notwithstanding this, in our view, the minute is reflective of the

board's view at the time and it was only when the minute was presented to these individuals at interview that they sought to put forward an alternative view."

324 We do not think that that adequately reflects the position. The minute was unsigned but this was not stated in the HTJL report. Furthermore, the report did not make clear that the appellant for one was saying that he had never seen the minute until the receipt of the interview bundle and did not consider the minute to be accurate. We are not surprised that the appellant objects to the use to which this minute was put in the HTJL report in the light of the statements made by Mr Biddle during the interview. We think he has good reason to feel that way.

(e) Drafting of statements of the complainants

325 Advocate Sinel submitted that the fact that the Executive drafted the statements of complaint by the complainants referred to at para 201, namely Mr M, Mr and Mrs C and Mr R, showed that the Executive was biased and had made up its mind. We do not accept this point. It is almost invariably the case that statements from complainants and witnesses in a criminal investigation are drafted by the police officers carrying out the investigation. This does not mean that the police officers are biased. The statement is derived from what the complainant or witness has told the police officer and that person has to approve of and sign the statement. In our judgment the position is exactly the same in relation to the Executive and we can see nothing wrong in the fact that they have drafted the statements of complaint upon the instructions of the complainants.

Conclusions on sub-paragraph (vii)

326 During the course of his submissions, Advocate Sinel made a number of other assertions about bias or predetermination on the part of the Executive. We do not think it necessary to refer to each allegation but we have reminded ourselves of his submissions.

327 The question for us is whether the material before us leads us to conclude that this sub-paragraph of Ground 3 is made out. We have no hesitation in concluding that it does not. Undoubtedly, the Executive has made some mistakes as we have outlined above. But, from the material before us, we conclude that they were endeavouring to discover what had occurred. Although it is clear that, as their investigations progressed, they were forming an adverse view of the conduct of the appellant and others at HTJL, this does not in our judgment mean that they were biased or that the decision of the Board is thereby somehow invalidated. It would be astonishing if any investigator (whether police or financial regulators), did not begin to form an adverse view of the subject of the investigation as it progresses; but the important aspect is that such views should not prevent the investigators from retaining an open mind and being willing to be persuaded by evidence which is contrary to the suspicions which they are forming. The appellant submits that the Executive

had a closed mind because they did not accept the submissions he was making. We do not see it that way. In our judgment, the reason that they did not accept many of his assertions is because there was nothing to back them up; they were mere assertions and the contemporaneous documents tended to point in the opposite direction. We have considered many of these points under Ground 1.

Conclusion on Ground 3

328 As can be seen, there are some areas which we have described where we consider the Commission (whether in the form of the Executive or the Board) should have behaved differently. These relate to the letter dated 25 th May 2014 from the Deputy Chairman (paras 256–262), the unduly short initial timetable for responses to the draft HTJL report (paras 269–270), the omission of section 3 from the draft HTJL report (para 271), the one minute decision on 1 st May 2014 (paras 289–293), the filing of and subsequently not considering the Debenture (paras 295–298), the unsatisfactory wording of the Article 37 warning (paras 311–317) and the use of the unsigned board minute (paras 321–324).

329 However, notwithstanding these matters, we do not consider that, taken in the round, the procedure which led to the Board's decision was unfair such that it should be quashed. The appellant had ample opportunity to put forward his case and he knew the gist of what was being said against him, such that he was in a position to respond. It is common for administrative bodies to be found to have made minor procedural errors of one sort or another. Such errors do not of themselves mean that a decision is automatically to be quashed. It is only where the errors have led to unfairness that the Court will intervene. We are quite satisfied that there has been no such unfairness in this case and we therefore reject Ground 3.

330 Had we concluded that the Board's procedures had led to unfairness, we would have quashed the decision and remitted it to the Board. As the Court said in *Interface* at para 35, “where an appeal is allowed because of procedural errors or unfairness of sufficient gravity, the likely remedy will be that the decision is quashed and the matter remitted to the decision-maker for reconsideration.” We would have quashed the decision regardless of the view which we have formed in relation to Ground 1 as to the reasonableness of the Board's decision on the merits.

331 Advocate Sinel argued that it would be wrong to remit the matter to the Board in such circumstances. The Board had made its decision and was biased. It could not possibly approach the matter with an open mind if called upon to reconsider it. He submitted that the correct approach would be simply to allow the appeal and overturn the decision as to the direction and the issue of the Public Statement. We cannot accept that that would be an appropriate outcome. It would mean that, even though there were reasonable grounds for thinking that the appellant had displayed a serious lack of integrity and serious incompetence, he should be free to engage in financial service business. In our judgment, it is commonplace following appeals or judicial reviews for a decision-maker to have to

reconsider a matter even though it has previously reached a decision. We see no reason why the Board should be regarded differently and as incapable of approaching the matter afresh. We would therefore have remitted the matter to the Board for reconsideration if we had concluded that there had been procedural errors of sufficient gravity to lead to unfairness so as to justify quashing the decision.

Return to Ground 1

332 We have held earlier in this judgment that the findings of fact made by the Board were not unreasonable. However, that leaves over the question of whether, in the light of these findings, it was nevertheless unreasonable for the Board to conclude that the appellant had displayed a most serious lack of integrity and incompetence of a very serious kind. The recommendation of the Executive, of course, had been simply that the appellant showed a lack of integrity and competence.

333 In summary, the facts found by the Board included the following:–

(i) The appellant was the driving influence at HTJL.

(ii) He, together with some HNW investors had invested in Handmade and stood to lose their investment because of the financial problems of Handmade.

(iii) Similarly, HNW investors who had invested through the Media Fund stood to lose considerable sums given that, to the knowledge of the appellant, funds had been fraudulently diverted to Handmade by Mr Meehan.

(iv) The plan for Almorah to buy the shares in Handmade was devised essentially by the appellant (with HNW investors) and was undertaken with a view to seeking to retrieve the position from the point of view of the HNW investors (other than Mr Meehan) and the appellant.

(v) Almorah acquired the CLNs for 55p per CLN.

(vi) The appellant devised the Paragon structure as a means of securing liquidity for Handmade. Funds from the Paragon investors were paid directly to Almorah and then to Handmade in order to pay Handmade's pressing creditors.

(vii) The Paragon investors paid £1 for each CLN even though these had been acquired very shortly before by Almorah for 55p. This was to the potential benefit of those who were invested in Almorah, which included the appellant personally.

(viii) Although it was intended that some of the HNW investors in Handmade (other than Mr Meehan) would become shareholders in Almorah, the fact was that, until at least August 2010, the only shareholder of Almorah was the appellant who was presented publicly as Almorah's owner by means of the AIM press release.

(ix) The AIM press release was a misleading document in that it asserted that the members of the Concert Party (which included the HNW investors) were not to become shareholders in Almorah whereas it is clear that, according to the appellant, it was always the intention that they should do so and, according to him, should be treated as being the beneficial owners from the start.

(x) The appellant was subject to various substantial conflicts of interest when considering the Paragon investors. To name but some:–

(a) He was a shareholder in Almorah (even if of a fairly small percentage after August 2010) and therefore stood personally to gain if Handmade survived and prospered. It urgently needed cash to do so.

(b) He personally guaranteed the payment of US$4 million by Handmade to the Actor and therefore stood to avoid a substantial personal liability if that sum was paid. He directed that the first payment of Paragon monies should be used to pay an instalment of the amount due to the Actor, thereby reducing his potential liability under the guarantee.

(c) All payments through the Paragon structure potentially benefitted the HNW investors (i.e. other clients of HTJL) as well as the appellant personally.

(d) None of these conflicts were disclosed to the Paragon investors. Furthermore, at least three of them were not informed of the fact that Almorah had purchased the CLNs for 55p very shortly before the Paragon payments first started and they were not informed that the appellant personally, as well as the HNW investors, stood to benefit from the cash injected through Paragon.

334 Whilst the appellant may have sought to justify the Paragon payments to himself by reference to the value of and security over the film library, the Board was fully entitled to conclude that he was driven more by a desire to save Handmade and failed to give any meaningful consideration to the risks and appropriateness of the investments for the Paragon investors. The fact was that the underlying investment for the Paragon investors was a debt instrument owed by a company which was in deep financial difficulty and, as known to the appellant, at risk of insolvency at the time the Paragon investments were made. A lender such as a bank invariably looks not only at the value of the security offered but also the ability of the debtor to service the debt. Furthermore the security in this case was clearly illiquid as subsequent events have shown. The evidence shows the appellant scrambling around trying to find the appropriate Paragon client to provide funds to meet urgent payments required to be made to creditors of Handmade. There was ample evidence that he was not fulfilling his fiduciary obligations towards the Paragon investors.

335 It is the Commission which regulates financial services businesses not the Court. It is therefore for the Commission in the first place to determine whether conduct which it has found proved amounts to a lack of integrity or to a lack of competence and, if so, the level displayed in each case.

336 Advocate Sinel was critical of the finding of lack of integrity. He said that this amounted to a finding of dishonesty and that there was insufficient to prove that. That immediately raises the question of what is meant by a 'lack of integrity'.

337 On 2 nd April 2014, the Commission sent to Advocate Sinel a note which identified the legal authorities relevant to the definition of integrity. That note referred to five English cases from which extracts were quoted and said that the Commission's established approach to a 'lack of integrity' was based on those authorities. Some of those authorities made clear that there was a difference between dishonesty and a lack of integrity. Thus in *Milan and Vulkelic -v- FSA* [13 March 2009] the complainant had been found to be 'not dishonest but lacked integrity' in turning a blind eye to the obvious. In *First Financial Advisers Limited -v- FSA* [21 June 2012] the Upper Tribunal concluded:–

> ***"[e]ven though a person might not have been dishonest, if they either lack an ethical compass, or their ethical compass to a material extent points them in the wrong direction, that person will lack integrity.*** In that case the complainant's failure to appreciate or manage conflicts of interest was held to go to the question of a person's integrity as well as competency and capability."

338 No submissions were made at the Stage 4 meeting seeking to dissuade the Board from that interpretation of lack of integrity, but Advocate Sinel now submits that such a finding is effectively a finding of dishonesty. In that respect we were referred to two recent authorities in England which have been issued since the Board's decision.

339 In *Newell-Austen -v- Solicitors Regulatory Authority* [2017] EWHC 411 (Admin) there was an appeal against a finding of the Solicitors Regulatory Authority (SRA) that in certain respects Ms Newell-Austen had acted with a lack of integrity and in others with dishonesty. Morris J held that dishonesty and a lack of integrity are not synonymous. Dishonesty requires satisfaction of the well-established twin test in *Twinsectra Limited -v- Yardley* [2002] UK HL 12; namely, the conduct in question must be found to be dishonest *"by the standards of reasonable and honest people"* and the respondent must have realised that by those standards his or her conduct was dishonest. By contrast, the test of 'lack of integrity' was an objective test alone. A person may lack integrity even though not established as being dishonest (see paras 46–48 and 55 of the judgment).

340 It is clear that the decision in *Newell -v- Austen* was not only consistent with the authorities discussed in the note provided to the Board in this case but also with at least two other English cases (quoted in the decision to which we refer in the following paragraph). In *Bolton -v- Law Society* [1994] 1 WLR 512, Sir Thomas Bingham MR at 518B-E drew a distinction between being found guilty of acting with dishonesty, on the one hand, and on the other, of acting without 'integrity, probity and trustworthiness'. In the former case a strike-off was almost invariable; in the latter case a striking off did not necessarily follow but it might well. Similarly, in *Solicitors Regulation Authority -v- Wingate* [2016] EWHC 3455 (Admin) at para 37, Holman J said:–

> ***"He submitted, and I agree, that dishonesty and lack of integrity are not the same.*** While all dishonesty involves a lack of integrity, not all lack of integrity involves dishonesty. The law requires a subjective element to any finding or conclusion of dishonesty, but the question whether a person lacked integrity is objective."

341 In *Malins -v- Solicitors Regulation Authority* [2017] EWHC 835 (Admin) Mostyn J disagreed. He referred to the Oxford English Dictionary which defined dishonesty as *'the reverse of honesty; lack of probity or integrity; disposition to deceive, defraud, or steal; thievishness; theft, fraud; also a dishonest or fraudulent act'*. It defined integrity as *'soundness of moral principles; the character of uncorrupted virtue, esp.* in relation to truth and fair dealings; uprightness, honesty, sincerity'. He considered that, based on the dictionary definitions, honesty and integrity were synonyms. He felt that, if the observation of Holman J quoted above was correct, the SRA could side-step the requirement of proving the subjective element of dishonesty in any case by the simple expedient of charging the same facts as want of integrity.

342 It is clear therefore that, although the preponderance of authority in England suggests that a lack of integrity does not require dishonesty (although a finding of dishonesty necessarily includes a lack of integrity), the position is not authoritatively settled at appellate level, albeit that in *Bolton -v- Law Society* the Court of Appeal appears to have accepted that there is a difference between dishonesty and lack of integrity.

343 We did not hear full argument on this topic but for the purposes of this appeal, we proceed on the basis that dishonesty and lack of integrity are not synonyms and that the observations of Holman J in *Wingate* and of Morris J in *Newell-Austin* correctly describe the position. We found particularly helpful the quotation in the note to the Board referred to above, namely that "even though a person might not have been dishonest, if they lack either an ethical compass or their ethical compass to a material extent points them in the wrong direction, that person will lack integrity."

344 Given that the appellant had been informed through his legal adviser that this was the basis upon which the Board would consider the question of integrity and no objection having been taken, we think that is a further reason for holding that the Board acted reasonably in proceeding on the basis that a lack of integrity is not the same as dishonesty.

345 We would however add this. We can well understand Advocate Sinel's submission that the man in the street may well not appreciate that there is a difference and would read a public statement containing a finding of a lack of integrity as amounting to a finding of dishonesty. If the Board wishes to continue on the current basis — which on the basis of the preponderance of English authorities we hold it is entitled to do — we would strongly recommend that it issue and publish a guidance note making clear that a finding of lack of integrity is not the same as a finding of dishonesty and expanding on what it does mean. This will mean that subjects of regulatory action will know where they stand and the public

can have access to the published guidance so as to fully appreciate the meaning of any public statement.

346 In our judgment, given the findings referred to above, it was undoubtedly open to the Board to conclude that there had been a lack of integrity and competence on the part of the appellant. In our judgment the evidence that he had lost his ethical compass was overwhelming as was the evidence of a lack of competence. The question is whether it was also reasonable to find there had been a most serious lack of integrity and incompetence of the most serious kind. The FS Law appoints the Commission as the regulator of the financial services industry and confers upon it the responsibility of making decisions such as that in the present case. The Court is not the regulator. The Court may only intervene if the Commission's decision is unreasonable. It is very much a judgment call as to whether the appellant's actions and failings in the present case are to be categorised as showing a most serious lack of integrity (as opposed to a lack of integrity) and incompetence of the most serious kind (as opposed to ordinary incompetence). In our view, this was a decision in the first place for the judgment of the experienced members of the Board and, having regard to the matters we have set out in this judgment, we cannot possibly categorise their assessment of the severity of the appellant's misconduct as being unreasonable.

Ground 4

347 Ground 4 states:–

> *"The effect of the directions is to prevent the appellant from working in the financial services industry in Jersey and to destroy his reputation.* In all the circumstances they are a disproportionate response to the appellant's proven conduct."

348 In our judgment, given the finding of the Board (which we have upheld) that the appellant had shown a most serious lack of integrity and that his displayed level of incompetence was of the most serious kind, a decision preventing him from working in the financial services sector until such time as the Commission should grant him permission to do so cannot be said to be unreasonable. Indeed, we would have been surprised had any other sanction been imposed.

349 We have considered whether he has been treated fairly and proportionately by reference to the directions issued in respect of his colleagues at HTJL. In summary form, the findings and directions made in the other cases were as follows:–

In all of these cases, as in the case of the appellant, the direction was capable of variation on application to the Board. In other words it was not a lifetime restriction; it was a restriction which would continue unless or until the Board was persuaded to vary or lift it.

Name	Finding	Direction

Mr Treharne	Lack of integrity and incompetence of the most serious kind.	Prohibited from working in any way for a financial service business.
Mr Noding	Lack of integrity and incompetence of the most serious kind.	Prohibited from working in any way for a financial service business.
Miss McClafferty	Incompetence of the most serious kind.	Prohibited from working in any way for a financial service business. Note — this prohibition was varied by the Commission in 2016.
Mr Nicholls	Incompetence of the most serious kind.	Limits on the nature of function he can perform for a financial service business. Note — this prohibition was varied by the Commission in 2015.
Mr McKimmon	Lack of integrity and incompetence of the most serious kind.	Prohibited from working in any way for a financial service business.
Mrs Roberts	Lack of integrity and incompetence of the most serious kind.	Prohibited from working in any way for a financial service business.

350 It is to be noted that four of the former colleagues were prohibited from working in any way for a financial service business. Given the findings in respect of the appellant, we do not find that the direction issued was disproportionate or excessive by reference to the decisions in relation to his colleagues.

The Second Appeal

351 As stated at para 85 above, the appellant filed a second Notice of Appeal on 21 st August 2014 in respect of the decision of the Commission to issue public statements in respect of Mr Treharne, Mr Noding and Miss McClafferty. Those three public statements were all issued and published on 24 th July 2014.

352 Article 25A(2) provides:–

"If a public statement identifies any person who is not registered, and at

> ***any time before the Commission issues the public statement it is reasonably practicable for the Commission to serve notice on the person, the Commission shall do so."***

Article 26C(2) confers a right of appeal against a decision of the Commission to issue a public statement on any person aggrieved by the decision to issue a public statement that identifies the person.

353 Each of the three public statements referred to states that ' *Bid Co*' (i.e. Almorah) was a company which *'HTJL's CEO claimed to beneficially own'*. The basis of this appeal is therefore simple. The appellant submits that he is identified in those statements and should therefore have been served with notice of them prior to their issue as required by Article 25A(2).

354 It is not disputed that the Board did not give notice to the appellant of its intention to issue the three public statements. As set out at paragraph 61 of Mr Averty's second affidavit, the Board was of the view that the three statements did not contain any express criticism of the conduct of the appellant and that accordingly it was not necessary to notify him in advance in accordance with the requirements of Article 25A(2).

355 In her written submissions, Advocate Lacey maintained that stance and contended that Articles 25A(2) and 25C only applied to a person who was not only identified but also criticised within the relevant public statement. She submitted that the public statements in respect of Mr Treharne, Mr Noding and Miss McClafferty did not criticise the appellant, they merely referred to the fact that HTJL's CEO claimed to beneficially own Almorah.

356 During the course of the hearing, Advocate Lacey conceded that the appellant had the right to bring his appeal in respect of the public statements in relation to Mr Treharne, Mr Noding and Miss McClafferty in that he was a person identified in those public statements. We think she was right to do so.

357 In the first place, we think that the appellant was identified in the other three statements in accordance with the principles established in the recent decision of the UK Supreme Court in *Financial Conduct Authority -v- Macris* [2017] 1 WLR 1095 where at paragraph 11, Lord Sumption said this:–

> ***"This appeal turns on the meaning of 'identifies' and on the meaning of the notice to which that word is being applied.*** Both are questions of law, although the answers may be informed by background facts. The essential question before us is what background facts may be relevant for this purpose. In my opinion, a person is identified in a notice under Section 393 if he is identified by name or by a synonym for him, such as his office or job title. In the case of a synonym, it must be apparent from the notice itself that it could apply to only one person and that person must be identifiable from information which is either in

> the notice or publicly available elsewhere. However, resort to information publicly available elsewhere is permissible only where it enables one to interpret (as opposed to supplementing) the language of the notice. Thus a reference to the 'chief executive' of the X Company may be elucidated by discovering from the company's website who that is. And a reference to 'CIO London Management' would be a relevant synonym if it could be shown to refer to one person and that person so described was identifiable from publicly available information. What is not permissible is to resort to additional facts about the person so described so that if those facts and the notice are placed side by side it becomes apparent that they refer to the same person. …."

358 Advocate Lacey accepted that the fact that the appellant was the CEO of the Horizon Group was publicly available and that accordingly, in accordance with the principles outlined by Lord Sumption, he was 'identified' in the three other public statements. We should add for the sake of accuracy that, contrary to what was said by the Commission in the three public statements, the appellant was never the CEO of HTJL, he was only the CEO of the Horizon Group. However, we do not think that that alters matters as we remain of the view that despite this inaccuracy, he was identified in the public statements because it was publicly available that he was CEO of the Horizon Group and the ordinary reader would not necessarily distinguish between Horizon Group and HTJL.

359 Secondly, unlike the equivalent provision in the Financial Services and Markets Act 2000, there is no reference in Articles 25A(2) or 25C(2) to the need for a person to be identified in a manner which is 'prejudicial'. The reference in the FS Law is simply to the person being identified. If it was intended that Articles 25A(2) and 25C(2) should apply only to persons 'prejudicially' identified rather than simply a person who was identified, it would need to say so as in the equivalent UK provision. We cannot properly read in such wording. Furthermore, the exemption in Article 25A(5) for the Commission or other persons exercising functions in the Law suggest strongly that there will be identification of such person even where there is no criticism or prejudicial comment.

360 The grounds of appeal in support of this Second Appeal annex the Notice of Appeal in relation to the First Appeal. We have already dealt with those matters in relation to the First Appeal and our decision is equally applicable in relation to the Second Appeal. That essentially leaves three points:–

> (i) The appellant should have been given advance notice of the intention to issue the three public statements pursuant to Article 25A(2).
>
> (ii) The effect of publishing the three public statements was to prejudice the appellant's appeal.
>
> (iii) The effect of publishing the public statements was to render the appellant's appeal pointless because, even if he were to be successful and thereby prevent publication of the Public Statement in his own case, the damage would have been

done because of publication of the three other public statements.

361 In our judgment, the first of these points is clearly correct. Advocate Lacey argued with some force that, if it was necessary for the Board to serve notice of an intention to issue a public statement on everyone identified within it, this would be extremely prejudicial to the proper regulation of financial business and the protection of the public. It would considerably increase the administrative time and delay in any public statements being finalised and published. Indeed, in this case, it would have resulted in the 'lock down' of all the other HTJL related public statements which for the most part imposed total prohibitions on those individuals working in the Island's finance sector. This would have had the serious effect of the industry, investors, members of the public and overseas regulators remaining 'in the dark' as to the sanctions and the reasons behind the issue of directions in respect of the other individuals pending the final determination of the appellant's appeal. As had been demonstrated in the current appeal, this 'lock down' would have lasted for some two years whilst the Commission's decisions remain suspended and public statements not able to be published.

362 We do not underestimate the difficulties to which she refers. However, the fact remains that the FS Law provides for such notice to be served and the remedy, if one is needed, is for the Commission to seek an amendment to the Law so as to introduce a requirement for prejudicial identification along the lines of that in the UK statute.

363 We should add that Article 25A(2) does provide that a statement only needs to be served on a person prior to the issue of the public statement if it is 'reasonably practicable' for the Commission to do so. However, there is no suggestion that the Board considered this aspect because it had taken the view that there was no need for service because there was no criticism of the appellant. It is therefore not open to the Board at this stage to raise any argument in that respect and indeed Advocate Lacey did not seek to do so.

364 It follows that the Board did not comply with the requirements of Article 25A(2). The question then is what course the Court should take as a result. In the ordinary course, if the other public statements had not been issued, the appropriate course would have been to quash the decision to issue them and remit the matter back to the Board for it then to comply with the requirements of Article 25A(2). However, that is not the position here as the public statements have been issued.

365 Furthermore, the Commission has issued three further statements in respect of HTJL directors and officers, namely in respect of Mr McKimmon, Mrs Roberts and Mr Nicholls. They were issued on 2 nd December 2014, 6 th November 2015 and 23 rd January 2015 respectively according to Advocate Sinel's skeleton argument. As in the case of the public statements for Mr Treharne, Mr Noding and Miss McClafferty, they describe and deal with the Paragon/Handmade matter and they identify the appellant in the sense that reference is made to the fact that HTJL's CEO claimed to have beneficially owned Almorah.

366 A further complication arises out of the fact that in relation to Mr McKimmon, Mrs Roberts and Mr Nicholls, either no appeals were lodged or the appeals have been withdrawn. It follows that there is no mechanism for ordering that those three public statements be withdrawn from the public domain or that a further statement be issued.

367 In the circumstances, we do not find we can go beyond declaring that the Commission failed to comply with Article 25A(2) in respect of the public statements concerning Mr Treharne, Mr Noding and Miss McClafferty. That is because:–

(i) The public statements concerning Mr McKimmon, Mrs Roberts and Mr Nicholls have been issued and there is no outstanding appeal either by those three individuals or the appellant in respect of those public statements. It follows that they are and will remain in the public domain.

(ii) The public statements in respect of Mr Treharne, Mr Noding and Miss McClafferty say nothing about the appellant beyond that which is contained in the public statements for Mr McKimmon, Mrs Roberts and Mr Nicholls. Given that the statements in relation to Mr McKimmon, Mrs Roberts and Mr Nicholls will remain in the public domain, there is therefore no additional prejudice caused by the three statements subject to this appeal also remaining in place.

(iii) The appellant has not been prejudiced in the conduct of the First Appeal by reason of the existence of the three public statements against which he appeals. We have not had any regard to them and in any event they add nothing to the material placed before the Board and before us in respect of the First Appeal.

(iv) In view of our decision in relation to the First Appeal, the decisions of the Board to issue a direction and a Public Statement in respect of the appellant are upheld (subject to any appeal to the Court of Appeal). This means that the Public Statement concerning the appellant will shortly be put into the public domain. In those circumstances, there is no additional prejudice to the appellant as a result of the public statements of Mr Treharne, Mr Noding and Miss McClafferty remaining in place.

368 In the circumstances, we allow the Second Appeal to the extent of declaring that the Commission failed to comply with the requirements of Article 25A(2), but we make no further order.

Summary of conclusions

369 For the reasons which we have given we dismiss the First Appeal but allow the Second Appeal to the extent of declaring that the Commission failed to comply with the requirements of Article 25A(2) but, in the circumstances of the case, we make no further order in respect of the Public Statements concerning Mr Treharne, Mr Noding and Miss

McClafferty.

370 Further to the Court's findings at paragraphs 101 and 102 above, the Court directs that, prior to publication, the Public Statement be revised so that the last sentence of paragraph 2.8 reads as follows:–

> *“In essence, Bid Co. became a financing vehicle to the Film Co. which is currently in liquidation with creditor claims of circa £31 million, subject to the possibility of the liquidators' rejection of what may be certain duplicate claims.”*