Neutral Citation Number: [2024] EWCA Civ 1575

Case No: CA-2023-001229

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Judge Rupert Jones and Jo Neill
[2023] UKUT 00101 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2024

Before :

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE NEWEY
and
LADY JUSTICE ANDREWS

- -

Between :

MR MARKOS MARKOU	**Applicant** **Respondent**
- and –	
THE FINANCIAL CONDUCT AUTHORITY	**Respondent** **Appellant**

- -
- -

Edward Brown KC (instructed by **FCA Legal Department**) for the **Appellant**
Ian Rees Phillips (instructed by **AJA Solicitors**) for the **Respondent**

Hearing dates: 15 and 16 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 17th December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Andrews:

INTRODUCTION

1. Mr Markos Markou is the Chief Executive Officer and the sole director and shareholder of Financial Solutions (Euro) Limited ("FSE"). FSE's business consists almost exclusively of residential mortgage broking, a regulated activity which carries with it a high risk of mortgage fraud.

2. Since November 2004, FSE has been authorised by the Financial Conduct Authority ("FCA") or its predecessor to advise on and arrange regulated mortgage contracts. The advisers who carried out that work for FSE on a day to day basis were two self-employed Polish women, Ms Jalkiewicz ("AJ") and Ms Jozwik ("JJ"), one of whom worked from her home and the other from a serviced office. They were paid on a commission basis, partly comprising a percentage of fees paid to FSE by the clients (many of whom were also Polish), and partly comprising a percentage of the commission paid to FSE when a lender accepted the business which they introduced to it.

3. The combating of mortgage fraud is a high priority interest for the FCA, as it operates to the substantial detriment of the integrity of financial markets and society generally. Accordingly, a person carrying on such business is required to establish, maintain and operate appropriate systems and controls to safeguard against the risk of fraud. Such a person is also required to maintain an appropriate level of professional indemnity insurance ("PII") which covers them against claims for professional negligence in the provision of services to their clients.

4. Mr Markou was approved under section 59 of the Financial Services and Markets Act 2000 ("FSMA") to perform SMF1 (Director) and SMF3 (Chief Executive) controlled functions at FSE. He was responsible for establishing and maintaining FSE's systems and controls and for having proper oversight of its regulated business. By a Decision Notice issued on 29 January 2021, the FCA withdrew that approval, made an order under section 56 of FSMA prohibiting Mr Markou from performing any function in relation to any regulated activity carried on by an authorised person, exempt person or exempt professional firm, and imposed a financial penalty on him of £25,000.

5. The Decision Notice related to Mr Markou's conduct during the period from 24 November 2015 to 14 October 2017 ("the Relevant Period"). In essence, the FCA decided that during the Relevant Period Mr Markou failed to have proper oversight of FSE's regulated mortgage business in that he recklessly:

    (a) failed to implement FSE's policies to combat mortgage fraud;

    (b) failed to properly supervise the two mortgage advisors who carried out the day-to-day business of FSE; and

> (c) failed to take sufficient steps to prevent FSE from transacting regulated mortgage business during a period in 2017 when he knew it had no PII cover in place.[1]

The FCA found that Mr Markou's conduct had demonstrated a lack of integrity (thereby failing to comply with Statement of Principle 1) and that he was not a fit and proper person to perform any function in relation to any regulated activity, including the controlled functions of director and Chief Executive at FSE.

6. Mr Markou referred the Decision Notice to the Upper Tribunal ("UT"). As Sir Stanley Burnton noted in *FCA* v *Hobbs* [2013] EWCA Civ 918 at [38], financial services references are not "ordinary civil litigation," as there is a wider public interest in regulatory compliance. When such a referral is made, the function of the UT is to consider all the facts and evidence put before it, and determine what is the appropriate action for the FCA to take in relation to the referred matter. Although the proceedings are adversarial, they are an integral part of the regulatory process, and the UT sits as a first instance tribunal rather than in an appellate capacity. Any appeals to this Court are a continuation of that regulatory process.

7. In its Decision dated 27 April 2023 [2023] UKUT 00101 (TCC), the UT allowed the Reference. It found that Mr Markou's conduct did not demonstrate a failure to act with integrity and that he did not act dishonestly or recklessly in any regard.[2] Although the UT did find that Mr Markou had failed to ensure that FSE did not conduct regulated mortgage business without PII after 11 May 2017 (and 10 July 2017), it remitted to the FCA the question of whether he had failed to act with due skill, care and diligence in that regard. It determined that the appropriate action for the FCA to take was to impose no financial penalty and no disciplinary sanction. It directed the FCA to reconsider the matter and decide what, if any, appropriate enforcement or supervisory action to take in the light of the findings of the UT and any further findings made by the FCA itself on the matters remitted to it.

8. The FCA appeals to this Court on five grounds with the permission of Falk LJ. Ground 1 concerned the scope of the jurisdiction of the UT under section 133 of FSMA, and specifically whether it had jurisdiction to entertain allegations that Mr Markou had recklessly misled the FCA through its Regulatory Decision Committee ("RDC") and misled the UT in oral evidence given in *Financial Services (Euro) Ltd* v *FCA* [2010] UKUT 139 (TCC) ("the FSE Tribunal Decision") in relation to his knowledge of FSE trading without PII. The UT held that it lacked jurisdiction because those matters, though pleaded, were not "of the same nature and based on the same factual background as the allegations made to the RDC and contained in the Warning and Decision Notices". However, for the sake of completeness, it went on to decide the substantive issue, and absolved Mr Markou.

9. That ground of appeal has been overtaken by events. In a judgment handed down on 2 October 2024, *FCA* v *Bluecrest Capital Management (UK) LLP* [2024] EWCA Civ 1125, ("*Bluecrest*") a different constitution of this Court ruled that the jurisdiction of

[1] The period stipulated in the Decision Notice was from 10 July 2017, but this was amended to include the period after 11 May 2017 when the matter came before the Upper Tribunal.
[2] The FCA has never alleged dishonesty.

the UT is not so confined. The relevant paragraphs are at [112] to [203] of the judgment of Popplewell LJ. The correct test is stated at [202]:

> "What is clear is that there must be some sufficient relationship between the matter referred and the decision which triggers the right to refer, and the critical question is, what is required by the concept of sufficiency in this context? The answer is to be found in the fact that the decision is a stage in the regulatory process and the Tribunal reference a further stage in that process. The logical answer is therefore that something is sufficiently related to the decision which triggers the reference to amount to or be included in "the matter" if it has a real and sufficient connection with the subject matter of the process, in the sense of its procedural or substantive content, which has culminated in the decision notice or supervisory notice. Such connection must be real and significant, not fanciful or tenuous. But if so, that is sufficient."

10. That test was met in the present case. As Mr Edward Brown KC on behalf of the FCA pointed out, this much was evident from the fact that the UT was able to consider the allegations within the same reference, having regard to the same evidence as had been served for the Reference. Having rightly found that the new allegations were connected to the same background circumstances as one of the existing complaints (FSE trading without PII), the UT was wrong to find at [167] that it had no jurisdiction to hear them. Ground 1 therefore succeeds, but that would be insufficient by itself to justify our interfering with the UT's Decision.

11. The four remaining grounds take issue with the UT's exoneration of Mr Markou from recklessness and its conclusion that he did not lack integrity. For the reasons set out below, I would also allow the FCA's appeal on Grounds 2, 3 and on certain aspects of Ground 4, but dismiss it on the remaining aspects of Ground 4 and on Ground 5.

RELEVANT LEGAL PRINCIPLES

12. The FCA contends that Mr Markou acted recklessly in relation to compliance with FSE's regulatory obligations, and that in the circumstances of the case this demonstrated a lack of integrity. Recklessness in this context has both subjective and objective elements: *Potter v Canada Square Operations Ltd* [2021] EWCA Civ 339; [2022] QB 1, applying the two-stage test enunciated by Lord Bingham in *R* v *G* [2003] UKHL 50; [2004] 1 AC 1034. The subjective element requires a finding that the person concerned appreciates that there is a risk that a relevant circumstance exists or that a relevant result may occur; the objective element requires a finding that it was unreasonable for them to take that risk. To put it succinctly, someone who runs an unreasonable risk of breaching regulatory obligations is acting recklessly.

13. The UT in the present case adopted that test, albeit by reference to earlier decisions of the UT, *Tinney* v *FCA* [2018] UKUT 0435 (TCC) and *Forsyth v FCA and PRA* [2021] UKUT 162 (TCC). It correctly directed itself that:

> "A person acts recklessly with respect to a result if he is aware of a risk that it will occur and it is unreasonable to take that risk having regard to the circumstances as he knows or believes them to be".

14. In order to establish that Mr Markou was reckless, it must be established on the balance of probabilities that he appreciated that there was a risk of FSE failing to comply with its regulatory obligations, (or, on ground 3, a risk of his misleading the regulator and the UT) and that he acted unreasonably in taking that risk. The second stage will necessarily involve an evaluation of what, if any, steps were taken by Mr Markou in the knowledge of the risk to safeguard against the acts or omissions which would constitute the non-compliance. It does not have to be shown that the risk eventuated. However, if it did, the inadequacy of the steps taken to prevent it from occurring would play a significant role in the assessment of the reasonableness of taking the risk.

15. Recklessness in this context is capable of demonstrating a lack of integrity, though it may not amount to it: see *Seiler v FCA* [2023] UKUT 00133 (TCC) at [41]. It is more likely to demonstrate a lack of integrity in a person carrying out senior regulated functions such as director and Chief Executive Officer: individuals carrying out such functions can reasonably be held to higher standards than the general public: *Page and others v FCA* [2022] UKUT 124 (TCC) at [59]. This was accepted by the UT at [52].

16. To the extent that the FCA seeks to disturb any fact-findings made by the UT, it was accepted by Mr Brown that the applicable test is that set out by Lord Radcliffe in *Edwards* v *Bairstow* [1956] AC 14 at 36, namely, that "no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal." That includes a situation in which there is no evidence to support a particular fact-finding, or where the tribunal has misdirected itself by addressing the wrong question, or taking into account matters which are irrelevant to the issue it has to decide.

17. Mr Brown also sought to rely, if necessary, upon the observations of Lord Carnwath JSC in his concurring judgment in *Revenue and Customs Commissioners* v *Pendragon Plc and others* [2015] UKSC 37; [2015] 1 WLR 2838, at [49], when he referred to "a more flexible approach" being taken in the context of an evaluation of primary fact-findings by a specialist appellate tribunal entrusted with determining questions of principle under a particular statutory scheme (in that case, taxation). It is important that those observations be understood in (and confined to) their particular context, which was the evaluation of the situation by an appellate body *after* it had determined that there was a perverse fact-finding or other error of law in the decision appealed against, and corrected the error. The *Edwards v Bairstow* test still applies at the primary stage, as Mr Brown accepted. His submission was that Lord Carnwath's observations in *Pendragon* provided an answer to any contention by Mr Ian Rees Phillips, on behalf of Mr Markou, that this Court should be slow to interfere with evaluations made by the UT, such as whether certain behaviour was or was not reasonable.

18. Given the nature of the issues in the present case, if the FCA overcomes the high hurdle set in *Edwards* v *Bairstow* and makes good its submissions about the errors in the UT's Decision, this Court will not need to resort to the observations in *Pendragon* in order to decide what the consequences should be.

GROUNDS 2 AND 3

19. These two grounds are so closely linked that it is convenient to consider them together. Ground 2 is that even on the facts it found, (though some are challenged as perverse) the UT reached an irrational conclusion that recklessness was not established in respect of the risk of FSE carrying on regulated activities without PII. Ground 3 is that the UT erred in fact and in law in relation to whether Mr Markou misled the RDC, the FSE Tribunal, and the UT itself in the Reference and if so, whether he did so recklessly. Mr Brown submitted that the UT erred both in its factual conclusions, and in the application to them of the legal test for recklessness.

20. There is no dispute that carrying out regulated activity without PII is contrary to the regulatory regime. The purpose of PII is to protect the regulated entity and its clients should something go wrong as a result of defective advice or actions taken in the course of its business. Thus, as the UT accepted at [135], a mortgage intermediary without appropriate PII should not be advising on or arranging regulated mortgages for consumers. It does not matter at what stage of the arrangements the insurance cover lapses. If there is no PII, it is as much a breach of the regulations to continue to process an existing client's application for a regulated mortgage and send it to the prospective lender, as it is to take on a new client and give them advice about such an application.

21. There is also no dispute that FSE's PII was due for renewal on 11 May 2017 and was allowed to lapse. In the event, cover was never renewed. The circumstances surrounding these events are of some importance and it will be necessary to return to consider them in more detail.

22. In the reference which led to the FSE Tribunal Decision it was no part of the FCA's case that FSE had continued to carry on regulated activities at a time when it had no PII. The issue before that tribunal was whether it was reasonable of the FCA to have cancelled FSE's Part 4A permission because it did not meet a threshold condition (payment of fees). Following the removal of FSE from the intermediary panels of NatWest and Barclays, the FCA carried out a supervision visit on 9 May 2017. FSE's trading activity after that visit was relevant to the question whether it could afford to pay the fees when they fell due, and the FSE Tribunal made findings about it. As detailed in the FSE Tribunal Decision at [24], Mr Markou filed a witness statement in those proceedings which said that owing to a lack of PII, FSE was not trading. It was prevented from renewing its PII solely because of the failure of the FCA to conclude the investigations that it had opened against FSE and Mr Markou. The FCA's behaviour had directly brought about the situation in which FSE had generated no income from which to pay the fees.

23. Mr Markou gave oral evidence at the hearing in that reference in February 2020 that FSE had ceased trading on 9 May 2017, and that evidence was accepted. The FSE Tribunal Decision was dated 22 April 2020. The FSE Tribunal found as a fact that FSE conducted no regulated mortgage business after 11 May 2017. The relevant passages in the FSE Tribunal Decision are summarised by the UT in its Decision in the Reference at [73]. As the UT noted at [337], by the time of the hearing of the Reference, that finding was agreed to be factually incorrect. Nevertheless, Mr Markou sought to argue that for various reasons the FCA could not seek to disturb it. The UT

decided that it was not bound by the erroneous finding, and there has been no cross-appeal.

24. The UT rejected a submission by Mr Rees Phillips that Mr Markou's evidence in the FSE proceedings that FSE "did not trade" meant only that "it did not accept any new business." It found that there was "little ambiguity" as to what he actually said, which was that FSE "did not trade", without any qualification. Indeed FSE's counsel in the FSE reference had stated that there was a "cessation of regulated activities" after 9 May 2017, and that is what the FSE Tribunal found: see the UT Decision at [74] to [81].

25. A Warning Notice was issued to Mr Markou on 23 July 2020, some three months after the FSE Tribunal's Decision. In written submissions before the RDC, in September 2020, Mr Markou stated that "FSE did not submit any new mortgage business after 9 May 2017." However, he then stated that FSE submitted mortgage applications after that date where FSE had received (or invoiced) fees prior to that date (UT Decision [121]). This appears to have been the first occasion in which Mr Markou sought to draw a distinction between the completion of ongoing regulated business and taking on new business.

26. The FCA's original pleaded case in the Reference was that from 10 July 2017, Mr Markou knew that FSE had no PII in place and that its cover would not be renewed. However he recklessly failed to ensure that AJ and JJ stopped carrying on such business (old and new). The FCA relied on evidence from mortgage lenders, in particular Santander, regarding mortgage applications submitted to them by FSE after its PII cover lapsed [112]. By the time of the hearing, the FCA's case was that 20 residential mortgage applications were submitted to Santander by FSE between 15 July 2017 and 14 October 2017 (though data from Santander's records, extracted and appended to a letter from Santander to the FCA dated 22 May 2020, indicated that there were in fact over 40 mortgage applications submitted to them by FSE since 12 May 2017).

27. On 25 April 2022, Mr Markou served a witness statement in which he said the following:

> "8. One of the biggest "wrongs" committed by the Authority, is in relation to the manner in which they stated that I have lied in my witness statement dated 2 December 2019 which was used in [the FSE reference]. The Authority allege that I lied, in that I accepted new business under FSE after 9 May 2017, despite being expressly advised that no new work was to be undertaken after that date (and I voluntarily agreed to that as set out in my email of 10 May 2017 (00:16)). References are made by the Authority to mortgage applications being submitted after 9 May 2017. These have not been disclosed to us by the Authority despite us requesting full and frank disclosure of all such documentation, *but in any event, my position remains unchanged. No new work was undertaken by FSE.*
>
> 9. Further, *and more importantly, despite referring to the fact that FSE would complete "ongoing business" taken on prior to 9*

> *May 2017, the reality of the situation was that there was no such work undertaken….there was no period of time whereby FSE undertook work without insurance in place as the PII insurance expired on 12 May 2017.*
>
> 10. To be clear, *the only matters undertaken by FSE were routine accounting aspects*, which were incapable of being dealt with in advance, as the drawdown of the facilities (or otherwise) had not yet completed and the timeframe for doing so was unknown to us."
>
> [Emphasis added].

28. Thus there was a clear assertion by Mr Markou, consistently with what he had told the FSE Tribunal, that in practice *neither* ongoing regulated mortgage business *nor* new regulated mortgage business were undertaken by FSE after the expiry of the PII cover on 11 May 2017. Paragraph 10 appears to put a gloss on what he had said to the RDC about the processing of ongoing mortgage applications after that date, by explaining that FSE were simply collecting outstanding fees from lenders on transactions which had completed (invoices post-dating July 2017 had been produced by Mr Markou at earlier stages of the Reference). As I have pointed out, from a regulatory perspective it does not matter whether the business was ongoing or new; carrying on any kind of regulated business without PII is not permitted, though there is some force in Mr Brown's point that taking on new business could be regarded as a more egregious regulatory breach.

29. Mr Markou's evidence was that he had given specific oral instructions to AJ and JJ that no *new* work was to be undertaken; as I shall explain, it emerged in evidence before the UT that his instructions regarding the processing of ongoing applications was quite the opposite.

30. At the hearing of the Reference, after hearing argument from both parties, the UT ruled that the FCA could run the case that regulated business was in fact carried on by FSE in the period between the lapsing of the PII policy in May 2017 and 10 July 2017, as well as after the latter date.

31. In the written opening submissions in the Reference prepared by Mr Rees Phillips on behalf of Mr Markou, dated 22 November 2022, (around six months after the FCA had served its evidence) it was conceded that the documents showed that some regulated business was conducted by FSE after 11 May 2017 *and* after 10 July 2017. However, Mr Markou did not modify his witness statement to reflect this. On the contrary, he sought to maintain that it was accurate. As the UT recorded at [346], in his oral evidence he sought (more than once) to explain the reference in paragraph 9 of his witness statement to "no such work undertaken" as a reference to "new business". In context, it is impossible to read paragraph 9 as referring to anything other than ongoing business.

32. The UT found as a fact at [343] that FSE conducted (a) ongoing business, where contact with clients had been made before the expiry of the PII cover in May 2017, even if mortgage approval applications were submitted thereafter; and (b) a limited amount of new business both after the expiry of PII on 11 May 2017 and after 10 July

2017, when Mr Markou was told by the broker that PII cover would not be renewed. It found that there were 10 proven instances of new business (where contact was first made with FSE by clients after 11 May 2017) of which three occurred after 10 July 2017 [355] to [357]. There was no finding as to how much ongoing business was carried out.

Did Mr Markou know that there was no PII after 12 May 2017?

33. The first question that the UT had to consider was the state of Mr Markou's knowledge that FSE had no PII from 12 May 2017 onwards. FSE's expiring PII policy with Axa Insurance incepted on 12 May 2016 and expired on 11 May 2017 (both dates included), and covered claims for compensation and/or damages first made against FSE and notified to the insurers during the period of the policy.

34. At [11](iii) of the Decision the UT recorded that Mr Markou's case was that:

> "he was not aware of the non-renewal of FSE's PII (on 10 May 2017) until 10 July 2017 and he had instructed his mortgage advisors not to take on new business from 10 May 2017. Any failure by him to prevent FSE's mortgage advisers from processing three applications as new business after 10 July 2017 was not unreasonable, negligent nor reckless in the circumstances and any failing was modest or de minimis."

The UT went on to state at [353] that it was "not in dispute" that Mr Markou did not know that FSE's PII had expired until 10 July 2017 when informed by his broker, so "there were two months when he was unaware that FSE's PII had expired." It found at [358] that Mr Markou "only knew PII was not in place from 10 July 2017" and at [388] that "he was not aware that he would be uninsured after 11 May 2017 (or even that this was likely)…."

35. Those findings, which underpin the UT's reasons for finding that Mr Markou was not reckless, are unsustainable. Not only was there no evidence to support them, but the evidence, including contemporaneous documents, contradicts them. That evidence establishes that Mr Markou *did* know that FSE's PII had expired on 11 May, indeed, he had expressly instructed the brokers to refrain from taking steps to renew it until after the results of the FCA's visit were known, as the FSE Tribunal had found. Any attempt to suggest that he did not know that the PII had expired would have been very much in dispute.

36. In fairness to Mr Markou, he does not appear to have claimed to have been unaware of the fact that FSE's PII had expired, and indeed admitted it in cross-examination. When Mr Brown asked him this question: "FSE's PII expired on 11 May 2017 and *you knew it had expired*, didn't you?" he replied: "*so did the FCA* because they had that document [a copy of the policy] and they knew it expired." [Emphasis added]. Mr Markou was next asked when he told the FCA that FSE's PII had expired on 11 May, and he said it was when he got the email from his broker on 10 July 2017. Mr Brown then asked: "from the period after 11th May 2017 you understand that FSE has no PII in place?" and he said: "yes". Mr Rees Phillips submitted to us that as Mr Brown had slipped into the present tense, he was asking about Mr Markou's understanding as at the date of the hearing, but in the context of the particular line of questioning, that

interpretation cannot be right. I am satisfied that Mr Markou understood that he was being asked about his state of knowledge on and after 11 May 2017 and answered the question on that basis, just as he had answered the earlier question about his knowledge that the PII had expired.

37. Mr Markou's evidence as to his knowledge at the time was consistent with the contemporaneous documents, and with what he told the FSE Tribunal. There was no evidence that any steps were taken to obtain temporary cover or that Mr Markou believed that FSE was "held covered" for a period of grace. Nothing in the policy terms suggests that it would have been. Indeed, in answer to a question from Judge Herrington, the Chair of the FSE Tribunal: "if the insurance ran out in May, what was the position then between May and July about insurance?" Mr Markou responded: "No, there was no insurance. I stopped trading from – when they told me – from 9 May." By that answer, Mr Markou indicated that he was well aware of the consequences of having no PII. That was why he was at pains to emphasise that FSE stopped trading from 9 May. The UT was not bound by the findings of the FSE tribunal, and it did not expressly adopt them, but the only previous findings which it (rightly) found to be erroneous were those relating to the alleged cessation of trading by FSE. It quoted the other fact-findings extensively without comment, and, perhaps more pertinently, Mr Markou gave no evidence in the Reference which contradicted them.

38. On any view, because he had decided to hold off renewing the policy until he knew the outcome of the FCA's visit, Mr Markou knew that there was no PII in place when he received the FCA's letter of 9 June 2017 setting out its position following the visit. Thereafter, he knew that there would be no PII unless and until the brokers, acting on his instructions, and furnished with the FCA's letter containing the conclusions it drew from its supervisory visit, managed to persuade insurers to grant cover.

39. The FCA's letter raised a number of concerns, including concerns about a company named Financial Solutions House Ltd, a vehicle through which FSE contracted for the services of AJ. The FCA appended to the letter a schedule setting out the details of its findings from its review of 19 customer files. In the final paragraph of the letter, entitled "Professional Indemnity Insurance", the FCA informed Mr Markou that "you must check that the agreement you have with your insurer will cover for any advice given by Financial Solutions House Ltd. Please send us a copy of your insurer's response by 23 June 2017. You must also check whether you must notify your insurer of the firm's removal from the NatWest and Barclay's intermediary panels." This indicates that the FCA, which knew when the PII was due to expire, assumed that cover had been renewed.

40. In the same letter, the FCA requested Mr Markou to consider applying on a voluntary basis to cancel FSE's Part 4A permission and his approved person status by 23 June. As the UT held at [376] Mr Markou sent an email to the FCA on the following day expressing his dissatisfaction with its visit. (That is the email of 10 June referred to in paragraph 8 of his April 2022 witness statement, quoted at [27] above). Mr Markou declined the request to voluntarily surrender FSE's Part 4 permission. He said this:

> "You have stated that we cannot conduct any more new business… I will voluntarily comply with your request for a limited period and if

> the matter becomes unduly protracted for more than 21 days I will revert to you and let you know if the firm's position changes."

41. The UT found that Mr Markou had undertaken to the FCA to cease "new business" from 10 May, that this was his sincere intention, and that he wished to maintain that undertaking in respect of new business, but believed that this did not prevent him from continuing ongoing business: [377] and [378]. However, irrespective of the scope of the undertaking and what it precluded, Mr Markou must have known that FSE could not carry on *any* regulated business, ongoing or otherwise, unless and until it obtained PII.

42. The FCA sent an email to Mr Markou on 15 June 2017 repeating its request for a voluntary cessation of (all) regulated business. This received a robust response from Mr Markou by email on 26 June:

> "… I see no reason why our firm cannot continue [to] deal with mortgage business, as the purposes of your visit has not been proved and there is no reason to deprive our advisers of their livelihood… I await hearing from you within three days about your comments in respect of us continuing the mortgage and insurance business, which we are permitted to conduct."

Consistently with this, three days later on 29 June Mr Markou sent an email to the FCA in these terms:

> "As stated in our e-mail, *we shall continue conducting our mortgage and insurance business until we hear from you further."*
>
> [Emphasis added].

That appeared to be the notification that FSE's position had changed, which Mr Markou had said on 10 June he would give after three weeks. It was given at a time when, as he knew, FSE still had no PII in place, although it is likely that by then the brokers had been instructed to obtain cover (see [45] below).

43. On 6 July 2017 the FCA sent a letter by email to Mr Markou which noted that he did not agree to voluntary cancellation of FSE's permission or of his approved status; that "you will not check that the agreement you have with your insurer will cover for any advice given by Financial Solutions House Ltd"; and noting that "you have not informed your insurers about your removal from lenders' panels." Nothing was said at that stage to disabuse the FCA of its erroneous belief that FSE had PII in place.

44. The UT found that Mr Markou:

> "sought to renew [the PII] but it was not subsequently renewed. He did not know of this until 10 July 2017. This was the date [Mr Markou] was made aware by his broker that his PII would not be renewed, given the [FCA's] intervention – the premium costs would be prohibitive": [250].

That is a reference to an email from the broker sent on the afternoon of 10 July 2017 under the heading "Re FCA previous enquiry – urgent time sensitive - Financial

Solutions (Euro) Ltd," forwarding an email from Axa Insurance dated 7 July. The insurer's representative said, pithily: "In light of the ongoing regulatory issues this firm are experiencing we will not be providing terms, we have closed our file accordingly."

45. The UT made no finding as to when Mr Markou gave instructions to the brokers to renew the PII, but in the light of the evidence which I have set out above, it must have been at some juncture after the receipt of the FCA's letter of 9 June, and before the insurers provided their negative response on 7 July. We were told by Mr Rees Phillips that there was evidence before the FSE Tribunal of efforts that were made after receipt of that response to place the cover with other insurers, but the premium quotations proved to be prohibitive. In the light of the nature of the concerns expressed by the FCA in the letter of 9 June, that could hardly have come as a surprise. It was found by the UT that the non-renewal of PII was a direct result of the FCA's visit [390].

46. Mr Markou therefore became aware that it was not going to be possible for FSE to obtain PII on or around 10 July 2017. He informed the FCA that PII had not been renewed by email sent on 12 July. The UT accepted his evidence that he orally told AJ and JJ that PII had not been renewed at around the same time, but he did not discuss with them what business they should conduct after 10 July 2017 [393].

47. The UT's finding that Mr Markou only knew that FSE had no PII when he got the broker's email on 10 July, and that he was unaware of the situation in the 2 months prior to that, is plainly incorrect. That email merely notified Mr Markou that the policy would not be renewed by Axa. Whenever it was that Mr Markou gave the instructions to the broker to seek to renew cover, he no doubt hoped that the insurers would agree, and that if they did agree, the premiums would be affordable. He may even have thought that any belated renewal of the policy would be backdated to 12 May. But a person who believes that his company's insurance will be renewed *in future* at a time after it has been allowed to lapse, is nevertheless aware that, unless and until he has confirmation that it has been renewed, the company is uninsured and therefore cannot carry out any regulated activity. As the Chancellor pointed out in the course of the hearing, the very act of seeking to renew at a time when the policy has already expired and there was a previous decision not to seek to renew before it did, is an indication that the person giving the instructions knows there is currently no cover.

48. The UT held at [362] that Mr Markou did not clarify the position with his insurers as of 11 May 2017 as to whether he was insured in the interim while he sought to renew the insurance. But Mr Markou needed no such clarification. There was never any suggestion that he believed FSE was held covered after the expiry date of the policy; that was an assumption the UT made after erroneously conflating Mr Markou's knowledge that the PII would not be renewed with his knowledge that there was no extant PII. In fact, Mr Markou was aware of the absence of PII at all material times from 12 May 2017. On 10 July 2017 he knew there was no longer any prospect of obtaining cover. The upshot is that at all material times from 12 May, Mr Markou also knew that FSE should not have been carrying on *any* regulated business, including the ongoing mortgage business that Mr Markou had told the FCA on 10 June, 26 June and 29 June he had every intention of continuing.

49. Given that the regulated activities formed the major part of FSE's business and indeed were the source of income for both mortgage advisers, there was a real and apparent risk that unless FSE stopped trading altogether, it would carry on regulated business without PII, which Mr Markou knew it was not allowed to do. That risk was obvious, and it could not be described as negligible. It was unnecessary to show that the risk eventuated, just that it existed and that it was unreasonable to take it; but the ten proven instances of new business being processed were aggravating features. They indicated, as a minimum, that any steps taken to safeguard against the risk were ineffectual.

Was it reasonable for Mr Markou to take the risk of FSE carrying on regulated business without PII?

50. Mr Markou was a senior manager and in effect the controller of FSE. He was responsible for ensuring that it complied with its regulatory obligations. There was no suggestion that he was unaware of what constituted regulated activity. The regulated activities comprised the majority of FSE's business. In those circumstances there is force in Mr Brown's submission that the only reasonable thing for someone in his position to have done was to have procured that FSE ceased trading, at least until such time as he received express confirmation that PII was again in place.

51. It is clear from the correspondence with the FCA that Mr Markou was not prepared to hold off the acceptance of new mortgage clients for more than a limited period, and that he deliberately decided to take the risk that regulated business would be carried out in the period before the insurance position was regularised. Moreover, on the UT's findings, he took no reasonable steps to prevent it. The *only* step he took to stop FSE carrying on regulated business without PII was a single verbal instruction not to take on new business, which was given to AJ on or around 9 May 2017. That instruction was neither confirmed in writing nor followed up in any way, even when he told AJ and JJ that the PII had not been renewed.

52. The UT found that in addition to the absence of written instructions to the mortgage advisors (both after 9 May and after 10 July 2017), Mr Markou took no other available steps to ensure that his advisors were not conducting regulated mortgage business during this time. There was no evidence that he examined any of the files submitted to lenders for approval by the mortgage advisors, and he failed to check the position with AJ and JJ to ensure that no files were being submitted to lenders for approval [363] and [364].

53. Those findings were made against the background of earlier findings that "record keeping was inconsistent or absent at times" and Mr Markou "was perhaps over-prepared to adopt an informal or flexible approach to his own agreed policies" [329]. In particular the UT noted that the Mortgage Sales Process (MSP) adopted by FSE and updated in June 2014 as part of its policies, systems and controls against the risk of mortgage fraud, *obliged* the mortgage advisors "to discuss the recommendation and proposed outcome to the customer with [Mr Markou] before the business is submitted, which is an addition[al] safeguard". Yet Mr Markou provided only limited examples of written evidence of reviewing or discussing any mortgage application or customer with them pre-submission [330].

54. If the MSP had been adhered to at any point after 11 May 2017 it is likely that Mr Markou would have been made aware that his verbal instruction had not been followed, and that new business had been accepted (or that it was under consideration). He could then have taken steps to stop it. Instead there were at least 10 new mortgage applications, three of which were processed even after Mr Markou had expressly told the advisors that there was no PII. I say "at least" because the FCA did not carry out a full audit of FSE's files; it relied on a sample of cases from one lender's records. The UT found that the failure by AJ to follow his direction not to process new business was as much a failing on Mr Markou's part as on hers, pointing to the lack of file supervision and the failure to give repeated or written instructions.

55. On the face of it, the limitation of the instructions to taking on new business would suggest to the person receiving those instructions that it was all right to continue with regulated business for pre-existing clients. However any doubt on that score was resolved by Mr Markou's evidence at the hearing, accepted by the UT at [379], that after the FCA's visit AJ asked him what she and JJ were going to do with the clients that were already being processed, and he said that they could submit ongoing cases for mortgage approval (which, I interpolate, is rather more than processing fees).

56. That was not just taking the risk of FSE carrying on regulated business without PII, it was encouraging it, if not actively procuring it to do so. AJ's evidence (at paragraph 138 of her witness statement) was that she did not know what Mr Markou meant by "ongoing cases" and that she used her own judgment to decide what was an ongoing case that she should continue to progress. There was no finding as to how many ongoing cases were submitted to lenders, but Mr Rees Phillips told us that in the two years prior to May 2017, FSE was processing around 20 mortgage applications each month.

57. Whether or not Mr Markou knew that, after he had provided them with the assurance that they could do so, AJ and JJ went ahead and submitted ongoing applications to lenders, and irrespective of how many such applications there were, by giving the instruction that he did, he expressly condoned that activity. That is consistent with the attitude he was displaying in his correspondence with the FCA at the time, which indicated that he had every intention of continuing with the regulated mortgage business despite his awareness that PII had not yet been renewed and, on any rational view of the potential impact of the FCA's letter of 9 June, there was obviously a significant risk that it might not be renewed.

58. In the light of these matters, the UT's conclusion at [389] that it was "not unreasonable to take the risk of continuing with ongoing business" is irrational, even on its own mistaken assumption that Mr Markou thought that PII was still in place up to 10 July but did nothing to satisfy himself that it was. It is tantamount to encouraging regulated persons to flout their regulatory obligations.

59. The UT found that Mr Markou was unaware at the time of the 10 mortgage applications that were submitted in relation to new clients after 12 May 2017 [380]. If he *had* known about them, it would have made his position even worse; but the fact that there were 10 proven examples of new business, 3 of which occurred after 10 July 2017, when on any view Mr Markou was aware that there was no prospect of FSE getting PII, does not improve it. It reinforces the FCA's case that Mr Markou

unreasonably ran the risk that this would happen by failing to take any steps to reiterate or reinforce his earlier verbal instructions.

60. The UT found that Mr Markou failed to prevent FSE's mortgage advisers conducting regulated business after 11 May 2017 or 10 July 2017 and that in doing so he put the interests of FSE's mortgage customers at risk: [361] to [366]. Whilst that is of course true, the risk to the affected customers (and any other risk associated with trading without PII), was not the *relevant* risk, it was the imminent risk of regulatory non-compliance by FSE.

61. The regulatory system is based on risk-based prevention, not on whether claims or fraud have actually occurred. It was therefore irrelevant that (as a matter of good fortune) there have been no claims made against FSE in respect of the regulated activity that was carried out whilst it was uninsured. The FCA originally pleaded that reliance on legally irrelevant mitigation was a separate legal error by the UT, but that complaint was deleted in the Amended Grounds of Appeal for which permission was granted. However, the paragraphs in the UT's Decision dealing with mitigation remain relevant to the question whether the UT erred in its approach to and findings on recklessness.

62. The UT appeared to regard the absence of any uninsured claims, and the fact that the PII cover was on a claims made and notified basis, as mitigation. That cannot possibly be right. The implication that, because claims were infrequent, if there had been a renewal in July 2017 FSE may well have got away with trading uninsured for around two months, and therefore it was acceptable to carry on business without insurance cover for that period, was aptly described by Mr Brown as anathema. That line of reasoning undermines the purpose of financial services regulation.

63. If a claim had been made against FSE by a customer during the period between May and July 2017 it would not have been covered by PII. No insurer would have taken on that existing claim even if the insurance had been renewed. The UT also seemed to think it was a point in Mr Markou's favour that his instruction not to renew FSE's PII but to let it lapse pending the outcome of the supervision visit would have exposed all of FSE's previous customers in addition to any whose mortgage applications were processed on and after 12 May, including the 10 new ones, a comparatively small number. That, to me, is the clearest possible indication that the UT was not focusing on the mischief of which the FCA was complaining, which was the risk of carrying out regulated activity without PII. The fact that there would also have been no insurance cover for claims made in respect of an earlier period of trading underlines the potentially serious consequences of allowing the PII to lapse, but it does not afford Mr Markou an excuse for taking the risk of FSE trading without such insurance.

64. Indeed, none of the so-called mitigating features which the UT identified excused the absence of any real effort by Mr Markou to ensure that throughout the time that FSE was known by him to be uninsured it did not carry out any regulated activities (not to mention his positive condoning of the continuation of certain of those activities). The finding that the inability to obtain PII cover when the renewal instructions were finally given was due to the FCA's conduct, which the UT criticised at [372], is also irrelevant. Whatever the reason why it had no PII, FSE was not allowed to carry out regulated activities without it.

65. At one point, though this is not entirely clear, the UT appears to have reasoned that Mr Markou's hope of getting the PII renewed was enough to justify taking the risk of FSE carrying on business without it in the meantime. That reasoning would be indefensible. However, any observations that are open to that interpretation must be read against the background that the UT was labouring under the misapprehension that Mr Markou believed that FSE (still) had PII at the time when he gave the instructions for renewal. The UT mistakenly believed that the only conscious risk he took was the risk of FSE taking on *new* business after 10 July 2017, something he had previously told the mortgage advisors not to do. Had it not made that fundamental error, the UT might have expressed itself differently.

66. The fact is that on any rational view of the evidence, nothing that Mr Markou did came even close to addressing the risk of FSE trading during a period when he was aware there was no PII, and that would have been obvious at the time. However much he trusted AJ and JJ, it was plainly unreasonable for him to have assumed that a single verbal instruction to them would be enough, without any form of follow-up or checks. It was equally unreasonable to have thought that they would be sufficiently alive to the implications of the non-renewal of the PII cover, when he told them about it, to require no further or repeated instructions. The express instruction to continue processing applications from existing clients puts the matter beyond argument. Far from trying to stop FSE conducting regulated business without insurance, Mr Markou was actively encouraging it.

67. In conclusion, on this ground of appeal, the UT, having made a perverse finding that Mr Markou did not know that there was no PII in place until 10 July 2017, erred in law by failing to ask itself the right questions, namely:

> (1) in the light of his knowledge that there was no PII, did his encouragement to continue processing ongoing applications and his desultory efforts to prevent the carrying on of new regulated business amount to recklessness? and if so,
>
> (2) did that recklessness demonstrate a lack of integrity in a senior manager and Chief Executive Officer of the regulated business?

Each of those questions admits of only one answer, which is yes.

68. It is clear to me that, standing back and looking at the evidence in the round, Mr Markou displayed a cavalier attitude towards the imminent risk that FSE would carry on regulated business without PII. Objectively, a single verbal instruction to the mortgage advisers, confined to new business, especially when set against the background of a failure to adhere to FSE's established policy which required Mr Markou to carry out systematic checks on what they were doing, was nowhere near a reasonable response to the risk. The active encouragement to continue processing existing applications made matters worse, irrespective of how many such applications there were.

69. A senior manager of a regulated entity should not have run the risk of that entity carrying on regulated business without PII. That risk was real, it was imminent and it was not trivial. If such a person takes that risk, as Mr Markou did, in the hope (or

even the expectation) that the insurance lacuna created when the policy was allowed to lapse would be filled, they are not acting with integrity.

Was Mr Markou reckless as to the risk of giving misleading evidence?

70. Turning to ground 3, the FCA's pleaded case was of an alleged reckless failure by Mr Markou to deal transparently with the FCA, the FSE Tribunal and the UT itself in his explanations as to the extent of FSE's regulated trading activity at the time when it had no PII. This involves considering the position at three stages, namely:

    i) Mr Markou's evidence to the FSE Tribunal;

    ii) Mr Markou's witness statement, which he expressly confirmed to be true at the start of his cross-examination; and

    iii) Mr Markou's oral evidence to the UT in the Reference.

    There is an intermediate stage between (i) and (ii), namely, when Mr Markou made submissions to the RDC between September 2020 and January 2021, but that adds nothing material to the FCA's case.

71. I have already referred to Mr Markou's evidence to the FSE Tribunal and set out the relevant paragraphs of his witness statement in the Reference. Essentially, he maintained that FSE had ceased all regulated activities on 9 May 2017, the date of the supervisory visit. In the witness statement he made it plain that he was referring to the cessation of both ongoing and future business, other than processing fees (but failed to mention that he had told AJ that she could continue with ongoing applications). These unqualified statements were all made in the knowledge that he had taken no steps to check the position.

72. The UT, having set out paragraphs 8-10 of Mr Markou's witness statement in full, found that his written evidence in the Reference was consistent with his evidence to the FSE Tribunal [341], [349] and [412]. With classic understatement it described paras 8 to 10 of Mr Markou's witness statement as "inaccurate". It found that even within the Reference he gave inconsistent evidence on this subject [345].

73. It is not, and never has been, the FCA's case that Mr Markou knew his evidence was untrue at the time when he gave that evidence to the FSE Tribunal or when he signed his witness statement. Rather, it contends that it was unreasonable for a regulated senior manager and Chief Executive Officer, in all the circumstances, with the knowledge that he had, to take the risk of giving inaccurate evidence about his business's regulated trading activity, a risk of which the UT found he was aware at all material times. The UT said it was satisfied that Mr Markou was "aware of the risk of failing to deal transparently with the FSE Tribunal as he was with us" [416].

74. The UT found at [409] that Mr Markou [first] realised that FSE had continued to carry on regulated activity after 11 May 2017 after his evidence in the FSE Tribunal in February 2020. It accepted his evidence in the Reference that:

> "When the new warning notice came on 23 July 2020 I think it was, when it was pointed out, *that is when I started to address my mind to that"*. [Emphasis supplied].

If he waited until July 2020 to address his mind to what business FSE had transacted (or may have transacted) after the PII was allowed to lapse, it follows that Mr Markou must have assumed that FSE had not taken on new clients after 9 May 2017 and that any ongoing business related only to the processing or collection of fees, and gave evidence to the FSE Tribunal based upon those assumptions, which he had done nothing to check. The UT characterised the inaccuracy of that evidence variously as the consequence of an "innocent mistake" or an "honest and reasonable [mistake]" rather than recklessness, see e.g. [130] and [416]. The FCA challenges those findings as being inconsistent with the proper application of the recklessness test to the UT's own fact-findings.

75. The UT also found at [409] that:

> "it was only after [Mr Markou] had received [the FCA's] evidence and reviewed the disclosure given after April 2022 that it became clear to him that FSE (through its mortgage advisors) had engaged in regulated business and submitted mortgage applications to lenders for approval on behalf of its clients from 11 May 2017 at a time when it did not have PII in place."

Mr Rees Phillips told us that the 10 files from Santander referred to in and exhibited to AJ's witness statement of 1 April 2022 were disclosed when witness statements were exchanged on or around 25 April 2022. That meant that Mr Markou did not find out the true position until after he had made his witness statement, although he had known for well over a year before he made it that the FCA was alleging that FSE had been carrying on regulated business without PII and that Santander had supplied the FCA with records that allegedly demonstrated this.

76. The UT held that Mr Markou's "false written and oral evidence" [to the FSE Tribunal and thereafter up to and including his witness statement] was made "speaking in ignorance of the true state of affairs which he later accepted to be correct having reviewed the full documentation." [413]. The UT's exoneration of Mr Markou in respect of his inaccurate evidence at stages (i) and (ii) was therefore based largely, if not solely, on the fact that Mr Markou had not reviewed the FCA's evidence at any point before he signed his witness statement. But those documents, or copies of them, would have appeared in FSE's own files, which the FCA had taken away. He failed to ask for copies of FSE's files or to ask to inspect them at any time after he first started thinking about the matter in July 2020. Indeed he did nothing at all to check the position for himself, but instead challenged the FCA to prove it.

77. In addition to its findings of a lack of adherence to the policy of file supervision at the time when the business was carried out, the UT went on to find that Mr Markou "gave insufficient attention to retain, retrieve and inspect his business's records as to what occurred after 11 May 2017" and was "over reliant on his memory and desire to wholly vindicate his actions" [415]. Given that Mr Markou had taken no steps to ensure that AJ and JJ were carrying out his single verbal instruction not to do any new business, and he was unaware of what they were in fact doing, his memory would not have assisted him even if the events in question had occurred shortly before he gave his evidence, instead of years earlier.

78. Turning to stage (iii), Mr Markou had from the end of April 2022 until 7 November 2022, when the hearing of the Reference began, in which to review the FCA's evidence and correct what he had said in paragraphs 8-10 of his witness statement. He did not avail himself of that opportunity. These were not minor inaccuracies: the extent of FSE's trading in the relevant period, what Mr Markou knew about it at the time, and what steps he took to prevent it, were at the heart of the Reference. He was challenging findings by the FCA that he had recklessly allowed FSE to carry on regulated activities without PII.

79. Having made its findings that the FCA had proved that FSE had conducted both new and ongoing business after 11 May 2017, the UT found at [410] that Mr Markou accepted this to be the case both before and during the hearing. The reference to "before the hearing" was to his counsel's skeleton argument. The UT quoted the relevant paragraph in that document at [342]. In it, Mr Rees Phillips submitted that only three of the ten transactions which were documented were of relevance (because as then pleaded, the FCA's case on what became Ground 2 of this appeal had been confined to business conducted after 10 July 2017).

80. Despite what was said in the skeleton argument, at the start of his cross-examination, far from accepting that FSE had carried on regulated activity without PII, Mr Markou expressly adopted the truth of his witness statement, which categorically denied it. However, as the UT recounted at [344], during the course of his cross-examination Mr Markou did accept that three new mortgage applications were processed after 10 July 2017. The UT noted that Mr Markou was not clear how the files married up to the list in AJ's witness statement, which the UT said the FCA had "failed to prepare accurately so as to reflect the direction to still process existing clients' applications" [355]. Although by the time of the Decision, the FCA had been allowed to amend its case to encompass the period after 11 May 2017, the UT's decision to concentrate only on the evidence about the three post-10 July 2017 mortgage applications may have been because of the fundamental mistake the UT made as to Mr Markou's state of knowledge of the absence of PII in the period between 11 May and 10 July 2017.

81. Mr Rees Phillips submitted that Mr Markou should not be blamed for the fact that he did not procure that Mr Markou corrected his witness statement in the light of the disclosure of the ten lending files. However, it was the witness's responsibility to ensure that the evidence he gave was accurate. He had ample time to correct it. In any event, the real nub of Mr Brown's criticism was that Mr Markou, when given an express opportunity in cross-examination to accept that para 9 of his witness statement was clearly wrong, tried to explain it away on an obviously untenable basis, as the UT itself acknowledged. Mr Brown submitted that was not something which could be rationally ascribed to "honest confusion," nor to the failure to inspect the lending files. Mr Markou *did* know the true state of affairs by the time he came to give inconsistent and inaccurate oral evidence before the UT that sought to explain the fundamental inaccuracies in his earlier evidence.

82. As the UT recorded at [345] to [349], in the course of his cross-examination Mr Markou "repeatedly and consistently" sought to explain away paragraph 9 of his witness statement as referring only to *new* business. Whilst it rejected that evidence, the UT exonerated Mr Markou from being "dishonest, deliberately inaccurate and reckless" on the basis that he had nothing to gain from attempting to mislead the UT

in his oral evidence (because it had already been accepted by his counsel prior to the hearing that both ongoing and new business was conducted after 10 May 2017).

83. That reasoning is based on false logic. Aside from confirming the truth of his witness statement, there was no attempt by Mr Markou in his oral evidence to deny that FSE had indeed carried out regulated business, new and old, in the material period. But establishing that FSE did carry on regulated business without PII was only part of the FCA's case. The unsatisfactory evidence related to a *different* matter, namely, how it was that he, as the person responsible for ensuring FSE's regulatory compliance, had previously come to make persistent, repeated and categorical denials that the regulatory breaches had ever occurred, and indeed had made the unqualified statement to the FSE Tribunal that FSE ceased trading on 9 May 2017, which led to a finding to that effect. The FSE Tribunal was misled by that evidence, however inadvertently. The UT still had to consider how that state of affairs came about, and if and to what extent Mr Markou bore any personal responsibility for it.

84. Once it became clear that, contrary to his evidence right up to the hearing of the Reference, FSE had indeed been carrying on business without insurance, the focus of the inquiry turned to what Mr Markou did or did not know about this (a) when it occurred, (b) when he gave evidence before the FSE Tribunal, and (c) when he made his witness statement. It would be wrong to suggest that a witness in Mr Markou's position had nothing to gain from misleading the UT about those matters. The UT acknowledged the desire for self-exculpation, but seemingly without appreciating how that could motivate someone to be less than frank.

85. Mr Markou's evidence in cross-examination was possibly the most troubling aspect of his evidence at any of the three stages I have identified, though the contents of his witness statement are also problematic. When it is demonstrated that what a witness has said on previous occasions and in his witness statement cannot possibly be correct, he is either lying or mistaken. When given the chance to explain, one would not expect a witness who was mistaken to insist, repeatedly, that the inaccurate evidence he gave was *different* from the evidence which had been shown to be incorrect, especially when that explanation is demonstrably untrue. The UT did not appear to ask itself why a witness who cared about whether his evidence was true and accurate and who was doing his level best to answer questions honestly, would seek to recast the evidence he had given previously in such a way as to pretend that the major inaccuracies in it (which had now become evident) did not exist because he really meant something completely different.

86. The UT also appears not to have asked how it came about that paragraphs 9 and 10 of the witness statement were couched in the terms in which they were, because Mr Markou, having taken no steps to ascertain the situation, was never in a position to state that the only activity carried out in respect of pre-existing applications was routine accounting for fees that had fallen due.

87. I do not see how Mr Markou's repeated insistence that his previous evidence had only ever related to new business (and by necessary implication that he had never denied the continuation of ongoing business) could rationally be attributed to confusion on his part, particularly as it was he who drew the distinction between ongoing and future business in the first place. A witness of integrity would have accepted that he was mistaken and that, in the light of hindsight, he could and should have done more to

check the position before stating what he did. Mr Markou did neither of those things. At the very least, he was careless about the truthfulness of the explanation given to the UT in his oral evidence about how his witness statement came to be couched in the terms that it was.

88. The UT concluded that it was "not unreasonable for [Mr Markou] to take the risk of giving the evidence that he did, having regard to the circumstances as he knew or believed them to be at the time" [415]. Mr Brown submitted that on its own findings the UT could not rationally have exonerated Mr Markou of recklessness in this way. A senior regulated individual needs to be very careful indeed about the risk of giving inaccurate or misleading evidence to the regulator or the Upper Tribunal in the course of regulatory proceedings on matters of importance. As Mr Brown observed, such a person's failure to even think about the accuracy of the evidence that they were giving to a regulatory tribunal about their company's regulated business activities is a hallmark of recklessness, and should have been recognised as such.

89. The UT had the undoubted advantage of seeing and hearing Mr Markou give evidence over several days, and an appellate court should be slow to interfere with assessments of credibility made by a tribunal which has had that advantage. But this is not so much a matter of credibility as one of assessment of the propriety of the attitude taken by a senior regulated person towards his responsibilities to the regulator (and to a tribunal which is part of the regulatory process) and, in particular, to the risk of misleading them. We are in as good a position as the UT to evaluate that attitude from what he said at different times.

90. In my judgment, as regards stages (i) and (ii), the UT erred in reasoning that Mr Markou was not required to know (or seek to find out) what regulated activity FSE was carrying out until the FCA disclosed FSE's own documents back to him. He was responsible for FSE's adherence to its regulatory obligations and he could not justifiably make an assumption that it did so without taking even the most basic steps to check, particularly when he knew he had told AJ that she could continue with existing regulated business. (He never suggested that this was something he had forgotten about). In a sense, his reckless approach towards the accuracy of his evidence was just another facet of the reckless attitude he had displayed towards the risk that FSE would carry on business without PII.

91. The UT's evaluation of the reasonableness of taking the risk of misleading the regulator and the two tribunals also appears to me to have been affected by the same fundamental error about Mr Markou's state of knowledge and belief that underpinned its reasoning on ground 2. A person who mistakenly believed that FSE was held covered pending renewal of the insurance would have believed that FSE could carry on processing existing applications. On that hypothesis, Mr Markou would have thought there would be nothing to inhibit FSE from taking on new business when the voluntary undertaking to the FCA expired, and nothing to inhibit FSE from continuing to process existing applications at any time prior to 10 July 2017. The only risk of FSE carrying on business without PII of which he would have been conscious would have been the risk after 10 July.

92. Seen from that perspective it is perhaps understandable why a regulatory tribunal might focus on the three applications processed after 10 July 2017 and why it might take the view that Mr Markou would have had no reason to take any steps to verify

what he had said to the FSE Tribunal or in his witness statement about FSE's carrying on existing or new business prior to that date. The tribunal's focus would necessarily be on whether Mr Markou was reckless as to his evidence about whether any (new) business was conducted after 10 July 2017. In that context it would be open to it to find that his oversight of the fact that there were three new applications between July and November 2017, and his evidence that there was no business carried on after 10 July, was the result of an honest mistake.

93. When the error as to his state of knowledge of the insurance position is corrected, however, Mr Markou's evidence has to be assessed in a very different light, including the fact that he had been reckless as to FSE continuing to conduct regulated business without PII. On the UT's findings, he had taken none of the reasonable steps available to him to check what FSE had done, but simply relied on his own recollection (which, given his lack of adherence to the policy of checking new applications before they were sent to lenders, would not have assisted him) and on his desire to vindicate his own behaviour.

94. Mr Brown submitted that once all those matters are properly taken into account, then irrespective of the UT's assessment that he was "intent on telling the truth", it was self-evident that Mr Markou unreasonably took the risk that his evidence was inaccurate and that the regulator and the FSE Tribunal would be misled by it. I agree. Mr Markou was never in a position to be able to state categorically that FSE had ceased trading in May 2017 even if that is what he genuinely believed to be the case. He always knew he had confined his instructions to the mortgage advisors to a single oral instruction to stop taking on *new* business, though he never made that clear to the FSE Tribunal. Nor did he explain that he had expressly sanctioned the processing of ongoing applications.

95. Mr Markou took the risk that the FSE Tribunal would make an inaccurate finding in that reference that FSE had ceased trading on 9 May 2017. Objectively it was unreasonable for him to take that risk without taking any of the simple steps that were reasonably open to him to check that his evidence was accurate. The fact that the risk eventuated, in that the FSE Tribunal accepted Mr Markou's evidence and made the inaccurate finding that FSE had ceased trading on 9 May, makes matters worse.

96. Once the present Reference was underway and the FCA was squarely alleging that FSE traded without PII, Mr Markou, having given the matter attention for the first time, appears to have initially provided more accurate information to the RDC. However, he then provided a witness statement which rowed back from what he had stated to the RDC, expressly confirming that FSE had neither taken on new work nor processed existing applications, and appearing to clarify in paragraph 10 that what he had previously said about the latter was just a reference to the processing of fees. Again this was done without taking any steps to check that what he said was correct, even if he believed it was.

97. Whilst the absence of the documentation from the mortgage lenders may have explained a belief on Mr Markou's part at that time that there had been no new business done in that period, it does not factor in the express instruction that he had given to AJ that she and JJ could continue to process existing applications. The UT never properly engaged with Mr Markou's attitude towards the accuracy of his evidence concerning the continuation of existing business. Paragraphs 9 and 10 of Mr

Markou's witness statement may have been designed to address that issue by stating that the only activity carried out by FSE related to fees. But Mr Markou was not in a position to say that from his own knowledge, and the UT held that this evidence, too, was inaccurate.

98. When that was demonstrated, instead of accepting it to be so, he tried to explain it away on a basis which was patently incorrect. He repeatedly and consistently tried to explain away his earlier categorical denial that there was any ongoing business by insisting that he really meant new business. Mr Brown aptly described this as a "wall of obfuscation" which could not rationally be attributed to confusion. His behaviour may well have been motivated by a desire for self-exculpation, rather than a deliberate desire to mislead, but it is not indicative of a desire to be open and transparent. A witness who behaves in that way may not be lying, though such behaviour is often the precursor to a finding that he was. On any view, he does not care whether his evidence is accurate, and he is not doing his best to tell the truth.

99. In conclusion on ground 3, for the reasons stated above, the UT erred in acquitting Mr Markou of being reckless as to the evidence that he gave both before the FSE Tribunal and in his witness statement and in his oral evidence to the UT itself. Such behaviour on the part of a senior manager of a regulated business is self-evidently indicative of a lack of integrity.

GROUNDS 4 AND 5

100. The remaining two grounds, 4 and 5, relate firstly to the systems and controls that FSE had put in place to safeguard against the risk of fraud occurring in the regulated mortgage business (ground 4) and the alleged inadequacy of the degree of supervision exercised over AJ and JJ (ground 5). No complaint was made as to the adequacy of the systems and controls themselves; the FCA's case was that Mr Markou did not follow the systems he had purported to implement for FSE's business. Indeed the UT held that he did not, but that the failures were either *de minimis* or excusable (for reasons which Mr Brown submitted were wrong in law).

101. Mr Brown submitted that the UT erred in law in its overall approach to these allegations; at one stage it appeared to have reasoned that even if FSE's own systems and procedures were not followed, there were other adequate systems with lesser controls deployed in the sector, and what FSE did would have complied with those systems, so the non-compliance with its own model did not matter.

102. The real mischief of that overarching error in approach, Mr Brown contended, was that the UT was diverting itself from the key question, namely, what did non-adherence to the systems and controls which FSE had adopted reveal about the fitness and propriety of Mr Markou to be in charge of that business? The FCA's case was that if a senior regulated person tells the regulator: "this is what I am going to do to assuage your concerns" and then deliberately does not do it, they are not fit and proper. Once the UT had found that, by and large, Mr Markou had not followed his own systems, that conclusion should have followed.

103. Mr Brown submitted, and I accept, that the regulatory approach does not measure compliance by reference to a notional yardstick of reasonableness across the residential mortgage sector. It places the burden upon firms and individuals to

implement appropriate systems and controls for their specific businesses, and the FCA will intervene when those systems and controls are not followed.

104. Mr Brown further submitted that the UT erred in placing significance on a lack of evidence that the non-compliance led to exposure to mortgage fraud (for example at [274] and [284]), which was legally irrelevant. The purpose of fraud policies is to mitigate the exposure to fraud in every case; every failure to apply the policy means the relevant check has not been adopted. It does not matter if that did or did not lead to a fraud; a fraud may occur despite the full implementation of a system designed to safeguard against it.

105. It is unnecessary to burden this already lengthy judgment with a detailed analysis of all of the complaints made by Mr Brown. I have some sympathy with his submission that the UT's criticism of an alleged lack of detail in the FCA's pleaded case was unfair, particularly as Mr Markou had never suggested that he did not understand the allegations or that further particularity was required under the Tribunal rules. However I do not consider that this betrayed any lack of even-handedness on the part of the UT.

106. The first question is what findings were made by the UT concerning non-adherence to FSE's own adopted systems and controls? Mr Rees Phillips made the powerful point that the FCA's case had depended on the evidence of the two mortgage advisors, AJ and JJ, but it was demonstrated by reference to contemporaneous documents that their memories were flawed. For example, AJ alleged that she had not seen a copy of the "Business Risk Awareness" checklist but there were contemporaneous versions of that document with her signature on them [304]. In the light of this, Mr Rees Phillips submitted, and I accept, that the UT was entitled to find that it was not satisfied that certain of the allegations of non-adherence to FSE's policies were established on the balance of probabilities.

107. Whilst the UT's acceptance of Mr Markou's excuse for not producing documentation on the basis of the "sheer number of documents in existence" at [267] might be open to criticism, I accept that it was entitled to take the view that he had produced a reasonable selection of contemporaneous documentary material in relation to certain of FSE's policies, and it was entitled to accept that some documents may have been mislaid in the course of multiple office moves.

108. Turning to the specifics, at the heart of this aspect of the case, as the UT identified at [269], were allegations that Mr Markou failed to implement and enforce the MSP and the use of the checklist. The MSP set the policy. That was introduced in 2014 and updated in July 2015. The checklist was introduced as an aide memoire for the mortgage advisers in October 2015. The MSP itself did not stipulate what documentation should be taken from clients and cross-checked against the financial information they provided in order to satisfy FSE that they could afford to take on the mortgage, and the application was otherwise bona fide; but the checklist to be used by the mortgage advisers in implementing that policy specifically required four months each of payslips or bank statements. Since the checklist was adopted as part of the systems and controls used by FSE it cannot be treated as not forming part of the policy or as somehow subservient to it. The fact that it was an ancillary document did not afford it any lesser status, though the UT appears to have taken the view that it did.

109. It did not follow that if the documentation produced by a customer fell short of the requirements of the MSP, the mortgage could not be shown to be affordable by reference to other information or documents. However in such circumstances a note should have been placed on the file to explain why the affordability criteria were met and to record any explanation given by the customer for only having three months' worth of payslips (for example, the fact that he or she had only just started working for that employer.) The representative samples relied on by the FCA contained no explanations of that nature. All kinds of potential explanations were put forward by Mr Markou in the course of his cross-examination (though not in his witness statement) which the UT appears to have regarded as reasonable, but that is beside the point. No-one knows if they were the explanations which would have been given at the time. The failure to ask for an explanation is just as bad, if not worse, than the failure to record one.

110. As the UT recorded at [273] it was accepted by Mr Markou that in practice AJ (who was responsible for the majority of the mortgage applications) only obtained three months' worth of bank statements and pay slips. The UT accepted that there were not four months' worth of bank statements and payslips in the examples relied on by the FCA, but then rejected the contention that the policy was not adhered to. It gave two reasons at [274]: first, that the MSP itself (as opposed to the checklist) did not require four months' worth of payslips; secondly that "it is fairly standard within the mortgage broking industry to obtain three months' worth of the documents for PAYE employees." It also said that there was no evidence that not having four months' worth of payslips led in any way to exposure to mortgage fraud.

111. The question whether the policies were or were not adhered to is a binary question. Neither of the reasons given by the UT for finding that the policy was adhered to in respect of the documentary requirements withstands scrutiny. The checklist reflected what was required to show adherence to the policy. It served no purpose otherwise. On the UT's own fact-findings it should have held that the policy in the MSP concerning the documentation to be provided by clients was not adhered to and that Mr Markou had failed to ensure that it was adhered to. It is beside the point that other businesses might take only three months' worth of payslips or bank statements: FSE's policy was to take four months' worth. This was not done, and in the light of the finding made as to AJ's practice it cannot be said that the examples relied on by the FCA were isolated aberrations, despite Mr Rees Phillips' attempts to portray them as *de minimis*. The fact that there is no proven link between non-adherence to the policy and the incidence of mortgage fraud is irrelevant. To that extent the UT fell into error.

112. The same is true of the requirement in the MSP that Mr Markou should review every mortgage application. He did not do so. The UT found at [318] that he did not consider that every file had to be reviewed but that "10% was the advised target". The correct question was not whether that was reasonable or proportionate. If it had been FSE's policy, it may or may not have been regarded as adequate for FSE's business, but it was not FSE's policy. If the policy which Mr Markou had voluntarily set for FSE was too onerous for the owner of a small business he could and should have changed it, and obtained the regulator's approval; but a failure to adhere to the policy cannot be excused on the basis that adherence to some lower standard than the one that the regulated person had set for himself and his business was acceptable.

113. In refusing permission to appeal the UT said that "any suggestion that a literalist or "tick box" approach had to be applied to every word of each policy held by FSE without regard to the reasonableness or proportionality of so doing may itself be unreasonable in a small business setting". That characterisation betrays a fundamental misunderstanding of the FCA's case. The FCA did no more than require that Mr Markou (and those whom he was responsible for supervising) adhered to the policies that he himself had set, because that was what the FCA was entitled to expect of him. It is one thing if the policy involves the exercise of judgment or discretion, where there may be room for a degree of flexibility. It is quite another if its requirements are set in absolute terms. Reviewing each file means what it says; it does not mean reviewing a sample, or up to 10%.

114. The MSP required "robust notes [to] be placed on file to clarify any inconsistencies in the documents provided." [275]. The UT took the view that the question whether there were any such "inconsistencies" was a matter of value judgement and if there were reasonable grounds for disagreement on that issue, there was no breach of the policy if a note was not placed on the file [282] and [283]. It seems to me that there is more force in Mr Rees Phillips' answer to the criticism of the UT's Decision on this issue. The interpretation of the word "inconsistencies" has a bearing on the question whether there was a failure to record inconsistencies between the documents which were provided and the financial information given by the customer.

115. Unlike the other requirements of the policy, which are expressed in absolute terms and are unambiguous, the mortgage adviser had to decide whether there was or was not an inconsistency between the basic financial information required and other information supplied by the putative borrower. Did it cover all differences, however minor, or only certain types of difference which might be perceived as a "red flag"? The UT considered the evidence in great detail and it was entitled, in my judgment, to form the view that, save for one example, the FCA fell short of demonstrating that the "inconsistencies" were of the type that on true interpretation of the policy required a note to have been placed on the client files.

116. Whilst the UT is open to criticism for accepting Mr Markou's speculative explanations for the discrepancies in the documentation that the FCA had highlighted by way of example, it was entitled to reject the FCA's overarching submission that any discrepancy was an "inconsistency" which the policy required to be noted. Mr Brown sought to characterise the UT's approach as being that it was acceptable for a regulated person to *overlook* an inconsistency if they think that there is no fraud, but I reject that characterisation.

117. The UT took the view that Mr Markou's explanations for the absence of such notes were reasonable, even if other supervisors might have adopted a stricter approach [286]. It found that "whilst he may have taken a more literal approach to the interpretation of inconsistency … [Mr Markou] was reasonably entitled to apply an evaluative judgement as to which inconsistencies required noting as badges of potential fraud" [290]. Thus the UT accepted Mr Markou's interpretation of what his own policy required. It was entitled to do so. Whereas a different tribunal might have reached a very different conclusion about the failure to note inconsistencies, the UT's findings on that aspect of the FCA's case were open to it, and cannot be challenged as irrational. Properly understood, the Decision does not suggest that it is acceptable to overlook an inconsistency on the basis of a belief that there is no fraud. On the

contrary, the UT decided that Mr Markou's evaluation of what amounted to an inconsistency for the purpose of the policy was reasonable.

118. In any event, regardless of whether or not it was right to do so, it is difficult to see how Mr Markou could be castigated as behaving recklessly if he implemented the policy he had adopted, on the basis of his own subjective understanding of what it meant, regardless of whether an objective interpretation of the policy might have been different from that understanding.

119. So far as the Business Risk Awareness Checklist is concerned, the UT found that Mr Markou did implement the systems and controls he had adopted as suitable for FSE's business despite the FCA's proof that two of the 19 sample files did not contain a completed checklist and Mr Markou's admission that "we live in a real commercial world and sometimes these things do not happen, even though they are meant to happen." I find it hard to understand why the UT described that as a reasonable approach, as well as a realistic one, since the checklist was the means by which it could be demonstrated by FSE to its regulator that the MSP was being adhered to, and systematic checks should have flagged up the absence of such documentation. Whilst it may be frank, that answer sheds quite a telling light on Mr Markou's attitude to the need for strict regulatory compliance.

120. It appears that the UT reached the conclusion that it did on the basis that the FCA was unable to demonstrate that any more than two examples of files existed where there was no checklist. It expressly accepted Mr Markou's evidence that he did review those checklists which existed. Mr Brown made the fair point that the numbers may have been relatively small but they constituted 10% of the sample taken for the purposes of the Reference and therefore could not be disregarded as *de minimis*. It was not open to the FCA to run a case on the basis of 2,000 files, and the sample taken across the whole of FSE's business during the Relevant Period was never suggested to be unrepresentative.

121. Whilst there is considerable force in those submissions, it is difficult to challenge a conclusion that two examples are insufficient to establish a widescale pattern of failure to complete the necessary checks, particularly when considered against the whole of the evidence. In any event, I doubt that this particular point adds anything of substance to the point about the absence of a review of each file. Had that aspect of the policy been adhered to, Mr Markou should have picked up the absence of checklists, any failure by the advisors to note any inconsistencies of a type that he thought should be noted, and the failure to obtain the requisite number of payslips and bank statements.

122. The final complaint made by the FCA in relation to ground 4 concerned the Initial Disclosure Document which was given by FSE to all potential customers and which inaccurately stated that FSE had access to mortgage lenders across the market, even after certain lenders had removed it from their approved panels. The UT found at [299] that there was an inadvertent failure to update the document due to a "simple oversight". It exonerated Mr Markou from recklessness in that regard. Mr Brown submitted that on the UT's findings Mr Markou had given no thought to the need to treat FSE's customers fairly, and that he must have been aware of the risk that they would be misled if the literature was inaccurate in a material respect. However it seems to me that simply not turning one's mind to the need to update a crucial

document is careless, not reckless. In any event, it does not demonstrate a lack of integrity.

123. In conclusion on Ground 4, the UT did fall into error in its approach, though not in every respect alleged by the FCA. On the UT's fact-findings, FSE's policies were plainly not adhered to in two material respects, namely the taking of the four months' worth of payslips and bank statements, and the review of each file. It is clear from what happened on and after 12 May 2017 that non-adherence to the latter requirement had serious repercussions quite apart from the fact that it meant that the systems that FSE was supposed to put in place to safeguard against fraud were not being adhered to.

124. Was Mr Markou reckless as to the non-adherence to the policy? The answer to that question involves an evaluation of the reasonableness of his permitting or tolerating such extensive deviations from it. The UT appears to have taken the attitude that because lesser controls are implemented elsewhere in the industry and the business of FSE was small, it would have been unreasonable to expect the policy to have been adhered to. But that undermines the point of having a policy in the first place. Therefore when the UT found that the evidence demonstrated that Mr Markou was "exercising proper (reasonable and proportionate) implementation of FSE's policies and procedures during the Relevant Period," [328] it was applying the wrong test. Either the policies and procedures were implemented or they were not. Minor deviations might be disregarded as *de minimis*. The nature and extent of deviations would also have a bearing on the question whether the failures to abide by the policy were reckless or negligent or innocuous, but partial adherence to a policy, whatever the justification may be for it, cannot be equated with its implementation.

125. It seems to me that when the matter is considered from a correct application of the relevant legal principles, the FCA's criticism of Mr Markou is made out. The UT found on the evidence that he only reviewed a small proportion (5%-10%) of the client files prior to the submission to the lender, albeit that the frequency and percentage of review reduced over time as the two advisors became more established in their roles [310] and [317]. He left it to AJ to supervise JJ's work [317]. It also found that he admitted to the RDC that he did not consider that every file had to be reviewed but that 10% was the advised target (despite what the MSP stated) [318]. That means that 90% or more of the files went unchecked by him. The UT said that he was "perhaps over prepared to adopt an informal or flexible approach to his own agreed policies" [329]. That is an unduly generous assessment.

126. The fact that the two mortgage advisors were working away from FSE's office made it all the more important to implement the aspect of the MSP which required their work to be reviewed, so as to ensure all the proper steps were being sufficiently adhered to when checking mortgage applications. The UT found that AJ's client files were uploaded to the FSE server to which Mr Markou had access, and JJ brought her client files in to the FSE office in hard copy [316] so he had the means to oversee their work. Mr Markou was the regulated person, he was in a senior management position, and it was his role to carry out those reviews. He took a deliberate decision not to adhere to the policy which he had chosen to adopt, and notified the FCA he had adopted, and decided instead to adopt a less onerous approach of which the FCA was completely unaware. Not only was he aware of the risk that FSE was not complying with its adopted policies, which he had provided to the FCA and which were designed

to protect against fraud, he deliberately chose to take that risk. That is recklessness, and again it betrays a cavalier attitude towards compliance with regulatory obligations which is inconsistent with the integrity to be expected of a senior manager. It is no answer to say that no mortgage fraud actually occurred.

127. The UT's findings that Mr Markou was "reasonably intent on delivering FSE's compliance with its regulatory requirements" [315] and its exoneration of him from recklessness [322] are inconsistent with its findings as to what he actually did (or failed to do), and to the extent necessary, the test in *Edwards v Bairstow* is met as regards the areas of non-compliance to which I have referred. In any event, the UT's approach to the question of what constituted compliance with the policy was fundamentally flawed. Consequently we are justified in interfering with its conclusions in this regard and drawing the appropriate conclusions from its fact-findings.

128. Ground 5 concerned the UT's rejection of the FCA's complaint about the inadequacy of the training, monitoring and supervision of AJ and JJ, who worked away from FSE's premises. I need say very little about it because in my judgment the UT was entitled to reject the evidence of AJ and JJ on these matters for the reasons that it gave, and to make the findings that it did. It found that there were reasonable reporting lines from the two advisors to Mr Markou and that he was sufficiently accessible to them [309]. It found that there was adequate training. It was entitled to reject most of the FCA's other criticisms (other than the failure by Mr Markou to review the client files in line with FSE's policy, which I have already addressed). As Mr Rees Phillips showed us, by reference to examples, there were contemporaneous documents evidencing the relevant policies and processes which were in place during the Relevant Period, which demonstrated to the UT's satisfaction that these were subject to spot checks and compliance reviews by external consultants, regularly updated, maintained and then implemented.

129. Having had the advantage of considering all the documentation in detail and hearing the evidence of the witnesses the UT was plainly in a better position than we are to make an evaluation of the training, oversight and supervision of the mortgage advisors, and it reached conclusions with which it is not open to this Court to interfere. Ground 5 therefore fails. In fairness to Mr Brown, it was not at the forefront of his submissions.

CONCLUSION

130. For the above reasons, I would allow this appeal on Grounds 1, 2, 3 and in part on Ground 4, but dismiss it on the remaining aspects of Ground 4 and on Ground 5. The question then arises as to what should be the consequences. I do not consider it to be necessary to remit the matter to the UT. We should remake the Decision.

131. It seems to me that, having found that the FCA did establish that Mr Markou was reckless and that his recklessness demonstrated a lack of integrity, it is appropriate for us to dismiss the Reference in respect of the FCA's decision to withdraw the approval given to Mr Markou to perform the SMF1 and SMF 3 functions and in respect of the FCA's decision to make an order prohibiting him from performing any function in relation to any regulated activity carried out by an authorised person, exempt person or exempt professional firm. However, since not all the allegations made were proved,

the level of the appropriate financial penalty to be imposed on Mr Markou should be adjusted to reflect this. If my Lords agree, I would remit the matter to the FCA with a direction to impose the lesser financial penalty on him of £10,000.

Lord Justice Newey:

132. I agree.

Sir Julian Flaux, Chancellor:

133. I also agree.