[2020] EWHC 3519 (Ch)

CR-2019-004645

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**INSOLVENCY AND COMPANIES LIST**

**IN THE MATTER OF BROOKLANDS TRUSTEES LIMITED**
**AND IN THE MATTER OF THE COMPANY DIRECTORS DISQUALIFICATION ACT 1986**

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

18 December 2020

**Before**:

**Deputy Insolvency and Companies Court Judge Baister**

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**Between:**

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| **THE SECRETARY OF STATE FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY** | **Claimant** |
| **- and -** | |
| **(1) PAUL MARTIN EVANS** | **Defendants** |
| **(2) NIGEL ARTHUR WILLIAM BASSET EVANS** | |

**Mr Tiran Nersessian** (instructed by **Howes Percival LLP**) for the **Claimant**
**Mr Mark Cunningham QC** (instructed by **Addleshaw Goddard LLP**) for the **Defendants**

Hearing dates: 16, 18, 19 & 20 November 2020

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# Approved Judgment

**This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 18 December 2020 at 2.30 pm.**

**Deputy Judge Baister:**

## The claim

1. By claim form issued on 11 July 2019 the Secretary of State for Business, Energy and Industrial Strategy seeks disqualification orders against Paul Evans and Nigel Evans arising out of the insolvency of Brooklands Trustees Limited (which I shall call "Brooklands" or "the company"). The claim is supported by two affidavits of Wendy Jones and an affidavit of Matthew Phillips. Both defendants have filed and served affidavits, that of the second defendant largely adopting the evidence of the first. Ms Jones and both defendants also gave oral evidence; Mr Phillips was not called.

## The background

2. Brooklands, which was incorporated on 6 March 2006, was one of a number of companies established in that year to provide savings and retirement products, including self-invested personal pension schemes (known as "SIPPs") and small self-administered schemes, largely to expatriates. It was authorised and regulated by the FCA.[1] The first defendant was the managing director of the company at the material times; the second defendant, who is the first defendant's father, was its finance director.

3. Brooklands provided individual SIPPs through a single HMRC-registered pension scheme, The Brooklands SIPP, which had around 5,500 members and managed about £650 million.

4. In December 2009 Brooklands entered into an arrangement with a Cypriot company, FCP Insurance Consultants Limited ("FCP"), under the terms of which the latter would introduce to it international pensions business. The application form submitted by FCP stated that its business was insurance brokerage and that it was regulated by both the UK FCA and the Cyprus Insurance Companies Control Service.

5. In 2010 and 2011 FCP approached UK-resident customers, proposing that they invest in the Brooklands SIPP and/or in a fund called the LM Managed Performance Fund which invested in property developments in Australia. This was an unregulated collective investment scheme.

6. FCP's introduction to Brooklands of business from individuals in the UK created a regulatory problem as to how such customers were to be given appropriate advice. A decision was reached to use the services of a Mr Simpson operating through a company called Universal Wealth Management Limited.

7. Between August 2011 and January 2013 20 UK-resident customers entered into SIPPs with Brooklands, having been introduced by FCP. Their monies were invested in the unregulated fund. It ran into difficulties, and in March 2013 voluntary administrators were appointed over its operator, LM Investment Management Limited.

8. Complaints were made by investors to the Financial Ombudsman Service. With one exception, all of them complained that the company had failed to undertake sufficient

[1] On 1 April 2013 the Financial Services Authority (FSA) became the Financial Conduct Authority. I have followed Ms Jones's lead by simply using the initials FCA throughout. The change has no practical consequences for the purposes of this judgment.

due diligence in accepting business from FCP, as a result of which Brooklands had allowed their pension monies to be invested in a high risk unregulated fund which was not suitable for them. Those complaints culminated in adverse adjudications by the Financial Ombudsman Service in July/August 2015. Although in the defendants' view the ombudsman's finding were flawed, they were advised that the prospects of challenging them were insufficient. Advice on the company's financial position was taken which led to the appointment of administrators on 22 July 2016.

9. By 23 November 2018, the Financial Services Compensation Scheme had received 1,032 claims against the company (not all of them relevant to the allegation in these proceedings). Of the claims which it had processed by that date, the scheme had paid out 366 claims in a sum totalling £10,581,709. Evidence bringing the court up to date as at 20 February 2020 indicates that claims against the company continued to be received in 2020, taking the total up to 1,420. The total amount of compensation paid to investors who had invested in the unregulated, high risk fund stood at £7,306,569 of which £3m odd was paid as a result of claims made by the 20 customers mentioned in the allegation.

10. On 19 January 2018 the Financial Services Compensation Scheme declared the company to be in default on the basis that it had failed to carry out sufficient due diligence into both its introducers and its financial products.

11. The company was dissolved on 19 October 2018.

## The allegation

12. The allegation, set out in paragraph 7 of Ms Jones's first affidavit, is that between 31 August 2011 and 23 January 2013 the defendants failed to ensure that sufficient due diligence was carried out both in respect of entities from which the company accepted pension transfer business and products provided by those entities, as a consequence of which the company accepted pension transfer business in respect of at least 20 United Kingdom resident customers from a Cypriot based insurance company that was not licensed to advise on and facilitate the company's SIPP; furthermore, the first defendant failed to identify that the investments recommended to those customers were not suitable for them, taking account of their investment experience. The customers transferred over £3 million into the company's SIPP of which £3,335,048 was transferred to these investments. There follow a number of sub-paragraphs, a-o. I have not set out the allegation verbatim, nor do I set out the sub-paragraphs. The scope of the allegation is the subject of argument, a matter to which I shall return later. I should, however, note, even at this early stage, that the complaint in fact relates only to one entity, FCP, the Cypriot insurer mentioned in the allegation, not to two or more; and the number of customers relevant to the allegation is in fact limited to 20 as Ms Jones confirmed in cross-examination. The same allegation is made against each defendant (paragraph 8 of Ms Jones's first affidavit).

## The regulatory framework

13. The company was, as we have seen, regulated, a matter which is at the heart of the Secretary of State's case, for it is said that insufficient regard was had by Brooklands and the defendants as its directors to the regulatory framework in which it carried on business. Thus, the Secretary of State relies on a variety of FCA publications as to the

standards to which a company providing services of the kind in issue here is to be held. In paragraph 30 of his skeleton argument Mr Nersessian, very fairly, puts his client's case like this: "In line with the [Financial Ombudsman Service], the [Secretary of State] acknowledges that not all material within such regulatory material constitutes formal guidance. However, all of the materials that the [Secretary of State] relies on contain expressions of standards and expectations that are important to this court's considerations as to whether the Defendants have acted in a manner that makes them unfit". It is for that reasons that in opening his case he took me in detail through the regulatory material relied on by his client.

14. His starting point was the *FCA Handbook* and the principles stated therein. The version that I was taken to is dated October 2020. There was argument about the dates of some of the materials relied on by the Secretary of State but there was none about the section headed "Principles for Business" which sets out in paragraph 2.1 "The Principles" which I understand obtained at the material times as they do now. They are:

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| **1** Integrity | A *firm*[2] must conduct its business with integrity. |
| **2** Skill, care and diligence | A *firm* must conduct its business with due skill, care and diligence. |
| **3** Management and control | A *firm* must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems. |
| **4** Financial prudence | A *firm* must maintain adequate financial resources. |
| **5** Market conduct | A *firm* must observe proper standards of market conduct. |
| **6** Customers' interests | A *firm* must pay due regard to the interests of its *customers* and treat them fairly. |
| **7** Communications with clients | A *firm* must pay due regard to the information needs of its *clients*, and communicate information to them in a way which is clear, fair and not misleading. |
| **8** Conflicts of interest | A *firm* must manage conflicts of interest fairly, both between itself and its *customers* and between a *customer* and another *client*. |
| **9** Customers: relationships of trust | A *firm* must take reasonable care to ensure the suitability of its advice and discretionary decisions for any *customer* who is entitled to rely upon its judgment. |
| **10** Clients' assets | A *firm* must arrange adequate protection for *clients'* assets when it is responsible for them. |
| **11** Relations with regulators | A *firm* must deal with its regulators in an open and cooperative way, and must disclose to the *FCA* appropriately anything relating to the *firm* of which that regulator would reasonably expect notice. |

[2] This and others underlined/italicised terms are defined, but nothing hangs on the definitions for the purpose of this judgment.

The Secretary of State's case relies on what are said to have been breaches by the company/the defendants of principles 2 and 6, although others were referred to in passing and are plainly relevant.

15. Paragraph 1.1.1 of the *Handbook* provides that the Principles apply in whole or in part to every firm. Paragraph 1.1.2 says that they are

> "a general statement of the fundamental obligations of firms and the other persons to whom they apply under the regulatory system. […] They derive their authority from the FCA's rule-making powers as set out in the [Financial Services and Markets] Act [2000]…and reflect the statutory objectives."

Paragraph 1.1.4 says that adhering to them is "a critical factor" such that "breaching the Principles may call into question whether a firm…is still fit and proper" to do financial business. Paragraph 1.1.7 deals with the consequences of breaching the Principles (disciplinary sanctions) before going on to say, in relation to Principle 2, "[A] firm or other person would be in breach if it was shown to have failed to act with due skill, care and diligence in the conduct of its business."

16. In his opening Mr Nersessian made the point that the Principles were not akin to exhaustively drafted laws but were, rather, an expression of fundamental obligations. The surrounding regulatory material is intended to put flesh on the bones of those fundamental obligations by providing more detailed assistance on how they are to be adhered to.

17. Mr Nersessian submitted that the same can be said of the *Conduct of Business Sourcebook*. Chapter 2 deals with what are called "Conduct of business obligations." Paragraph 2.1, headed "Acting honestly, fairly and professionally," provides (at 2.1.1(1)) that "A firm must act honestly, fairly and professionally in accordance with the best interests of its client."

18. In his opening Mr Nersessian departed from the regulatory material relied on to take me to section 1 Trustee Act 2000:

> "(1) Whenever the duty under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular—
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> (a) to any special knowledge or experience that he has or holds himself out as having, and
>
> (b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.
>
> (2) In this Act the duty under subsection (1) is called "the duty of care".

19. The FCA produced a report entitled *Self-Invested Personal Pensions (SIPP) operators* in September 2009 (oddly referred to as a "thematic review" although no one can explain in what way it might be said to be "thematic"). I was taken to a number of passages. The Introduction says it is intended to "make clear what we expect of SIPP operator firms in the areas we reviewed," and urges those to whom it is addressed "to review their business in light of its contents," warning that "firms unable to demonstrate that they have analysed their systems and controls as a result of this…review, and made any appropriate improvements, may be the subject of further regulatory investigations." Chapter 2 expresses concern at "a relatively widespread misunderstanding among SIPP operators that they bear little or no responsibility for the quality of the SIPP business that they administer, because advice is the responsibility of other parties, for example Independent Financial Advisers". (This is theme of much of the regulatory material to which I was taken.) Paragraph 2.2, "Treating customers fairly," warns that SIPP operators are obliged to ensure compliance with Principle 6 "regardless of whether they provide advice". Paragraph 2.3, "Relationships with firms that advise and introduce clients to SIPP operators," reiterates the warning against the misapprehension as to the scope of responsibility for any business administered, the need to identify "obvious potential instances of poor advice and/or potential financial crime" and refers to Principle 3. Examples are given of steps that might or should be taken to ensure regulatory compliance with the Principles.

20. Before leaving the September 2009 review I should set out two important passages on which the Secretary of State relies and which Mr Nersessian cites in paragraph 31 of his skeleton argument:

> "We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ("a firm must pay due regard to the interests of its customers and treat them fairly") insofar as they are obliged to ensure the fair treatment of their customers."

And:

> "We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs."

21. Examples of good practice in which firms could engage are cited by Mr Nersessian as pertinent:

> "Confirming, both initially and on an ongoing basis, that intermediaries that advise clients…have the appropriate permissions to give advice they are providing to the firms' clients, and that they do not appear on the FSA website listing warning notices."

> "Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified."
>
> "Requesting copies of the suitability reports provided to clients by the intermediary giving advice."

22. I should also set out in full a passage relied on by Ms Jones in her first affidavit but which Mr Cunningham complains was not set out in full (it is part of section 2.3 headed "Relationships with firms that advise and introduce clients to SIPPs operators"):

> "We agree that firms acting as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However we are also clear that SIPP operators cannot absolve themselves of any responsibility, and it would expect them to have procedures and controls, and to be performing and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate SIPP's that are unsuited or detrimental for clients."

Mr Cunningham relies on it in support of the proposition that a SIPP operator is not responsible for advice given by third parties. He also stresses that the review sets out what operators "could" do and its pointing to "reputational risk". He says that "could" must not be elevated to "must," and a risk to reputation should not be elevated to the level of a "risk of disqualification."

23. There was a further review in October 2012. It refers to a significant increase in the use of unregulated collective investment schemes, but otherwise I think it is sufficient to note that it reiterates many of the points in its predecessor document, emphasising the need to undertake due diligence on introducers and investments held "particularly where this is conducted by third parties."

24. Definitive guidance appears to have come in October 2013 in the form of *A guide for Self-Invested Personal Pensions (SIPP) operators*. The date is important, given the period to which the allegation relates, but page 3 mentions that it is the second review of its kind since 2007 "when the activity of administering SIPPs became regulated by our predecessor regulator, the FSA". It goes on to refer to the original publication of the guide in 2009 and says, "These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007". It makes clear that regard must be had to Principles 2 and 6. It says that it is clear that a member of a pension scheme is a client for SIPP operators and thus a customer within the meaning of Principle 6. It abounds with examples of good practice (in particular as regards relationships with introducing and advising firms) and emphasises the importance of conducting due diligence. Unregulated collective investment schemes receive special treatment in relation to due diligence as these are "complex, opaque,

illiquid and risky, and tend to invest in high risk ventures…," and it recommends steps to be taken, drawing attention to various other communications setting out the FCA's views on risk.

25. Again I set out some of the passages on which Mr Nersessian particularly relies. The first is an example of good practice:

> "Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un-authorised business warnings."

The guidance also contains a section under the sub-heading "Due diligence," which refers to Principle 2 requiring all firms to "conduct their business with due skill, care and diligence," and stating that,

> "all firms should ensure that they conduct and retain appropriate and sufficient due diligence (for example, checking and monitoring introducers as well as assessing that investments are appropriate for personal pension schemes). "

Specific measures recommended for SIPP operators to consider include:

> "Periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate, enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme having checks which may include, but are not limited to:
>
> - ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and
>
> - undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers."

26. I was also taken to an FCA document on *Pension transfers or switches* of April 2014 which contains the statement, "We believe pension transfers or switches to SIPPs intended to hold non-mainstream propositions are unlikely to be suitable options for the vast majority of retail customers." Firms operating in this market need to be particularly careful to ensure their advice is suitable; and a Dear CEO letter of 21 July 2014 alerting readers to a recent review, encouraging firms to review the findings, and take action "to demonstrate an appropriate degree of protection for consumers' pension savings." Again there is emphasis on conducting and retaining appropriate and sufficient due diligence and assessing that "assets allowed into a scheme are appropriate for a pension scheme."

27. Much of the material relied on by the Secretary of State underlines the fact that much of the advice it contains is not about one-off checking or monitoring; it should be continuously monitored and reviewed.

28. There is much more in the same or similar vein, but I think the foregoing is more than sufficient to establish the scope and flavour of what was expected of a company such as the one of which the defendants were directors; and its importance.

## Regulatory findings against the company

29. The company's regulatory system failed, as is evidenced by findings made against it. As we have seen, the company was the subject of a significant number of complaints. Ms Jones exhibits and relies as an example on that of a Ms R Papworth which was about the SIPP the company set up for her and its investment in the L M Managed Performance Fund. Ms Papworth complained that the company did not undertake sufficient due diligence in accepting business from FCP, as a result of which her pension money was invested in a high risk unregulated fund resulting in total or near total loss to her. Her complaint is closely aligned with the allegation in this case. It was the subject of a detailed adjudicator's assessment dated 6 July 2015 which was responded to by the company's solicitors on 30 October 2015 but culminated in a decision by the ombudsman of 12 April 2016. The ombudsman's detailed decision runs to 24 pages. He upheld the adjudicator's assessment of the complaint, relying, in doing so, on Principles 2, 3 and 6, the 2009 review and other FCA guidance. At page 12 of his decision he makes the following point:

> "I accept that the 'Dear CEO' letter, the 2009 and 2012 reports are not formal 'guidance' whereas the 2013 guidance is. But the fact that the reports and the 'Dear CEO' letter did not constitute formal guidance does not mean their importance should be underestimated. They contain the regulator's thoughts on how regulatory obligations might be met and should be viewed as significant.
>
> Some of these documents were issued after the events subject to complaint, but the regulations and principles that underpin them existed throughout. Brooklands' regulatory obligations existed from the outset of Ms P's relationship with Brooklands – they did not change or evolve over time. So I think the reports, letter and guidance, which, as mentioned, each gave the regulator's view on the kinds of steps the principles might require a SIPP operator to take in practice, are each relevant considerations in this case. Some were issued after the events subject to complaint, but the regulations and principles that underpin them existed throughout."

That is precisely the point Mr Nersessian made when introducing documents that postdate the period to which the allegation in this case relates.

30. As to the ombudsman's substantive findings on the adjudicator's assessment, I cite:

> "He accepted that Brooklands was not required to conduct a suitability assessment. But, based on its requirement to treat

> customers fairly, it should have put in place risk management systems that would have flagged potential instances of unsuitable or poor advice. In this case, he felt that there were a number of issues that would have been identified had such controls been in place. These included excessive initial commission, the domicile and permissions of the introducer (FCP), and the high volume of very similar business that was introduced by one firm over a relatively short period"

He also said:

> "To be clear, I am not making a finding that Brooklands should have assessed the suitability of the LMMP fund or the SIPP for Ms P. I accept Brooklands had no obligation to give advice to Ms P or otherwise to ensure the suitability of an investment for her. My finding is not that Brooklands should have concluded that the investment was not suitable for Ms P. It is that Brooklands should not have accepted the business from FCP and failed to treat Ms P fairly or act with due skill, care and diligence or take reasonable care to organise and control its affairs responsibly by doing so. It would have been fair and reasonable for it to have done so."

Upholding Ms P's complaint, the ombudsman directed the company to pay compensation.

31. Before leaving the ombudsman's decision I should mention another brief passage from it to which Mr Cunningham took Ms Jones when she was cross-examined:

> "During 2011, FCP/UWM made seven introductions to Brooklands. This figure represented less than 1% of new business introduced to Brooklands in that year. The figure for the year before was two. While the figure for 2012 was higher (33), this only represented around 3% of new business introduced to Brooklands that year".

The importance of this is that the company's SIPP had about 5,500 members (see the administrators' report to creditors recited in paragraph 31 of Ms Jones's first affidavit). The 20 who complained to the ombudsman made up only about 1% of Brooklands' business, a figure not challenged by Ms Jones when it was put to her by Mr Cunningham.

## The company's compliance arrangements

32. Central to this case is how the company did satisfy the regulatory requirements to which it was subject.

33. The first defendant describes what he calls "Internal compliance controls at Brooklands" in paragraphs 37 ff of his affidavit. The first point to note is that he is here using "Brooklands" to refer to a number of companies; the second is that what he goes on to describe, as he confirmed in cross-examination, was not internal at all but the exact opposite, for the company's administration and compliance functions were outsourced from the very beginning to companies that have changed from time to time,

although the underlying function and staff remained constant. The change was not for any sinister reason but because the compliance company moved between Emirate states, and local laws required the incorporation of a new company when the function moved. The final incarnation was Strategic Admin Solutions FZ LLC ("SAS") located in Dubai which the first defendant describes in his affidavit as an "affiliate company." In his oral evidence he clarified what he meant by that, which was that he and his brother were its directors. Senior members of SAS whose names feature in the evidence include Matthew Tailford, who worked there between 2008 and 2010, and later James Bonner who worked for SAS until 2015. It had a team of 30 people engaged in administrative and/or compliance work. Quarterly checks were undertaken to monitor the quality of that work.

34. SAS's work was in turn monitored by an independent consultancy, Enhanced Solutions Limited. Enhanced Solutions undertook two reviews a year of SAS's work and reported to the board of Brooklands. The first defendant said, "We would then have the team in to consider what needed to take place to meet the requirements." The first defendant accepted that the twice yearly checks were not exhibited to his affidavit. He does, however, say in paragraph 45 of his affidavit, "At no time did Enhance raise issues of the type now complained of by the Secretary of State." The Enhance reports were considered by the board. The second defendant said in cross-examination that they had been given to the administrators. That is why they too had not been produced.

35. The FCA also reviewed the company from its regulatory perspective. Here we do have some documents. It conducted a review in 2009 which resulted in a letter of 23 April from Amarit Maunmi which, she says, "summarises my assessment and any next steps that may be taken.". Her overall assessment was:

> "We consider that you are in a position to demonstrate that consumers can be confident they are dealing with a firm where the operation of its SIPP scheme is being run in accordance with FSA regulatory requirements. You were also able to demonstrate that areas of your business are delivering fair outcomes for customers such that consumers can be confident that they are dealing with a firm where the fair treatment of customers is central to its culture."

The thoroughness of the review reported on in Ms Maunmi's letter was explored at trial. It was not a full inspection or an audit, but the first defendant thought it had been quite thorough, and I am inclined to accept that since there is reference in the second paragraph to information given "during our discussion" but also to "information available to us prior to conducting the assessment." I say that in spite of not knowing the full scope of the information provided (beyond that it must have been regarded as adequate) and the addition of a disclaimer at the end of the letter to which Ms Jones drew attention. The disclaimer refers to it as a "high level review…not an examination or audit [so] may not identify all of the risks associated with the past, current and proposed activities;" and it goes on to say that "it should not be assumed that it has identified all possible areas of difficulty and non-compliance." Whilst the report contains recommendations and suggests steps to be taken, it is plain that the FCA was satisfied with what the company was doing.

36. A letter of 16 May 2014 reports on the outcome of what is described as a "thematic assessment" conducted on 18 February 2014, again by the FCA. The date means that I should not attach too much weight to this in the light of the period to which the allegation relates, but I accept the first defendant's point made to Mr Nersessian in cross-examination that the review would necessarily have looked back in time and not just to the year in which the assessment took place, and on that basis I do attach some weight to the finding, "The review of Brooklands Trustees Limited's due diligence procedures did not identify any significant failing." The letter also says:

> "We accept that the current due diligence and business acceptance procedures…appear suitably robust to mitigate this risk [that associated with high risk, non-standard investments identified in the preceding paragraph]. Only 11 of the approved investments have received any investment monies since January 2012. However, given the obvious risk of consumer detriment from inappropriate investments we require the firm to put in place a process to keep their due diligence and non-standard acceptance procedures and controls under review to prevent the firm being used as [a] conduit in this way."

37. I will presume that was done, as confirmation of implementation was sought by 23 May 2014 and there is no evidence of any subsequent action, as one would expect if it was not. Again, I note the disclaimer at the end of the letter.

38. The first defendant gives evidence of further monitoring of the company in the form of a telephone interview with the FCA of 29 July 2011 which he relies on "as further endorsement of [the company's] culture, systems and controls and, specifically, of its investment due diligence arrangements" (paragraph 48 of his affidavit). There is no documentary support for this, but the fact that it happened was not challenged, only the thoroughness of something done over the 'phone. He also refers to the FCA's having had "regular interaction" with the company after 2009 and the fact of its not hesitating to identify poor practice.

39. I should end this section of my judgment by saying something about the first defendant's evidence on risk assessment. The evidence on this arose in the course of Mr Nersessian's cross-examination of the first defendant and his statement that there were regular meetings between the company and SAS (this in the context of Mr Nersessian's putting to him that he was part of the regulatory team to which he replied "Yes"). My note of his evidence (which, like all of them, is not verbatim) records that the first defendant said that "There was a risk-based procedure. FCP hardly produced any cases at first. We concentrated on significant business. It was being done by reference to the level of business done."

40. Later in cross-examination the first defendant accepted Mr Nersessian's proposition that the board of the company was obliged to supervise SAS's work. He said, "Yes, it has oversight. We took it seriously to see that SAS performed its duties, hence the audit" [by Enhance, I presume].

## The company's regulatory failures

41. In spite of the FCA's positive assessments and in spite of the systems the company had put in place Brooklands failed in regard to the company's relationship with FCP and failed 20 customers, of which Ms Papworth was just one. The defendants do not dispute this, nor could they realistically do so in the light of the ombudsman's unchallenged findings. The first defendant does, however, maintain "that Brooklands undertook suitable and sufficient due diligence on FCP when the relationship with it was formed" and solved the problem that arose in relation to its introduction of UK-resident customers.

42. The relationship with FCP began in December 2009 with its making a written application to submit business. The application, in what looks to have been standard form at the time, seeks information about the prospective introducer backed by a declaration to be signed on behalf of the applicant emphasising the importance of the completeness and accuracy of the information given. It also requires the production of certified copies of any relevant regulatory licence and confirmation of the identity and residence of the directors or principles of the prospective introducer. Under the heading "Fitness and standing" the answer "No" is given to a number of questions as to whether the applicant, its directors or principles had ever been refused authorisation or licensing, had such revoked, been publicly censured, disciplined, suspended or expelled from a regulatory or professional body and the like. The application also records the nature of FCP's business as "insurance brokerage." The "passport" section of its record on the FSA register listed the services for which it was authorised in the EEA as "Insurance Mediation or Reinsurance Mediation," both, Mr Nersessian points out in his skeleton argument, activities defined by art 2 of Directive 2002/92/EC on Insurance Mediation. It is unnecessary to set them out: the point is that FCP was never authorised to provide pensions introduction services or investment advice anywhere in the EEA.

43. The first defendant leads no evidence as to what steps were taken to make any specific checks on FCP. In paragraph 18 of his affidavit he says that on the basis of the application the company formed the view that FCP had the necessary regulatory permissions, was authorised and had produced a copy of its licence, had not done anything that might cause the company to doubt its bona fides, credentials and expertise, had been providing services for "a substantial length of time" and had as its principals individuals of appropriate experience and qualifications. In his oral evidence he mentioned checks of the usual kind using Google and other online sources. He was taxed about failing to adduce any copy documents, especially the licence, and admitted it could not be found. He did, however, recall seeing what I take to have been a passport photograph of Graham Donald, one of FCP's directors, and his surprise that he was apparently older than he had expected, and that led him to believe that the relevant documents must have been provided and examined. I accept his evidence as to that. He could not otherwise remember details of any monitoring of FCP, certainly none that he undertook himself. The thrust of his evidence was that it was done by SAS under the supervision of Mr Bonner. He also pointed out that, as far as risk management was concerned, FCP never became a significant introducer of business.

44. On 16 February 2011 the Board of the Cyprus Securities and Exchange Commission announced that it had imposed a financial sanction on FCP and three other entities for breach of the Cypriot Investment Services and Activities and Regulated Markets Law 2007 by making representations through their websites "purporting to offer investment

services professionally in the Republic without holding a…Cyprus Investment Firms licence, as required by law." The sanction took the form of a fine of €5,000. The last paragraph of the announcement records,

> "That it does not appear that [FCP] actually provided investment services to investors and it only purported to do so on the website at issue and that the said website no longer exists."

The company failed to pick up this information which, as Ms Jones points out in her first affidavit, was published before the company accepted business from FCP from UK residents. The first defendant says that the first the company knew about the fine was when it came up in connection with the work done by the Financial Ombudsman Service when

> "I and others undertook internet searches and…that information about the fine was available only in Greek and on the website of the Cyprus Securities Exchange Commission."

Like Mr Nersessian, I am unsurprised that the announcement was made only in Greek, that being the official language of Cyprus (at least the part of the island with which we are concerned here). If, as the first defendant says in paragraph 12 of his affidavit, the company's business was predominantly with individuals not resident in the UK its regulatory and compliance systems ought to have included checks in line with its international reach, which should have included arrangements to search material in languages spoken in countries with which the company did business.

45. FCP was expected to be an introducer of non-UK business. In December 2011 administrative or compliance staff spotted that it had been submitting applications for investment by individuals who appeared to be resident in the UK. This, as I understand it, meant that regard had to be had to particular regulatory requirements: specifically, it gave rise to an obligation to ensure that investors introduced by FCP had received appropriate independent advice. Mr Bonner, who, as I understand it, raised the issue in the first place, was entrusted with the task of finding a solution to a problem that had already arisen. That took the form of engaging the services of a Mr Ray Simpson who the first defendant described as a highly qualified and experienced adviser. He could not, it seems, give advice in a personal capacity, so an arrangement was reached whereby he would do it through Universal Wealth Management Limited. A document entitled "Introducer Sign-Off" confirming the arrangement is dated 15 November 2012, which attests to the fact that it took some time (the Secretary of State says too much time) to put the new advisory arrangement in place. I should perhaps mention here too an email of 26 October 2012 from Graham Donald of FCP to Mr Simpson saying that Brooklands was happy with the proposed arrangement, but that Bernie Saker of Brooklands required confirmation that Mr Simpson really existed. so she would be 'phoning him. This too is relied on by the Secretary of State as an indication of dilatoriness on the part of the company, which I note, although I should also say that the existence of Mr Simpson is not in issue.

46. As a matter of fact, the solution turned out to be no such thing. Almost no customer appears to have been given the requisite advice by Mr Simpson or Universal Wealth Management. The first defendant accepted Mr Nersessian's assertion that the solution did not solve the company's problem: "I agree. I was not involved. I was told they

[FCP] had a contract with Ray as an independent adviser but it had to go through his firm;" and later he accepted that only two clients were advised by him. He explained this by saying that he had left Mr Bonner in charge of arrangements and accepted that, having done so, there were still administrative failings.

47. The professional and regulatory obligations to which Brooklands was subject, or to which it ought to have had regard, were continuing obligations; they did not arise only when the company began to do business with a new introducer but were intended to be reviewed in the light of changing practice, as the regulatory advice reviewed above makes clear. It is plain that little was done in relation to FCP after its initial application other than to deal with, and, I accept, provide what turned out to be an inadequate solution to, the problem that arose as a result of the introduction of UK-resident business. The impression I gained from the first defendant's oral evidence was that all efforts were concentrated on advice and that other due diligence considerations were overlooked. Having "solved" the problem by using the services of Universal Wealth Management the first defendant believed he had solved all FCP related problems, which was simply not the case.

48. As we have seen, twenty people introduced by FCP invested in SIPPS through the company between August 2011 and January 2013, so after the fine, which was not spotted, but, I understand, also after the more general advice problem that had arisen and been identified. The first defendant explained that in many cases funds had already been transferred and could not be returned.

49. Ms Jones relies on the scope of the activity for which FCP was regulated: the provision of insurance and reinsurance services. In cross-examination the first defendant explained that it was common for that to include pension and investment services in the case of foreign entities: "This was typical of offshore firms. In Australia and New Zealand they say 'superannuation,' but 'insurance' often covers a wide range of things." Later he said, "With hindsight we all believed Cyprus firms could do investment business." He went on to point out that three other firms had been fined at the same time as FCP. I am content to accept that as being the case.

## The law

50. The law on directors' disqualification is well known to all concerned in this case so I propose to deal with it quite shortly.

51. Section 6 Company Directors Disqualification Act 1986 provides that three conditions must be satisfied in order for a disqualification order to be made, namely that:

    1. the company has at any time become insolvent within the meaning of section 6 of the Act;

    2. the defendant was a director of the company;

    3. the defendant's conduct as a director was such as to make him "unfit to be concerned in the management of a company".

52. Deciding any individual case involves a three stage process described by Blackburne J in *Re Structural Concrete Ltd* [2001] BCC 578:

> "(1) do the matters relied upon amount to misconduct; (2) if they do, do they justify a finding of unfitness; and (3) if they do, what period of disqualification, being not less than two years, should result?"

The first stage involves an investigation of the conduct complained of as set out in the allegation. It is largely a factual exercise directed at answering the question, has the conduct complained of been made out on the facts before considering whether it warrants the description "misconduct". In carrying out that exercise the court must have regard to the matters listed in Schedule 1 paragraphs 1-4 of the Act; but they are not exhaustive. If misconduct is made out on the facts, the court proceeds to the question whether it warrants a finding of unfitness. If those two questions are answered in the positive the court moves to the third stage, deciding the period for which a disqualification order, which is then mandatory, should be made.

53. In his skeleton argument Mr Cunningham makes much of the need for the court to confine itself in its inquiry into misconduct to the scope of the allegation. He emphasises the words "whether the conduct upon which the Secretary of State relies" used by Blackburne J just before the passage cited above. There must be clarity as to that, he submits. He relies on a statement in *Mithani: Directors' Disqualification* that "…the court should only look at the specific allegations that have been made by the claimant in the written evidence" and a following passage citing from a judgment of Neuberger J in *Re Deaduck, Baker v Secretary of State for Trade and Industry* [2000] 1 BCLC 148:

> "When considering whether the conduct of the director has been such as to justify a disqualification order, the court is limited to the conduct the subject matter of the charge. Rule 3(3) [of the Disqualification Rules 1987] provides: "There shall in the affidavit or affidavits [supporting the disqualification application]...be included a statement of matters by reference to which the defendant is alleged to be unfit to be concerned in the management of a company." Clearly when considering the specific grounds upon which a person is alleged to be unfit, the court, in a case such as this, is limited to the ground or grounds specified in the affidavit evidence in support of the application."

54. If misconduct is largely a matter of finding the facts and checking that they are within the scope of the allegations, finding unfitness is very much a matter of judgment. In In *Re Bath Glass* (1988) BCC 130 Peter Gibson J said:

> "To reach a finding of unfitness the court must be satisfied that the director has been guilty of a serious failure or serious failures, whether deliberately or through incompetence, to perform those duties of directors which are attendant on the privilege of trading through companies with limited liability. Any misconduct qua director may be relevant, even if it does not fall within a specific section of the Companies Act or the Insolvency Act."

55. In *Re UKLI Ltd* [2015] BCC 755 Hildyard J held:

> "It being a major concern of the [Company Directors Disqualification Act] to raise standards and to protect those who deal with companies which have the benefit of limited liability from directors who have in the past departed from such standards, a finding of unfitness does not depend upon a finding of lack of moral probity: the touchstone is lack of regard for and compliance with proper standards, and breaches of the rules and disciplines by which those who avail themselves of the great privileges and opportunities of limited liability must abide…Although the touchstone of unfitness should reflect the public interest in promoting and raising standards amongst those who manage companies with the benefit of limited liability, the test is always whether the conduct complained of makes the defendant unfit, and not whether it is more generally in the public interest that a person be disqualified: thus, for example, the question is whether the present evidence of the director's past misconduct makes him unfit, not whether the defendant is likely to behave wrongly again in the future."

He went on to describe the exercise as making a value judgment:

> "'Unfitness' is ultimately a question of fact, or, as Dillon LJ stated in *Re Sevenoaks Stationers (Retail)* Ltd [1991] Ch. 164, 'what used to be pejoratively described in the Chancery Division as "a jury question"': but, as the authorities demonstrate, a less pejorative and possibly more accurate description may be a "value judgment". As such, that determination of unfitness involves a comparison with a standard of behaviour against which the conduct complained of may be measured.'"

56. It is not all misconduct that warrants a finding of unfitness. In *Re Grayan Building Services Ltd* Hoffmann LJ said that the conduct had to be such that

> "...viewed cumulatively and taking into account any extenuating circumstances [it had] fallen below the standards of probity and competence appropriate for persons fit to be directors of companies."

It is also *Re Grayan* on which Mr Nersessian draws in his skeleton argument for the following from Henry LJ who pointed out:

> "The concept of limited liability and the sophistication of our corporate law offers great privileges and great opportunities for those who wish to trade under that regime. But the corporate environment carries with it the discipline that those who avail themselves of those privileges … must accept the standards laid down and abide by the regulatory rules and disciplines in place to protect creditors and shareholders. And, while some significant corporate failures will occur despite the directors

> exercising best managerial practice, in many, too many, cases there have been serious breaches of those rules and disciplines, in situations where the observance of them would or at least might have prevented or reduced the scale of the failure and consequent loss to creditors and investors."

Mr Cunningham cites formulations about misconduct other than that of Hoffmann LJ in *Re Grayan* (paragraph 26 of his skeleton argument):

> "'total incompetence' (see *Re Lo-Line Electric Motors Ltd* [1988] Ch 477 D 486 per Browne-Wilkinson V.C.: incompetence 'in a very marked degree' (see [*Re*] *Sevenoaks* [*Stationers (Retail) Ltd* [1991] Ch 164] at 184 per Dillon LJ); and 'really gross incompetence' (see *Re Dawson Print Group Ltd* [1987] BCLC 601 per Hoffmann J). In *Re Barings & PLC* [1999] 1 BCLC 433, Jonathan Parker J, considered all these cases and, at 483, distilled the calibration into the following test:
>
> > '...the burden is on the Secretary of State to satisfy the court that the conduct complained of demonstrates incompetence of a very high degree'."

57. As to the requisite degree of competence that must be proved before a disqualification order can be made, Mr Nersessian submits that the court should be wary of setting the bar too high. In support of that he relies on a passage from the judgment of Morritt LJ in *Baker v Secretary of State for Trade and Industry* [2001] BCC 273:

> "34. In Section III of the judgment the judge dealt with certain issues of law. We refer to some of them, not because they were challenged by Mr Baker, but because they are relevant to the approach the judge took to the evidence and the matters relied on by the Secretary of State as demonstrating the unfitness of Mr Baker.
>
> 35. In Section IIIA the judge made a number of observations on the proper construction and application of the Act to which we refer, not because we disagree with the judge, but because we wish to emphasise the propositions to which he referred. First, the court must consider the question of 'unfitness' by reference to the conduct relied on by the Secretary of State and decide whether 'viewed cumulatively and taking into account any extenuating circumstances, it has fallen below the standards of… competence appropriate for persons fit to be directors of companies' ([1999] 1 BCLC 433 at p. 483b). Thus it is no answer to the allegations of the Secretary of State that separately and individually none of them is sufficiently serious to demonstrate the requisite unfitness. Secondly, the matter referred to in Sch. 1, para. 6, namely, 'the director's responsibility for the causes of the company becoming insolvent', requires a broad approach and is not to be assessed by reference to nice legal concepts of causation (p. 483f–g). Thus it matters not that others may also

> have been responsible for the causes of the insolvency whether more or less proximately. Thirdly, where the allegation is incompetence without dishonesty it is to be demonstrated to a high degree (pp. 483j–484b). This follows from the nature of the penalty. Nevertheless the degree of incompetence should not be exaggerated given the ability of the court to grant leave, as envisaged by the disqualification order as defined in s. 1, notwithstanding the making of such an order. Fourthly, it is not necessary for the Secretary of State to show that the person in question is unfit to be concerned in the management of any company in any role. This test, described by the judge as the lowest common denominator approach, is not what the Act enjoins. As the judge observed, the court is concerned only with the respondent's conduct in respect of which complaint is made set in the context of his actual management role in that company. If his conduct in that role shows incompetence to the requisite degree then a finding of unfitness and a consequential disqualification order should be made (p. 485d–h). Fifthly, a finding of breach of duty is neither necessary nor of itself sufficient for a finding of unfitness (p. 486d–g). As the judge observed, a person may be unfit even though no breach of duty is proved against him or may remain fit notwithstanding the proof of various breaches of duty."

58. In his closing submissions Mr Cunningham produced a further passage from *Mithani* (paragraph 410B) warning against "an unrealistic analysis of what a director could and should have done in the face of any difficulties that existed at the time when the conduct of the director fell into question." A footnote takes one to *Re Finelist Ltd, Secretary of State for Trade and Industry v Swan (No 2)* [2005] EWHC 603 (Ch) (a case about directors immersed in their business and clinging to hope, so not quite like the case here) and a number of other authorities on the point including the first instance judgment of Jonathan Parker J in *Re Barings (No 5)* [1999] 1 BCLC 433 in which he warns against "applying the wisdom of hindsight."

59. I have been taken to authority in less familiar areas too. Ms Jones refers in her first affidavit to a judgment of Jacobs J, *Berkeley Burke SIPP Administration Ltd v Financial Ombudsman Service Ltd* [2018] EWHC 2878 (Admin) in which the court dismissed an application for judicial review of a decision of the Financial Ombudsman Service. In her first affidavit Ms Jones draws attention to the fact that an issue in the case was the failure of the ombudsman to follow a previous decision of the Pensions Ombudsman Service. Jacobs J noted that the two statutory schemes differed (paragraph 138 ff of his judgment). I do not think I need concern myself with that. I was, however, taken to two passages from the judgment which are important for present purposes:

> "88. The Ombudsman then gave his answer to the question: 'did BBSAL act fairly and reasonably towards Mr C'. He said that he was doing so 'by considering what BBSAL's obligations meant in practice, what the firm did, and what it should have done. The Principles and appropriate due diligence are relevant considerations here'. He then addressed the following topics:

> 'what did BBSAL's obligations mean in practice' (p 17); the due diligence carried out by BBSAL (p 18); 'what should BBSAL have done (p 18); and 'If BBSAL had completed sufficient due diligence, what ought it reasonably to have concluded' (p 20). At the end of that section, he concluded that:
>
> > 'After considering these points, I don't regard it as fair and reasonable to conclude that BBSAL acted with due skill, care and diligence, or treated Mr C fairly by accepting the investment in SA. BBSAL didn't meet its regulatory obligations, and it allowed Mr C's funds to be put at significant risk as a result.
> >
> > I'm not making a finding that BBSAL should have assessed the *suitability* of the SA investment for Mr C. I accept BBSAL had no obligation to give advice to Mr C, or to ensure otherwise the suitability of an investment for him. My finding isn't that BBSAL should have concluded that Mr C wasn't a candidate for high-risk investment. It's that BBSAL should have concluded the investment wasn't *acceptable* for his pension scheme and thereby failed to treat Mr C fairly or act with due skill, care and diligence when accepting the investment.'"

And:

> "91. At one point in his submissions, Mr Kirk [leading counsel for the claimant] correctly said that Principle 2 was a very wide general principle, and that what it amounts to may be 'very subjective', with different people holding different views about what a SIPP operator ought to do. He submitted that the Principle had to be applied 'reasonably and proportionately'. He also said, again correctly, that Principle 6 was very wide. These submissions to my mind fortify the conclusion that the Ombudsman in the present case was not creating a new rule, but was applying the wide Principles 2 and 6 to the facts before him. The difficulty for BBSAL is that the Principles are indeed wide. But as Mr Strachan [leading counsel for the defendant] submitted, this was the virtue of the rules, not their vice."

60. If Jacobs J's judgment points one way (at least in some respects), the judgment of HHJ Dight in *Adams v Options UK LLP* [2020] EWHC 1229 (Ch) points, it is claimed, in a different direction. Mr Cunningham relies on it because of what the judge says (at paragraph 162 of his judgment) about the status of some of the guidance relied on in this case by the Secretary of State:

> "The Thematic Review cannot properly be described as a set of rules or even guidance and in my judgment cannot give rise to a claim for failing to follow the suggestions it makes."

Mr Cunningham says that that and the non-mandatory language used in the full FSA preamble make it "difficult to say that the defendants were under any obligation to identify that FCP was not licensed to offer investment advice. If there was no obligation to discharge then the failure to discharge it cannot attract a finding of misconduct."

61. *Adams* is going to the Court of Appeal. An application to adjourn this case to await the outcome of that appeal was refused by ICC Judge Prentis on 26 October 2020. For reasons which will become apparent, I respectfully agree with Judge Prentis's decision.

## The submissions

62. The submissions were detailed. I have touched on some already and I shall deal with others when I come to my conclusions; but I think I should set out in summary form the case of the Secretary of State and the defendants.

63. The Secretary of State's case can be reduced to a few simple propositions. The defendants were obliged to conduct the business with the competence required by the general law but also with regard to the Principles set out in paragraph 14 above. That means they were responsible for ensuring that systems were put in place sufficient to identify and prevent the kind of error that occurred at Brooklands and led to the complaints of and compensation paid to the 20 customers that Brooklands let down. Whilst it is acknowledged that not all the regulatory material relied on by the Secretary of State constitutes formal guidance, all of it contains expressions of standards and expectations that are important to the court's consideration as to whether the defendants' failures, as set out in the allegation, amounted to misconduct such as to makes them unfit. As Mr Nersessian says in paragraph 30 of his skeleton argument,

> "The [Secretary of State] commends the approach taken by the FOS to such materials…in its preliminary decision in the complaint of Ms R Papworth: '…the fact that the [thematic] reports and "Dear CEO" letter did not constitute formal guidance does not mean their importance should be underestimated. They contain the regulator's thoughts on how regulatory obligations may be met and should be viewed as significant.'."

64. Although his position on the relevance of HHJ Dight's findings in *Adams* diverges from Mr Cunningham's, he nevertheless relies on the authority but for a different proposition: he draws attention to the judge's description of the extensive due diligence undertaken by the SIPP provider in that case and the passage:

> "23. […] [T]he Defendant had prior to receipt of the Claimant's application form already conducted a number of due diligence exercises in relation to the Store First Investments in order to establish that the investment was a legitimate investment and one that was capable of being held in a SIPP pursuant to HMRC guidelines. The Defendant's due diligence into the Store First Investment included:
>
> 23.1 obtaining a report from Enhanced Solutions with regard to the suitability of Store First as an investment to be held within a SIPP. Enhanced Solutions is an independent company which

> offers various reporting and consultancy services, including impartial assessments of the appropriateness of investment strategies;
>
> 23.2 an internal review by the Defendant's compliance team at the time of legal documentation and literature relating to Store First. Template leases and sub-leases were reviewed. Significant research on Store First and the proposition was completed. Checks were conducted on the directors and shareholders and company accounts from 2004 to 2010 were reviewed;
>
> 23.3 obtaining and checking comprehensive company reports and accounts in respect of Store First investment and the due diligence that had been obtained and certified that the Defendant could administer investments in Store First."

65. The allegation is made in the same terms against each defendant. Mr Nersessian contends that both are equally responsible for the company's regulatory failings which amount to misconduct and warrant the making of an order.

66. The brunt of Mr Cunningham's submissions is that the "shortcomings" (the word he used in closing) complained of are accepted and regretted but cannot be said to amount to misconduct at all or to the degree required to constitute unfitness and justify disqualification. He relies on the Secretary of State's failure to identify in the allegation any duty or obligation that was breached, only recommendations. He invites the court to calibrate regulatory materials of the kind relied on by the Secretary of State: there is material that imposes an obligation, saying what must be done; there is material that indicates what should be done or could be done. The latter amounts to suggestion, which is the level of regulation we are largely dealing with in this case. We are not in the realms of breach of obligation at all.

67. The word "sufficient" was, he said in closing, pivotal to the allegation. The evidence demonstrated that the company had good systems in place. What went wrong only related to a small proportion of the business the company conducted and amounted, in essence, to a single failure. The adequacy of the company's systems was such that it survived FCA monitoring checks. It was significant that the FCA itself had taken no action against the defendants.

68. The court should be wary of imposing a requirement of perfection: it is easy to criticise with the benefit of hindsight.

69. As a matter of law, four different adjudications have established that a failure to adhere to regulatory recommendations and the like does not amount to a breach of obligation: (a) the decision of the adjudicator; (b) the decision of the ombudsman; (c) the judgment of Jacobs J in *Berkeley Burke*; and (d) the judgment of HHJ Dight in *Adams*.

70. The high burden posited by Jonathan Parker J in *Re Barings* has not, he submits, been met.

## Conclusions

71. Mr Cunningham accepts that the two qualifying conditions set out in section 6(1)(a) Company Directors Disqualification Act 1986 (insolvency and directorship) are met, so I do not need to deal with those but can, as he suggests, move to the stages identified in *Re Structural Concrete*.

72. The fact that Brooklands and its directors, the defendants, have been found to have been guilty of incompetence, the evidence of that being the ombudsman's decision in the *Papworth* case and the payments to other complainants, is evidence enough of incompetence. Apart from that, the first defendant has admitted that the company failed in its dealings with the 20 customers referred to Brooklands by FCP and has expressed regret for that. But even Mr Nersessian, who places reliance on those important facts, does not suggest that I can simply import the ombudsman's findings into the regime with which this court is dealing, so that that is the end of the matter. Nor is this court concerned with the defendants' fitness to work in the financial services sector. That is the province of others. This court is conducting an inquiry of a wholly different nature in a different legislative context. I propose to conduct that inquiry by asking myself a series of questions, dealing with the submissions of the parties and my conclusions on them as I go.

73. Before doing so, however, I should say something about the witnesses and the quality of their evidence.

## The witnesses

74. I found Ms Jones to be an honest and straightforward witness. She was subjected to a probing cross-examination which involved not just testing the facts on which she relies but a forensic dissection of the allegation and the way it is put. She withstood it well, showing at the same time that she was willing to concede points that went against the Secretary of State's case when she found it appropriate to do so. I have no reservations about the quality of her evidence.

75. The first defendant's written evidence leaves much to be desired. Whilst it says quite a lot, it is light on precision. A telling example of this emerged early in the course of the first defendant's being cross-examined when he explained that his use of "Brooklands" was not restricted to meaning the company (this in spite of the definition flagged in paragraph 4) but was also used to include the "group" of companies run under the Brooklands banner. A similar criticism can be made of his account of the compliance systems in place at Brooklands and when, and on timing in general. His written evidence also suffers from over reliance on the passive voice, meaning that it is often hard to tell who exactly he claims did what and when. It is unfortunate because all that gives the impression of a lack of frankness, even concealment. That impression was reinforced by the first defendant's tendency to give oral evidence about what would have happened as opposed to what he actually knew did happen. It is a common error, and I gave the first defendant a warning about it, after which he did not stop entirely but did much better. My initial suspicions based on those points were, however, dispelled by the general manner in which the first defendant gave his oral evidence. He was cross-examined by Mr Nersessian for the best part of a day as a result of which greater detail emerged than was to be found in his affidavit. He was not a perfect witness, but I found him generally to have given his oral evidence openly and frankly.

He was able to clarify many of the points in his written evidence about which I was harbouring reservations. In short, I think he was in the end an honest witness doing his best to assist the court.

76. The second defendant's cross-examination, like his affidavit, was short. In truth he had little to add to the evidence given by his son. Mr Nersessian, who was critical of the first defendant's evidence, conceded that the second defendant had been doing his best. I do not think I can sensibly add anything to that.

## What is the scope of the allegation?

77. This is the first question I ask myself. It is an important one since it was the subject of much debate. The allegation is analysed in some detail in part B of Mr Cunningham's skeleton argument and formed a significant part of his cross-examination of Ms Jones. He began by cross-examining her on the bold text under the heading "Matters determining unfitness" between paragraphs 33 and 34 of her first affidavit as if it were the basis of the Secretary of State's case. Ms Jones said it was simply a summary or restatement of the allegation proper, and rightly took Mr Cunningham back to paragraph 7. It was a fair exercise but ultimately fruitless. Mr Cunningham probed Ms Jones about the meaning of "ensure" in the second line of paragraph 7 of her first affidavit, asking who she claimed was the object of the verb. Ms Jones patiently explained that the first defendant had a duty of due diligence to the company which he had failed to see was carried out. Asked whose job it was to do the due diligence, she said she could not say; all she could say was that the first defendant had failed to ensure it was done. Asked whether her complaint was about a failure to put in a system or that the defendants had failed to do the due diligence themselves she said (my note is not verbatim), "I say they had a duty to ensure that a system was in place; a duty to the company and the clients." There was more in this vein, but again, in my view, it took the case nowhere. Mr Cunningham also tested the meaning of the word "sufficient," asking Ms Jones what was sufficient. She said that she relied on the standards set by the FCA, standards which she said the defendants had failed to meet. She also conceded at one point that good practice was not mandatory and accepted that there was no systemic failure at the company. She was less helpful to the defendants about the proportion of the business affected by the FCP failure. She accepted Mr Cunningham's percentage but also pointed out the level of compensation that had been awarded.

78. Mr Cunningham also undertook an analysis of the allegation(s) in paragraph 7 by reference to what he described as the body of the allegation and sub-paragraphs (a)-(o), separated from the body by a colon, the meaning of which he also scrutinised. He elicited the concession that some of the sub-paragraphs were simply narrative, another (d) comment, that (g) was a reiteration of a point already made but an insistence that (g), (h), (j) and l did constitute complaints forming part of the allegation.

79. I do not think the allegation has been drafted sufficiently tightly, and much of it is infelicitously worded. I have already pointed out that the reference in paragraph 7 of Ms Jones's affidavit to two entities was in fact conceded to mean just one, namely FCP; and that the reference to "at least 20" customers was in fact limited to 20: there were no more, at least no more on whose complaints reliance was being placed. That said, as is well known in this jurisdiction, in *Re Continental Assurance Co of London plc* [1996] BCC 888 1997], 1 BCLC 48 Chadwick J said,

> "I accept and endorse the need to ensure that anyone against whom proceedings are taken under s. 6 of the 1986 Act knows what the case is that they have to meet. Rule 3(3) of the 1987 Rules is designed to ensure that. But I deplore any tendency to introduce into this jurisdiction the inflexibility of a criminal indictment. What is essential is that the party knows what the criticism is. In my view, Mr Burt [the defendant] was well aware of what the criticism was in this case."

So it is in this case. The defendants did not seek further information about the allegations as they could have done. Furthermore, as Mr Nersessian demonstrated, paragraph 6 of the first defendant's affidavit shows a clear understanding of the criticisms made by the Secretary of State in this case, certainly sufficient to have enabled both defendants to challenge them effectively. The first defendant does so by looking at the allegation as being twofold: he calls the first limb the suitability allegation and the second the acceptability allegation. Both terms were used by both sides in the course of the hearing. The acceptability allegation is the failure to identify that FCP was not licensed to offer investment advice. The suitability allegation is the failure to identify that the investments recommended by FCP were not suitable for the UK customers who in fact invested. That analysis demonstrates a sophisticated grasp of the Secretary of State's case.

80. There is one respect, however, in which I find the allegation is defective. If I understood Ms Jones correctly when she gave her oral evidence, she conceded that by limiting the reference in the allegation to one entity she was excluding reliance on a failure on the part of the defendants to do sufficient due diligence on Universal Wealth Management. Mr Nersessian did his best to correct that in re-examination and more robustly in his closing submissions, and indeed the concession (if that is what it was) sits uneasily, arguably, with sub-paragraphs (k) and (l) of paragraph 7 of Ms Jones's first affidavit and with the evidence given in paragraphs 21 ff of her second affidavit which deals with Universal Wealth Management at some length. I do not think that is either sufficient or sufficiently clearly part of the allegation, and for that reason I decline to treat the company's dealings with Universal Wealth Management as part of the allegation, although plainly it remains part of the factual background to what went on at the material times.

81. Another complaint made by Mr Cunningham is the failure to set out in the allegation the duties relied on by the Secretary of State. I disagree. The defendants were bound by the Principles set out above. It is plain that they ought at all times to have had regard, at the very least, to Principle 2 (A firm must conduct its business with due skill, care and diligence), Principle 3 (A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems) and Principle 6 (A firm must pay due regard to the interests of its customers and treat them fairly). The first reflects the duty to exercise reasonable care, skill and diligence provided for by section 174 Companies Act 2006. There is, of course, a difference between duties owed under the general law and duties that arise, whether resulting from regulation or otherwise, by virtue of the trade or profession in which an individual or his company is engaged, but in this case the distinction, in my view, is artificial: the general Companies Act obligation (of which the defendants as directors ought to have been aware but by which they were bound) necessarily entails compliance with, as the

very least, the Principles of professional conduct underpinning the profession in which they are or were engaged in their role as financial services providers. The failure to set out the duties and the breaches complained of is, then, in my view, of no significance.

## Are the facts of the allegation made out?

82. Here and under the next heading I turn to the first stage of the inquiry outlined by Blackburne J in *Re Structural Concrete Ltd*.

83. Modified in the light of Ms Jones's concessions, stripping out reliance on anything that goes to the company's relationship with Universal Wealth Management Limited and putting the allegation into my own words, the essential elements of it seem to me to boil down to the following:

> (a) The period to which the allegation relates is 31 August 2011 to January 2013.
>
> (b) During that period the defendants failed to ensure that the company did sufficient due diligence in relation to pension transfer business from FCP which was not licensed to advise on and facilitate the company SIPP.
>
> (c) That failure adversely affected 20 UK residents in that the defendants failed to identify that the investments recommended for them, being unregulated collective investment schemes, were not suitable for them.
>
> (d) The value of such investments amounted to £3,413,525.
>
> (e) Specifically, the company (for the acts of which both defendants, as the board, were responsible):
>
> (i) failed to identify that in February 2011, before investments were accepted, FCP had been fined for purporting to offer advice for the provision of which it had no licence (paragraph 7 sub-paragraph (h));
>
> (ii) accepted two referrals in January 2012 even after it had contacted FCP to say it could not continue to accept such business and more generally without establishing who was providing advice to FCP's UK customers (l).

84. There was no argument before me about the period relied on by the Secretary of State. The due diligence undertaken was insufficient in that it failed to identify the mischief complained of by the Secretary of State (although I say that conscious of the need to deal with sufficiency to which I return later). Point (c) went unchallenged, as did points (d) and (e). To the extent that it might be said there may be any doubt about that I make clear that I find the facts of the allegation to have been made out. I do so on the evidence before me, irrespective of findings made elsewhere, although those of the adjudicator and the ombudsman fortify my own conclusion, as, of course, do the failings admitted and regretted by the defendants themselves.

85. Before leaving the facts of the allegation I should, however, say something about the significance in the context of the allegation of the financial sanction imposed on FCP and the failure on the part of anyone at the company to spot it. Mr Nersessian helpfully clarified how his client was putting his case. He was not suggesting, as I had thought, that the imposition of a fine of itself made it wrong to continue to accept business from FCP; rather, the fact of FCP's having been fined (had it been picked up) would or should have alerted the company and the defendants to the need to keep a close eye on any business FCP was referring, and had the company or its directors done so, it could or should have seen that appropriate advice was given to customers in line with professional and regulatory guidance, which in turn could or should have averted their investing in a risky fund that was not suitable for them. That seems a sensible proposition which I accept.

86. If the facts of the allegation are made out, as I find, the next question is whether they give rise to misconduct.

## Do the facts alleged and proved amount to misconduct?

87. Misconduct for the purpose of disqualification can take the form of dishonesty or incompetence. There is no suggestion in this case of dishonesty. I have made a finding of incompetence.

88. One of Mr Cunningham's many attacks on the allegation in this case is on the Secretary of State's failure to identify and "plead" the duties it is said the defendants have breached. (In her oral evidence Ms Jones accepted that none had been identified in her affidavit.) "[T]he burden is on the Secretary of State to prove the subsistence of a duty or obligation the breach of which might amount to misconduct", he says. "The obvious necessity of there being an antecedent duty or obligation can be inferred from the use of the word 'failed' as the doorway into the allegations of unfitness. There can only have been misconduct if the Defendants had 'failed' to do something they were obliged to do" (paragraph 14 of his skeleton argument).

89. Mr Cunningham submits that the material relied on by the Secretary of State did not create duties or obligations: rather, they are largely recommendations or examples of good practice. As he puts it in paragraph 15 of his skeleton argument, "It is hard to see how a measure that a SIPP operator 'could consider' as a 'good practice', that has been observed as such by the FSA, and has been the object of 'suggestions' made by the FSA, could possibly be elevated to a duty or obligation the breach of which amounts to misconduct." He bolsters that proposition by reference to HHJ Dight's finding in *Adams v Options,* at least as regards the thematic review. It follows, he contends, from that finding in *Adams* and from the non-mandatory language of the review as to the advisability of "taking basic measures such as checking, on an ongoing basis, that advisers who introduce clients to them are FSA authorised and have appropriate permissions" that the recommendation to do so fell short of being an obligation; it follows that a failure to discharge it cannot amount to misconduct. If that is the case for the acceptability limb of the allegation, the point is more powerful as regards suitability, he says, relying in support of that on the clear statement in the review "that firms acting as SIPP operators are not responsible for the SIPP advice given by third parties…"

90. In his skeleton argument Mr Nersessian makes what he describes as a preliminary submission: the Secretary of State does not accept that HH Judge Dight's comment on

the status of thematic reviews (or any other similar FCA published material) is instructive or relevant to the current claim. The judge's statements as to the status of FCA thematic reviews were made, he says, in the very specific context of a Part 7 claim for damages based on a breach of statutory duty and negligence. Furthermore, the issue the judge had to decide was the proper construction of the COBS rules that were alleged to have been breached and the scope of the duties they dealt with. It was in that specific context that the judge commented on the status of thematic reviews; their general evidential merit for determining the standard of required behaviour for SIPP providers was never considered nor questioned. It follows, Mr Nersessian submits, that what the judge said in *Adams* is of no assistance to the present case which is about something quite different.

91. I do not agree with Mr Cunningham's proposition as to the need to identify a breach of a duty or obligation and then demonstrate breach as a prerequisite for finding misconduct. I agree with Mr Nersessian that a breach of duty is neither necessary nor of itself sufficient to find unfitness, as indeed I think I must in the light of Morritt LJ's dictum at the end of paragraph 35 of his judgment in *Baker v Secretary of State* cited above. It seems to me that a director of a company which carries on a business that is a profession or is regulated must have regard to the overarching principles governing his or her profession or the service his or her company is providing and to what is regarded by the relevant regulator as good practice, and that a serious or pervasive failure to do so must be misconduct.

92. That being the case I am driven to find that this is a case in which the defendants have been guilty of misconduct as alleged. But that is not the end of the matter: it leads to the question whether it amounts to misconduct to the degree required by authority.

**Does the defendants' misconduct amount to incompetence of a sufficient level?**

93. I begin my answer to this question by asking another: did the defendants ensure that sufficient due diligence was done to avoid the mischief which they themselves accept occurred?

94. I have already described the due diligence, regulatory and compliance systems the defendants put in place. They seem sufficient to me as they did to the FCA based on the three monitoring events relied on by the defendants. Ms Jones did not suggest otherwise, at least on a general level. Plainly, however, they were not sufficient in that they failed to identify the problems as to the acceptability and suitability criteria as they affected the 20 customers who suffered as a result of what the first defendant admitted had been administrative failures.

95. Having regard to the general adequacy of the company's administrative systems I do not think the conduct that I have found proved can be said to amount to incompetence in a very marked degree, really gross incompetence or incompetence of a very high degree. In saying that I by no means disregard Morritt LJ's warning in *Baker* against exaggerating the degree of incompetence that is required, but do take into account the following.

96. First, "sufficient" cannot be elevated to mean perfection, as Mr Nersessian accepted. Mistakes occur in the best run organisations. This is a case where a mistake (or mistakes) were made. We do not know exactly how they came about, but the first

defendant's admission that there was administrative failure must, I think, be taken to mean that somewhere along the line there was human error, as there inevitably is from time to time. The label "human error" is not an excuse, but it is an explanation. It was in fact in this case a series of human errors or perhaps an initial human error followed by a failure of judgment. The initial error was not to pick up the fine against FCP. The second was not to keep a close eye on the business that FCP referred, which in my view was the defendants' responsibility, at least after they were told by Mr Bonner that there was a problem. If the initial error can be laid at the door of Mr Bonner or another individual or individuals at SAS, it was compounded by the first defendant's failure to supervise and ensure the effectiveness of the remedial steps that then needed to be taken. For what it is worth, I think the first defendant thought that the Universal Wealth Management solution made the problem go away, when in fact it did not.

97. Secondly, if the incompetence was an administrative failure, albeit one compounded as I have just said, at heart it related to a single business relationship: that with FCP; in that respect the failure may be said to be an isolated one, not one that was rooted in the way in which the company was run. The problem at the heart of the allegation was not in any sense pervasive.

98. Thirdly, the business in issue was a small proportion of the business the company transacted. The £3m odd loss to the public purse to which that gave rise is a significant sum, but that does not detract from the fact that all the cases in which compensation was made arose from a single ill-advised relationship. Again, there was nothing pervasive. I appreciate that that will be of little or no comfort to the investors concerned, but this is not a case about compensation any more than it is about the defendants' fitness as financial advisers; it is about whether they should be disqualified from holding the office of director. I do not think their failings are such as to engage the policy principles addressed by Hildyard J and which I have set out above.

## Are the defendants unfit to be directors?

99. Having determined the first of Blackburne J's stages in favour of the defendants I do not need to go to stage two. Both Mr Nersessian and Mr Cunningham accepted that in many ways the two stages elide. Nevertheless, as a matter of caution I shall treat unfitness as a separate stage, as Blackburne J said it was, and deal with it as such, not least lest it be said that I was wrong in my determination of the first stage.

100. The Company Directors Disqualification Act does not define unfitness. As Mr Nersessian says, the court is the sole arbiter of whether a director is unfit or not. It must make the value judgment described in *Grayan*, taking into account when doing so all the circumstances, including, of course, the regulatory circumstances.

101. I would say first that the points I have already made about the degree of incompetence in this case go to the question of unfitness too.

102. I also remind myself that I am concerned here with the defendants' conduct "qua director," a phrase I take from the judgment of Peter Gibson J *Re Bath Glass*. Whilst I accept, as Mr Nersessian asserts, that the supervisory buck in Brooklands stopped with the defendants, and the first in particular, and thus does go to an extent to their having been directors of the company, it seems to me that it has more to do with their competence as financial services providers. Their limited failings in that regard may

have implications, but not implications as to their right to trade with the protection of limited liability, requiring the protection of the public or otherwise going to the policy considerations enunciated by Hildyard J in *Re UKLI Ltd*.

## Result

103. For the reasons I have given I shall dismiss the Secretary of State's claim.

## Postscripts

104. In his closing submissions Mr Cunningham indicated that the outcome of these proceedings was likely to be the subject of scrutiny in the world of financial services. That may be so, but if it is I should add a word of warning to anyone who might read it as if it were some kind of precedent, for in my view it is not; it is, in common with most directors' disqualification cases, simply a case on its facts culminating in the court's making a value judgment on those facts as stated by Hildyard J in *Re UKLI Ltd*. That is my first postscript.

105. My second is about the use of language. In the 1980s Staughton J pleaded with lawyers and judges to abandon the old fashioned and obscure language of the law and to write in plain English, as most judges now at least try to do. That trend has been met by a countervailing trend in the world of administration and regulation to write in an increasingly obscure style, often using superfluous words or words of uncertain meaning. The word "thematic" used for a review or assessment, for example, seems to add nothing to the noun "review," just as describing a summary as an "executive summary" rarely implies more than is conveyed by the simple noun the word "executive" precedes. The expression "high level" used by the FCA gave rise to a lively debate about what it might mean. I thought it meant "of a high standard" or "thorough" or something like that, but that meaning did not work in the context in which it was used; Ms Jones thought it might refer to something carried out by a senior member of staff. Legal cases often involve poring over the meaning of words (and in this case even punctuation). The more straightforward the language the better, is the general rule in my view. If any regulators do in fact read this judgment I would ask them to note and act on my plea for them to use ordinary, plain English wherever possible.