FINANCIAL SERVICES TRIBUNAL

Chairman: **Mr Paul R. Beckett**
Members: **Mrs I. Marion Lawrence**
Mr Adrian Tinkler

IN THE MATTER of the Financial Services Act 2008

and

IN THE MATTER of an Application for a review of the decision taken by the Financial Supervision Commission, namely, the issue of a Warning Notice dated 24 October 2011 to each of Pritesh Ramesh Desai, Nigel Andrew Anthony McFarlane and Jayne Marian Evett

PREAMBLE

1. Pritesh Ramesh Desai ("Mr Desai") Nigel Andrew Anthony McFarlane ("Mr McFarlane") and Jayne Marian Evett ("Ms Evett") (together the "Appellants" and each "Appellant") have applied for a review pursuant to section 32 Financial Services Act 2008 (the "Act") of the decision of the Financial Supervision Commission (the "FSC") to issue a Warning Notice to each Appellant on 24 October 2011, pursuant to section 11 of the Act the ("Notices" and each a "Notice").

2. The Tribunal has been presented with voluminous papers and had the benefit of three days of submissions from Counsel at the full Hearing which commenced on 13 September 2012, was adjourned and resumed from 20 to 22 November 2012. Advocate Robert Colquitt ("Advocate Colquitt") appeared for the FSC and Advocate Tom Maher ("Advocate Maher") appeared for the Appellants. Save where Advocate Maher made specific reference to the applicability of a Notice provision to an individual Appellant, his submissions were applied to all three Appellants. The Tribunal has nevertheless reviewed the evidence in relation to each Appellant separately in reaching its conclusions.

3. The Tribunal has read and considered all the documentation presented to it and has taken fully into account all oral submissions. This being the case, the Tribunal has chosen not to quote extensively from such material when delivering its Decision but instead to highlight the conclusions which it has drawn from that material and to set out the consequences for the FSC and for the Appellants.

THE WARNING NOTICES: 24 OCTOBER 2011

4. The three Warning Notices each dated 24 October 2011 addressed to Mr Desai, Mr McFarlane and Ms Evett, are substantially identical in form and the Appellants have elected to appeal jointly against the Warning Notices having been issued. Nevertheless, as is apparent from the face of the Notices themselves, there are differences between the capacities in which Mr Desai, Mr McFarlane and Ms Evett are addressed. In addition, the period of effectiveness of each Warning Notice is not identical. The Warning Notice addressed to Mr Desai is to have effect until 15 April 2014 and the Warning Notices addressed, respectively, to Mr McFarlane and to Ms Evett are to have effect until 15 April 2013.

5. The Warning Notices take the form of a Notice addressed specifically to Mr Desai, Mr McFarlane and Ms Evett in their various capacities together with an Appendix which is identical in each case.

6. The Warning Notices are set out in the schedule to this Decision (the Appendix is reproduced in this Decision only once to avoid unnecessary duplication).

THE APPELLANTS' GROUNDS OF APPEAL

7. Each of the Appellants seeks a review of the decision of the FSC to issue the Notices on the following grounds which the Appellants have ranked in order of prominence and priority (as set out in paragraph 7 of the Appellants' Statement of Case):-

(i) **First Ground of Appeal** – "*the Notices be revoked with immediate effect as the FSC did not follow due process, fair and appropriate regulatory procedures (including, without limitation, avoiding conflicts of interest in the decision making process), principles of natural justice and/or human rights legislation ("Due Process") and therefore the issue of the Notices was fatally flawed by such procedural irregularities, breach of natural justice and breach of Due Process.*"
The First Ground of Appeal is therefore procedural in nature. In essence the Tribunal is asked to consider whether the statutory procedure was followed, whether the Tribunal has the discretion or the authority to augment such a procedure and if so whether it is minded to do so. The First Ground of Appeal is not concerned with motivation or whether the FSC's factual understanding was correct.

(ii) **Second Ground of Appeal** – "*the Notices be revoked on the grounds that they contain material factual errors and inaccuracies, are based on several misunderstandings of fact, relate to matters which were the subject of a Warning Notice issued against Pritesh Desai on 5 March 2010 and a Regulatory Letter to Blue Sea International Limited dated 5 March 2010 and therefore have already been subject to investigation, review and consideration by the FSC.*"
The Second Ground of Appeal is therefore factual in nature. Were there errors of fact?

(iii) **Third Ground of Appeal** – *"that the FSC's exercise of its discretion on the basis of the facts set out in the Statement of Case of the Appellants in relation to the issue to the Notices was improper, unfair and/or unreasonable and the Notices should therefore be revoked."*

The Third Ground of Appeal therefore requires a substantive (but objective and not subjective) review of the facts. Questions of motivation and the review of allegations of impropriety fall under this Ground of Appeal. The Tribunal is aware that the FSC is not infallible and may therefore make mistakes. It is for this reason, as submitted by Advocate Colquitt, that an appeal may be made to the Tribunal. However, the question is whether a regulatory body objectively assessed in exercising its functions would have acted in the manner in which the FSC acted. The Tribunal notes that it is a truism of administrative law that even in circumstances where the exercise of a discretion is itself not open to challenge, the manner of the implementation of that discretionary decision undoubtedly is.

SOURCE AND SCOPE OF THE TRIBUNAL'S JURISDICTION

8. Section 32 of the Act establishes the Financial Services Tribunal ("the Tribunal"). Any person who is aggrieved by a decision of the FSC to give a Warning Notice under section 11 of the Act or the terms of such a Notice (section 32(3)(i)) may appeal to the Tribunal. On the determination of an Appeal the Tribunal shall confirm, vary or revoke the decision in question (section 32(4) of the Act). Any variation or revocation of a decision shall not affect the previous operation of that decision or anything duly done or suffered under it (section 32(5)). Any decision of the Tribunal on an Appeal is binding on the FSC and on the Applicant(s) (section 32(6) of the Act) however an Appeal lies to the High Court, in accordance with the Rules of the Court, on a question of law from any decision of the Tribunal (section 32(7) of the Act).
9. The Financial Services Review Regulations 2001 (Statutory Document No. 332/01) lay down the procedure to be followed by the Tribunal (the "Regulations" and individually "Regulation").
10. Under Regulation 24(1) the Tribunal must decide, taking into account in particular the Applicant's grounds of review and the Reply of the Regulatory Authority (in the present case the FSC) whether:-
    (a) The disputed decision is based on an error of fact;
    (b) The disputed decision is wrong in law, or
    (c) The Regulatory Authority's exercise of its discretion in relation to the disputed decision was justified on its merits.

11. In this context a distinction must be drawn between determining that a decision is wrong in law (which would be a determination within the powers of the Tribunal) and that a decision is based on a law which is wrong (which would be *ultra vires* the Tribunal).

12. It follows from section 32(7) of the Act that the Tribunal is empowered to determine the facts of any appeal and that the High Court is bound by such a determination. There is, therefore, no right of Appeal from a decision of the Tribunal under Regulation 24(1)(a) in circumstances where the Tribunal rules that the disputed decision is based on an error of fact.

13. An Appeal will lie to the High Court on any decision of the Tribunal that the disputed decision is wrong in law (Regulation 24(1)(b)). The Tribunal adopts a broad interpretation of its powers under Regulation 24(1)(b) and is not constrained to review only the Act and the Regulations but also to take into account any legal principle which has a bearing on the Appeal which any of the Appellants or the FSC shall submit in argument.

14. An Appeal does lie to the High Court in respect of any decision of the Tribunal under Regulation 24 (1)(c) that the FSC's exercise of its discretion in relation to the disputed decision was (or was not) justified on its merits.

RULES OF EVIDENCE

15. Regulation 23(1) provides that evidence before the Tribunal may be given orally or by affidavit or in a statement and that the Tribunal may at any stage of the proceedings request the personal attendance of any deponent or maker of a written statement.

16. Regulation 23(2) empowers the Tribunal to receive evidence of any fact which appears to the Tribunal to be relevant whether or not the evidence (a) would be admissible in a Court of Law or (b) was available to the FSC when the disputed decision was taken.

17. Regulation 23(2) therefore permits the Tribunal to take into account *inter alia* the extracts from Hansard concerning debates in the House of Keys, both leading to the passing of the Act and in the current session of the House of Keys on the possible amendments to the Act, which were referred to in their submissions by Advocate Colquitt and Advocate Maher.

18. The standard of proof to be applied by the Tribunal is the civil standard, by which a fact must be shown on the balance of probability to be true. The higher criminal standard, by which a matter must be proved beyond reasonable doubt, does not apply.

19. The burden of proof is on the Appellants to refute the allegations which the FSC has made against them.

20. The Tribunal adopts a narrow interpretation of its powers to receive evidence which would not be admissible in a Court of Law. Unsupported or inadequately supported statements of fact or statements which amount to nothing more than speculation or conjecture (whether contained in the written material presented to the Tribunal or in oral submissions) have been discounted by the Tribunal.

REGULATION 20

21. Regulation 20(1) provides that where the Tribunal has received the Appellant's Statement of Case and the FSC's Reply, the Tribunal must without delay decide whether it is appropriate to conduct a Pre-Hearing Review with a view to:-

(a) Identifying the issues which are likely to be material to the Tribunal's decision;
(b) Expediting the proceedings at the hearing, and
(c) Assisting in the management of the Review.

22. Regulation 20(2) provides that the Tribunal may, if it is satisfied that to do so will produce a substantial saving in the cost of the Review, determine at the Pre-hearing review any question of law arising in relation to the Review which the Tribunal is satisfied will significantly affect the outcome.

PRE-HEARING REVIEW 31 MAY 2012

23. In correspondence with the Tribunal, Advocate Tom Maher (Counsel for the Appellants) and Advocate Robert Colquitt (Counsel for the FSC) adopted a diametrically opposed stance on the manner in which the Tribunal should hear the Appeal.

24. Advocate Maher contended that the First Ground of Appeal should be heard by the Tribunal at a Pre-hearing review under the provisions of Regulation 20 as a preliminary point or question of law.

25. Advocate Colquitt for the FSC contended however that in order fully to address the First Ground of Appeal, the Tribunal would need to be made aware of the full factual background to the issuing of the Notices and not merely (as Advocate Maher contended) to any points of legal principle which may apply.

26. On 31 May 2012 at a Pre-Hearing Review, pursuant to Regulation 20, which took the form of a Directions Hearing ("Pre-Hearing Review") the Tribunal in addition to setting out a timetable for the filing and exchange of Case Summaries, Skeleton Arguments and Witness Evidence ordered on 4 June 2012 (at paragraph 5) "The substantive hearing to be dealt with in phases, with the first phase of such focussing on the first ground of appeal (" the first ground") and to be followed by a pause when the Tribunal will consider its decision on the first ground, however before such a pause Counsel will be invited to call any witnesses they feel may be relevant to their argument on the first ground".

27. To accommodate the opposed views of Advocate Maher and Advocate Colquitt therefore the Tribunal invited each to make such submissions in support of or in opposition to the First Ground of Appeal as each felt appropriate. In the event that the Tribunal were to find in favour of the Appellants on the First Ground of Appeal the matter would thereby be concluded. In the event that the Tribunal were to find in favour of the FSC on the First Ground of Appeal, Counsel for both parties would be free to supplement any submissions made in relation to the First Ground of Appeal, hearing first from Advocate Maher on behalf of the Appellants and then submissions from Advocate Colquitt on behalf of the FSC. The Tribunal made it clear to Counsel at the Pre-Hearing Review that, in the event of the Tribunal proceeding to consider the Second and Third Grounds of Appeal, no adverse inference would be drawn by the Tribunal from any augmentation or

variation of the submissions made by either Counsel in relation to the First Ground of Appeal.

HEARING OPENED AND ADJOURNED: 13 SEPTEMBER 2012

28. The Hearing was opened on 13 September 2012 and it became immediately apparent to the Tribunal from the preliminary remarks of Advocate Colquitt that the admissibility, scope and relevance of documentation presented to the Tribunal subsequent to the Pre-Hearing Review was not agreed by Counsel.

29. Advocate Colquitt raised objections to the content of the Responsive Submissions of the Appellants dated 18 July 2012 ("Responsive Submissions"), and in particular to the inclusion of annotations to the common Appendix to all three Notices ("Appendix"). He submitted that this amounted to an unauthorised attempt to amend (contrary to the provisions of Regulation 5) the Statement of Case of the Appellants, but acknowledged that he had failed to take the point prior to the Hearing. He submitted that the Responsive Submissions be disallowed, or in the alternative that the Hearing be vacated to permit the FSC to respond. He further submitted that were the Tribunal nevertheless minded to admit the Responsive Submissions into evidence, then the FSC should be given 21 days following the Hearing to respond – in effect, leaving the matter part-heard.

30. Advocate Maher robustly defended his stance on the filing of the Responsive Submissions, arguing that the bulk of the annotations to the Appendix were in fact comments cut and pasted from Advocate Colquitt's own skeleton submissions.

31. Both Counsel referred the Tribunal to Regulation 26, which deals with irregularities, and to Regulation 22(2) requiring the Tribunal to conduct the Hearing fairly and without undue formality, and to Regulation 22 (8) by which the Tribunal has power to adjourn. In reaching its decision the Tribunal took this into account.

32. The Hearing was therefore adjourned, and by Order dated 14 September 2012 the Tribunal, having heard from the parties, and the Appellants having with the consent of the FSC successfully sought leave under Regulation 5(2)(c) by the filing of the Responsive Submissions, and the FSC having accepted the Tribunal's invitation made pursuant to Regulation 5(6) to send a revised Reply to the Tribunal, Ordered *inter alia* that (using its powers under Regulation 29 to dis-apply the period of 14 days referred to in Regulation 5(6))

the FSC should file its amended Reply by 5 October 2012, but that any further filing by the Appellants should be subject to an application by the Appellants for further amendment of the Statement of Case pursuant to Regulation 5.

ORDERS MADE SUBSEQUENT TO THE PRE-HEARING REVIEW

33. There then followed a series of administrative Orders (17 October 2012, 25 October 2012, 7 November 2012 and 14 November 2012) made necessary by the wish of the FSC to file papers in addition to their amended Reply. These Orders form part of the Tribunal record and are not reproduced here. All the administrative Orders were made with the consent of the parties.

34. The result was that upon the resumption of the Hearing on 20 November 2012 the canon of documentation to be considered by the Tribunal was in an agreed form.

35. Both Advocate Colquitt and Advocate Maher when asked by the Tribunal at the opening of the resumed Hearing whether either would seek to appeal any of the foregoing Orders pursuant to Section 32(7) of the Act (which provides: "*An appeal shall lie to the High Court, in accordance with the rules of court, on a question of law from any decision of the Tribunal*") confirmed that neither would do so, and so it was unnecessary for the Tribunal to determine whether the Tribunal is bound under section 32(7) to grant leave to appeal or whether such leave to appeal may be granted only in accordance with applicable Rules of the High Court applied by analogy; and whether a right of appeal is confined to a final decision of the Tribunal or may include interlocutory decisions.

REGULATIONS 2(1) AND 29(1): PREVIOUS NOTICES AND APPEALS

36. The Tribunal is empowered under Regulation 24(1) to review only the Warning Notices which are the subject of the current Appeals and to base this review on the written pleadings and oral submissions of the parties in the present Appeals. The Tribunal regards as outside the scope of its powers of review any previous Warning Notices addressed to any or all of the parties and any previous Appeals submissions, save that the Tribunal has taken into account the fact of the existence of such previous Warning Notices and Appeals as forming part of the background history of, and setting in context, the present Appeals.

37. With regard to the present Appeals the Tribunal in order fully to bring its collective mind to bear on the problem must be prepared to receive evidence of the chronology of events leading up to the issuing of the Warning Notices which are the subject of these Appeals. This does not mean however that the Tribunal will be bound to review submissions made in any previous Appeals by

the Appellants. The Tribunal in exercising its functions under Regulation 24 does so *de novo*.

THE TRIBUNAL AND THE HIGH COURT COMPARED

38. The following analysis formed part of the *ex tempore* decision of the Tribunal on the First Ground of Appeal delivered on 21 November 2012 (referred to more fully below) but is of general application and so is dealt with here.

39. The comparative powers of review of the High Court in doleance proceedings and of the Tribunal under the Regulations was the subject of case law cited and submissions made by Advocate Colquitt and by Advocate Maher in relation to all three Grounds of Appeal. Those submissions and the cases to which the Tribunal was referred have been fully considered by the Tribunal and are not reproduced here save as set out below.

40. Advocate Maher suggested to the Tribunal that the Tribunal, not being a court, ought not to limit its jurisdiction by reference to case law on doleance or judicial review, but should regard itself as having in effect unlimited powers of review.

41. By comparison, Advocate Colquitt referred the Tribunal to the principles set out in the Judgment of His Honour Deemster Doyle in the matter of *MTM (Isle of Man) Limited* 2003-05 MLR 415 (CHD) in which it is stated that the Tribunal should in the words of Deemster Doyle (paragraph 2 of the decision) "let the Commission get on with its difficult job".

42. The case of *MTM (Isle of Man) Limited*, a decision of the High Court of the Isle of Man handed down on 7th October 2004, concerned Petitions of Doleance (now known as Doleance Claims) and examined the circumstances in which the High Court would upon request by a Petitioner seek to overturn a decision of a public authority, which in that case as in the present appeal was the FSC. Deemster Doyle, quoting Acting Deemster Moran in *Re Kinrade* (an unreported decision of the Chancery Division of the High Court of the Isle of Man dated 14th May 2004) endorsed Acting Deemster Moran's analysis that a Petition of Doleance "is not a means whereby the Court is willing to substitute its own decision for those of the impugned decision maker and it is not suitable or appropriate or intended for the wholesale resolution of disputed issues of fact".

43. Deemster Doyle (at paragraph 34) ruled "the Doleance process is concerned with reviewing not the merits of the decision in respect of which the Petition of Doleance is filed but the decision making process. It is not for the judiciary to substitute their own decisions for the decisions of the body constituted by law to decide the issues in question. The concern of the Court is whether the decision making entity exceeded its powers, committed an error of law, committed a breach of natural justice, reached a decision which no reasonable entity could have reached or abused its powers".

44. Deemster Doyle continued (at paragraph 35) quoting Deemster Kerruish in *Re Malew Parish Commissioners* 2001-2003 MLR 129 "a Petition of Doleance is the

process by which the High Court exercises its supervisory jurisdiction over the decisions of inferior Courts, Tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties. The Court is concerned with reviewing not the merits of the decision, but the decision making process itself. It is no part of that purpose to substitute the opinion of the judiciary or an individual Deemster for that of the authority constituted by law to decide the matters in question. The duty of the court is to confine itself to the question of legality".

45. Advocate Colquitt submits on this basis that the facts as determined by FSC when issuing a Warning Notice under Section 11 of the Financial Services Act 2008 are not open to challenge.

46. Expanding on this point, Advocate Colquitt put forward the argument that in respect of facts which have been the subject of previous Warning Notices or of any previous decision of the FSC, if not having been challenged at the time using the appeal facility of the Tribunal itself, should be deemed time-barred (under Regulations 2(1) and 29(1) and therefore irrefutable. The Tribunal rejects this argument. Were it to be followed to its logical conclusion no fact, no matter how misconceived or erroneous, put forward by the FSC would be open to challenge if it had once formed part of a decision of the FSC and had gone unchallenged.

47. Further, the Tribunal does not agree with Advocate Colquitt's analysis of the decision in *MTM (Isle of Man) Limited*. A Doleance Claim is seeking to persuade the High Court to intervene and the High Court has discretion whether or not to do so.

48. When constituted to hear an Appeal, the Financial Services Tribunal exercises its powers under Regulation 24. It must do so. It is not a matter of the Tribunal's discretion whether or not to grant relief. The Tribunal is obliged to confirm, vary or revoke the decision in question. Therefore once an Appeal against a decision of the FSC has been made to the Tribunal that decision, although remaining in force pending the outcome of the Appeal, owes its continuing existence to the Tribunal. The Tribunal is not reviewing the decision making process of the FSC. The Tribunal is part of the decision making process of the FSC. The Tribunal is not a Court and has no Doleance powers.

49. Regulation 24 makes it plain that in being part of this decision making process the Tribunal is to review the evidence, not the least important aspect of which review is for the Tribunal to establish that there has been no error of fact. There can be no question of the Tribunal being bound by the FSC's inclusion, exclusion or interpretation of any fact.

50. The Tribunal regards as conclusive of this approach the absence of any fact-based right of appeal under section 32(7) of the Act. A finding of fact by the Tribunal is, on the analysis of Deemster Doyle in *MTM (Isle of Man) Limited* 2003-05 MLR 415 (CHD) as little open to judicial review as are the initial findings of fact of the FSC itself.

DECISION ON THE FIRST GROUND OF APPEAL

51. The Tribunal's decision was delivered *ex tempore* on 21 November 2012. The Chairman referred to the scope of the Tribunal's jurisdiction (see paragraphs 8 to 14 above), made a comparison between the Tribunal and the High Court (see paragraphs 38 to 50 above), set out the rules of evidence applicable to the Tribunal (see paragraphs 15 to 20 above), and classified the First Ground of Appeal as procedural (in comparison to the fact based Second Ground of Appeal and the substantive Third Ground of Appeal) (see paragraph 7 above). These matters having been addressed elsewhere (as indicated) in this Decision, they are not repeated here.

52. *Rules of Evidence applied.*

(a) Advocate Maher referred to a further paper which had been requested by the Appellants from the FSC relating to the review procedure undertaken by Mr John Aspden (Chief Executive of the FSC) ("Mr Aspden") but which had not been provided. The Tribunal has no power under the Regulation 23 to compel a person to attend who has not filed a witness statement and has no power to compel evidence to be produced.

(b) Advocate Maher referred to another person who had been the object of a Notice under section 11 of the Act, but did not identify that person or establish any connection to the present Appeals otherwise than by illustrative analogy. The Tribunal regards such evidence as incomplete and speculative, and as such outside the evidential bounds set by the Tribunal (see para 20 above).

53. *Human rights and natural justice.*

(a) The First Ground of Appeal referred to a possible breach of the human rights of the Appellants. This was however not raised in Advocate Maher's submissions. The Tribunal notes that under section 4 Human Rights Act 2001 only the Judicial Committee of the Privy Council and the High Court have the power to rule on the incompatibility of any legislative or administrative provision with the provisions of the European Convention on Human Rights.

(b) Advocate Maher made a very powerful case that principles of natural justice should inform the decision making process of the FSC, and called for "fair play in action". The Tribunal notes however that it has no power to vary the terms of the Act or of the Regulations. The Tribunal was referred by both Advocate Colquitt and by Advocate Maher to the House of Lords decision <u>Wiseman and Another v Borneman and Another [1971] AC 297</u> one plank of the decision in which was that a court has the power to imply into a statutory procedure a rule of natural justice. The Tribunal is not a Court, has no doleance powers (see para 48 above) and cannot so act.

54. *Fairness and due process*

(a) Fairness in relation to the First Ground of Appeal refers to regulatory procedures. The Tribunal lacks authority to adjudicate (see para 11 above).

(b) Expanding the idea that the FSC ought to express its concerns to a person before issuing a section 11 Notice, Advocate Maher proposed what Advocate Colquitt characterised as a "Pre-Warning Warning". The Tribunal notes that there is no provision in section 11 of the Act for a "Pre-Warning Warning" of the kind proposed. It must be presumed that Tynwald's intention was not to make provision for such preliminaries, and in evidence cited by Advocate Colquitt [Hansard Volume 130, No. 4] the House of Keys on 13 November 2012 again did not take the opportunity to introduce such preliminaries when considering further amendments to the Act. In Paul Wallis Furnell v Whangarei High Schools Board [1973] AC 660 to which the Tribunal was referred by Advocate Colquitt the Judicial Committee of the Privy Council approved the dictum of Lord Reid in Wiseman v Borneman (see paragraph 53(b) above): "[N]o-one supposes that justice requires that [the accuser] should first seek the comments of the accused or the defendant on the material before him."

(c) The Tribunal in any event lacks the authority to imply such preliminaries (see paragraph 48 above).

55. *Legitimate expectation*

Advocate Maher submitted that as the FSC before issuing a section 11 Notice to Mr Desai on 5 March 2010 had engaged in discussions with him, that the Appellants had a legitimate expectation that a similar consultation process would have been followed prior to the issue of the Notices the subject of these appeals. The Tribunal agrees with Advocate Colquitt that the exchanges referred to, which in general were invitations to meetings or to submit written responses, were ordinary regulatory exchanges and neither constituted a "Pre-Warning Warning" nor set the FSC a binding precedent. The paradox is that both Advocate Colquitt and Advocate Maher in their submissions submitted or acknowledged that there is no "procedure" as such contained within Section 11 of the Act. The Appellants maintain that this is insufficient to achieve justice. The Tribunal however cannot see how, if there is no procedure, there can ever have been a legitimate expectation that a previously adopted course would be repeated. That previous course could not, in terms of the Act, have constituted or embedded a procedure.

56. *Conflict of interest*

Advocate Maher referred to what are defined in the Appellants' Statement of Case as the Invalid Notices (referring to section 11 Notices issued to the Appellants on 15 April 2011 which were the subject of earlier appeals by the present Appellants and which prior to the resolution of those appeals were withdrawn

by the FSC and therefore revoked by the Tribunal as then constituted). For present purposes, save as an element in the chronology which the Tribunal is fully entitled to review (see paragraphs 37 and 46 above) the circumstances surrounding the issuing of the Invalid Notices, and in particular the role of FSC Commissioner Alan Smith, are irrelevant. The Tribunal is considering the present appeals de novo (see paragraph 37 above). In his submissions in relation to the First Ground of Appeal Advocate Maher failed to demonstrate proof of bias against Mr Aspden (and though invited by the Tribunal to adduce such evidence in relation to the Second and Third Grounds of Appeal, chose not to do so).

57. *Nature and effect of a section 11 Notice.*

(a) Advocate Colquitt argued that the issuing of a section 11 Notice was not an action in itself, but instead represented a decision not to take action, and not to penalise. He maintained that the livelihood of a person to whom notice was given would not be affected, and that only if the FSC's concerns were not addressed would formal action follow. He referred the Tribunal to the new Shorter Oxford English Dictionary (1993) definition of "warning". Advocate Maher emphasised that the sole route of appeal is a referral to the Tribunal, and that this is for the person affected both expensive and disruptive.

(b) The Tribunal is of the opinion that a section 11 Notice is more than a mere warning. It clearly has an economic consequence for the individual concerned. Although a section 11 Notice is not the most serious regulatory sanction in the FSC's armoury, it is not of negligible impact. The Notices as issued clearly imply that the possibility of proceedings under section 10 of the Act cannot be discounted. It must however be borne in mind that issue of a section 11 notice is restricted in accordance with s11 (7) and the FSC must remain mindful of this provision.

58. The Tribunal therefore unanimously decided that the Appellants had not succeeded on the First Ground.

THE SECOND GROUND OF APPEAL

59. *General observations*

(a) The Notices are addressed individually to each Appellant, but the detailed reasons (a requirement under section 11 of the Act) are contained in an Appendix which is identical in all cases. This is the case notwithstanding that some of the matters referred to in the Appendix do not apply to all three Appellants (other than in their over-arching capacity as Directors of Blue Sea International Limited – see sub-paragraph (e) below), but only to one or two of them. The Notices contain a number of factual errors beyond the forced errors of, in individual cases, referring to matters which are irrelevant. Such a casual approach to the use of a significant regulatory power by the FSC is not to be condoned.

(b) In conformity with its evidence-gathering powers, and in light of the documents and authorities filed by the parties and of the submissions made by Counsel, which form part of the record of these proceedings and so are not reproduced in full here, the Tribunal has for the purposes of determining the Second Ground of Appeal reviewed the Notices from the standpoint of the facts as known to the Tribunal and not as known to the FSC at the time of the drafting of the Notices.

(c) The question of whether or not the FSC would have benefitted from discussions with the Appellants prior to the issue of the Notices is moot, given the conclusions reached by the Tribunal on the First Ground of Appeal that the FSC was under no statutory obligation to do so. No evidence has been presented to the Tribunal to indicate that the FSC, though (in light of what is now known) clearly mis-informed by the Appellants or otherwise in a number of crucial areas, was less than committed in attempting to assemble its facts.

(d) In their submissions Advocate Colquitt and Advocate Maher urged the Tribunal to adopt differing standards of interpretation. The Tribunal understands their submissions (though Counsel did not use these terms in argument) to be the teleological analysis of the Notices versus the literal. Advocate Colquitt submitted that even if the Notices were expressed in a way which was deficient, this did not change the underlying factual reality which gave rise to the concerns of the FSC. Advocate Maher submitted that the Notices must be construed literally, and that the objective truth of the statements and allegations as set out in the Notices (and not as varied or modified in argument) must be determined. In reaching its decision the Tribunal has not felt it necessary to undertake a close textual analysis of the Notices but has instead concentrated on the substance of the allegations in light of what the Tribunal understands to be the purpose which a section 11 notice serves.

(e) Reference is made throughout the Notices to Blue Sea International Limited, of which the Appellants were each Directors, in its capacity as a provider of regulated services to Quadris, Keydata and Greenfield. The Tribunal notes that neither in the documentation under review nor in Counsels' submissions was any specific reference made (i) to the terms and conditions of appointment of Blue Sea International Limited or (ii) to its statutory duties under the Act or (iii) to allegations of the manner in which it failed to meet either its contractual or statutory obligations. Counsel focussed solely on the role of the Appellants as officers (in so far as applicable) of Quadris, Keydata and Greenfield. The Tribunal has however borne in mind the fact the Appellants have significant over-arching fiduciary responsibilities as Directors of Blue Sea International Limited.

(f) The Tribunal has reviewed the Notices thematically rather than individually, under three headings: (i) Quadris, (ii) Keydata and (iii) Greenfield, and its conclusions on the facts are set out below.

60. *Quadris*

(a) The FSC is mistaken in its allegation that Quadris Environmental Fund Plc ("Quadris") had no Custodian. Evidence supports the fact of Close Trustees (Isle of Man) Limited formally having undertaken these duties, but not having fully discharged those duties with regard to the recordal and reconciliation of all of the Fund's assets.

(b) Albeit on the initiative of the Board of Quadris, but only following intervention by the FSC, Cayman National Bank and Trust Company (Isle of Man) Limited were appointed successor Custodian. Whilst operational difficulties in relation Close Trustees (Isle of Man) Limited to do not therefore go to the fitness and propriety of the Appellants, that it became necessary for the FSC to intervene through the appointment of Ernst & Young LLC as Advisor to expedite the appointment of a successor Custodian is a cause of concern.

(c) The lack of synchronisation between the availability of audited statements of annual accounting periods of Quadris and of the annual accounting periods of Floresteca BV (in which Quadris had made a substantial investment) stems from the differing audit regimes in the Isle of Man and in Holland. The lack of synchronisation itself is not a result of any failure on the part of the Appellants and does not therefore go to the fitness and propriety of the Appellants, but the Tribunal notes that the Board of Quadris was on its own admission to a degree misled by Floresteca BV, particularly as Floresteca BV appears to have failed to comply with filing deadlines in its own jurisdiction.

61. *Keydata*

(a) Neither Mr McFarlane nor Ms Evett was an officer of Keydata.

(b) The FSC's concerns as to the absence of a Custodian during the period August 2008 and April 2009 are well-founded, but that matter was subsequently resolved and, the Tribunal notes with concern, was therefore a matter which pre-existed the issuing both of the Invalid Notices and of the section 11 Notices the subject of the present appeal.

(c) The FSC received an incomplete Offering Document, but this was a draft sent to it in error. The Offering Document as issued was complete and has, in accordance with usual industry practice, been further revised with the assistance of specialist Isle of Man counsel on a rolling basis.

(d) The FSC's concerns as to the acceptance into the fund of bonds issued by SLS Capital SA are well-founded. There is no substantiated proof that these bonds could be classified as coming within the definition of bonds issued by Lifemark SA (Luxembourg) as referred to in the Offering Document.

(e) The FSC's concerns as to the informality of the loan arrangements referred to in sub-paragraph (i)(d) are well-founded, but the Tribunal is satisfied on the evidence that the informality itself concealed no improper purpose or motivation on the part of Mr Desai.

(f) There is no evidence to suggest that Mr Desai had, or could have had, foreknowledge of the financial collapse both of SLS Capital SA and of Lifemark SA.

62. *Greenfield*

(a) Ms Evett was not an officer of Greenfield.

(b) Concerning the loan made by Greenfield to Intellectual property UK Limited (a company owned by the now bankrupt Mr Hexley), the Tribunal is satisfied on the evidence that this was a binding contractual commitment on the part of Greenfield prior to the assumption by Mr Desai of his duties as a Director and by Mr McFarlane of his duties as Company Secretary of Greenfield. The Tribunal notes however with concern the absence of any evidence that any loan impairment review was undertaken by Greenfield.

(c) The Tribunal is satisfied that the Board of Greenfield exercised its fiduciary responsibilities correctly in determining not to pursue Mr Hexley for the repayment to Greenfield of funds which demonstrably he no longer was in a position to pay (but notes with concern that no alternative strategy for recovery from relevant third parties was formulated)

DECISION ON THE SECOND GROUND OF APPEAL

63. A notice given under section 11 of the Act is not an act of retribution but of consumer protection. Therefore, if the issues (or the majority of the issues) identified in such a notice have been resolved (a fortiori if those issues are found to have been raised partially or wholly in error) – by those to whom a notice has been issued or otherwise, the notice will have served its purpose. Regulation 11 envisages that the FSC may at any time state that it does not seek to uphold the disputed decision. In the present appeals the FSC has chosen not to do so. The Tribunal, taking all evidence and authorities cited into account, and as part of the decision-making process, DECIDES, noting that the Tribunal must confirm, vary or revoke the Notices:

- There are insufficient grounds to determine that the Notices were fundamentally flawed such that each should be revoked.
- Nevertheless, for the reasons set out elsewhere in this decision, no single Notice was, in light of the evidence now available to the Tribunal, without a number of cumulatively material flaws.
- The issues raised in the Notices have been substantially resolved. Their consumer protective purpose has been served and the Notices are spent.
- The Tribunal has therefore resolved not to vary the Notices by way of a substantial re-write of their respective terms but only as to the end-date of their effectiveness. The Notices issued to Mr Desai, to Mr McFarlane and to Ms Evett are therefore varied such that the period of effectiveness of each

Notice ends (in accordance with the provisions of Regulation 24(5) as to the date upon which a decision of the Tribunal is to take effect) upon receipt by each applicant of this written Decision.

THE THIRD GROUND OF APPEAL

64. The Tribunal having decided in favour of the Appellants on their Second Ground of Appeal need not comment upon the submissions of the parties in relation to the Appellants' Third Ground of Appeal.

Paul R Beckett

Chairman

10 January 2013