Neutral Citation Number: [2018] EWHC 2707 (Comm)

Case No: LM-2014-000254

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LONDON CIRCUIT COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 October 2018

Before :

MARTIN GRIFFITHS QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

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Between :

LIBERTY PARTNERSHIP LIMITED (formerly known as TANCREDS LIMITED)	**Claimant**
- and -	
(1) GEOFFREY DOUGLAS TANCRED	
(2) GILLIAN MARY TANCRED	**Defendants**

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- -

Oliver Assersohn (instructed by **Nunn Rickard Litigation**) for the **Claimant**
Jacques Algazy QC (instructed by **Roythornes Limited**) for the **Defendant**

Hearing dates: 16-19, 23-24 and 26 July 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MARTIN GRIFFITHS QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

Deputy High Court Judge Martin Griffiths QC :

1. This is the trial of a preliminary issue as to whether any and, if so, which of the Claimant's claims should be allowed to proceed to further trial in the light of the expiry of a primary contractual limitation period. The primary contractual limitation period is 18 months but an alternative contractual limitation period applies to claims which arise or are delayed as a result of wilful concealment, which is the allegation in this case.

Background to the questions raised in the Preliminary Issue

2. The Claimant (Liberty Partnership Limited, formerly known as Tancreds Limited) bought a business from the Defendants, Mr and Mrs Tancred, which operated from high street premises at Market Deeping in Lincolnshire. The business provided independent financial advice to local people. It was conducted by a company called GD Tancred Financial Services Limited ("the Company"), owned by Mr and Mrs Tancred. By a Share Purchase Agreement dated 14 November 2007 ("the SPA"), Mr and Mrs Tancred sold all the shares in the Company to the Claimant, and that is how the Claimant acquired the business.

3. Mr and Mrs Tancred were the sole directors of the Company and also the sole shareholders. Mr Tancred's shareholding was 99% and Mrs Tancred's was 1%. Mr Tancred was a qualified and experienced independent financial advisor ("IFA"). Mrs Tancred was a former teacher, who, whilst not being an IFA herself, worked full-time for the Company in the office on the administrative side. This was very much a husband and wife team, running a family business together, with other staff whom they employed, both as IFAs and to deal with administration.

4. Before the sale to the Claimant, the business had got into trouble with the regulators. This began with a letter from the Financial Services Authority ("the FSA") dated 21 December 2004 announcing a routine visit to look at the Company's income withdrawal business. The FSA visited the office, interviewed Mr Tancred and reviewed various client files.

5. On 24 June 2005, the FSA wrote a letter headed "Advising on Pension Transfer/Opt Outs". It raised concerns about whether the Company had proper authorisation for what it was doing under the Financial Services and Markets Act 2000 ("FSMA"). On 4 July 2005, another IFA at the Company, Mr James Hudson, replied saying there had been "an oversight regarding the Pension Transfer Permission", and gave an explanation and various assurances. These included a statement that the Company "has Mrs Maureen McKenna of McKenna Associates as our Pension Transfer Specialist. Mrs McKenna, who is a G60 Adviser, always oversees any advice given in this area." G60 is a specialist qualification for financial advice on pension transfers, which Mrs McKenna had and neither Mr Tancred nor anyone else connected with the Company had.

6. The FSA followed up on broader concerns which had been raised by its visit in a letter of 19 October 2005. This was a 5-page letter requiring answers and proposals from the Company about a range of criticisms and concerns. It warned of possible referral for enforcement action. There was further correspondence but, on 7 April

2006, the FSA set up a formal investigation into the Company under FSMA. Visits, interviews and correspondence followed.

7. On 27 September 2006, the Company entered into a Settlement Agreement with the FSA ("the FSA Settlement Agreement"). One term was that the Company agreed to write "in a form of letter signed off by an external compliance consultant, and to the satisfaction of the FSA, to all existing income withdrawal customers". Another term was that all the Company's future sales of income withdrawal products would require sign off from an external compliance consultant. A company known as 360 Services was engaged by the Company to do this.

8. The FSA Settlement Agreement provided for a signed FSA Warning, an FSA Decision and an FSA Final Notice to be issued against the Company in succession, each to be in substantially the same terms. All of this was implemented. The FSA Final Notice against the Company was dated 17 October 2006.

9. It was after this that negotiations leading to the SPA were opened with the Claimant. A Confidentiality Agreement was signed on 1 January 2007 and the SPA itself was dated, as I have said, 14 November 2007. That was also the Completion Date for the sale of the business.

10. It was a term of the SPA that Mr and Mrs Tancred should continue to work for the business for a period of time. They eventually in or after the end of March 2009 (the precise date is disputed), over 16 months after the date of its acquisition by the Claimant under the SPA.

11. The SPA referred to a formal Disclosure Letter, dated (like the SPA) 14 November 2007. The Disclosure Letter provided "details of complaints from clients which have been brought to the attention of the Company" (as well as the FSA Settlement Agreement and the FSA Final Notice) and "details of complaints from clients of the Company since 2002".

12. It is the Claimant's (disputed) case in the Particulars of Claim that, although only one of the disclosed complaints led to a decision against the Company by the Financial Ombudsman Service ("the FOS"), a number of other complaints had been received before the date of the Disclosure Letter and SPA which were not disclosed, and that some 45 other complaints were received by the Company after the SPA, and prior to April 2013, relating to business placed before the SPA and arising from non-compliance by the Company with its regulatory obligations. 13 of these complaints were upheld by the FOS and compensation had to be paid. Another 19 were successfully defended, not pursued further or withdrawn. The rest had not been resolved before the Company went into liquidation. No new business was being placed by March 2009 and the Company went into Creditors Voluntary Liquidation on 5 April 2013. The Claimant now brings this action to recover losses which it alleges were suffered as a result of breaches of the SPA.

Procedural history

13. Proceedings were issued on 14 November 2013. Particulars of Claim and a Defence followed in March and April 2014. After transfer to this Court from the County Court, an Order for directions was made by consent on 19 June 2015 which directed that

"The issue of the alleged wilful concealment shall be tried as a preliminary issue". That is the Preliminary Issue which I am now deciding. Directions for disclosure and witness statements, limited to the preliminary issue, were also agreed.

14. A consent order dated 18 November 2015 directed service of Points of Claim on the Preliminary Issue (the "PCPI") and Points of Defence on the Preliminary Issue (the "PDPI"). The PCPI were served on 21 December 2015. Including Schedules, they were longer than the original Particulars of Claim and represented, in effect, a complete re-pleading of the case on the Preliminary Issue (although they did not supersede the Particulars of Claim). The PCPI included details of complaints not previously identified in the Particulars of Claim or in Further Information served by the Claimant on 5 November 2014 pursuant to a Part 18 request. The PDPI were served on 25 January 2016 (amended on 27 October 2016) and objected to the scope of the PCPI. The Claimant served further (voluntary) Particulars of the PCPI on 25 November 2016 and a Reply to the PCPD on the same day, making further changes to the Claimant's case.

The issues

15. The Claimant's case was refined during the course of the trial of the Preliminary Issue, partly as a result of concessions obtained from Claimant witnesses in cross examination. By the end of the trial, the following questions remained for me to decide.

    i) Whether the Claimant was running new causes of action outside the scope of the Particulars of Claim and, if so, whether amendment should be permitted to allow them.

    ii) Whether there was wilful concealment of the FSA letter dated 24 June 2005 and the letter in response dated 4 July 2005.

    iii) Whether there was wilful concealment of the true extent of Ms McKenna's involvement in the Company's pension transfer transactions.

    iv) Whether there was wilful concealment of breaches of a warranty stating that 360 Services had assumed compliance of all income drawdown products sold by the Company.

    v) Whether there was wilful concealment of a failure to comply with an FSA requirement that the Company should send a letter "in a form… signed off by an external compliance consultant, and to the satisfaction of the FSA, to all existing income withdrawal customers…"

    vi) Whether there was wilful concealment of complaints alleged by the Claimant to have been made before the SPA by customers surnamed Aldous, Fox, Holling, Isaacs, Johnson, Smith and Vickers.

    vii) Whether there was wilful concealment of matters which eventually gave rise to complaints made after the SPA by customers surnamed Allen, Bloodworth, Clarke, Drury, Holloway, Hornsby, Lingard, Smalley, Smith, Trout, Upex, Vesty and Vickers.

viii) Whether any claims which I may find to have been wilfully concealed under the various issues just identified will not only be outside the contractual limitation period (by reason of the wilful concealment) but will also entitle the Claimant to pursue other similar claims.

16. When considering these issues and deciding the Preliminary Issue, my task is to determine whether there has been wilful concealment so as to permit the bringing of claims outside the primary contractual limitation period of 18 months. I will have to identify and examine the claims, in order to decide whether they were wilfully concealed. Save to the extent required by this examination, it is not my purpose to make final decisions on the claims themselves. However, some findings on the evidence about the claims are unavoidable as part of the exercise I have to perform.

The evidence

17. In the course of the 7 day trial, in addition to submissions from Counsel in opening and closing, I heard evidence from a total of 15 witnesses, all of whom were cross examined. I was also referred to documents, in 4 lever arch files of trial bundles, and provided with various written submissions, before, during and (on the first issue) after the trial, the last of which was dated 29 August 2018. Despite the large number of issues and witnesses, the trial was completed before me within the 7 days available for the hearing. Nothing was lost by this efficiency, and I congratulate Counsel on both sides for their focussed conduct of the case.

18. The Claimant called as witnesses the brothers Richard and Nicholas Ash, who were directors of the Claimant when it acquired the Tancreds' business. The Claimant also called as witnesses Russell Facer of 360 Services, Maureen McKenna of McKenna Associates, Edith Winter (who worked on the administration side of the business before and after the acquisition), and seven of the clients (Anthony Aldous, his wife Judith Aldous, Susan Vickers, David Holloway, Raymond Isaacs, Paul Marriott and Malcolm Smith). The Defendants' witnesses were the Defendants themselves (Mr and Mrs Tancred) and James Hudson, an Independent Financial Advisor employed by the Company before the acquisition who also acted as complaints handler.

19. At many points there were direct conflicts of evidence between Claimant and Defendant witnesses. However, the Claimant witnesses were more numerous, more diverse and (with the exception of Mr Hudson on the Defendants' side and the Ash brothers on the Claimant side) more independent than the Defendants' witnesses. In addition, when examining individual instances of these conflicts of evidence I have found the Claimant witnesses to be more credible, consistent and reliable than the Defendant witnesses. I will give my general conclusions about the witnesses now, and make more detailed findings on particular issues later.

20. Mr Tancred was an evasive witness who made few concessions and whose position was at important points clearly contradicted by documents. For example, he described the FSA decision as a "minor Censure for poor paperwork". Mrs Tancred also said "It is important to emphasise that the FSA censure related to [Mr Tancred's] sloppy paperwork and inadequate levels of explanation provided to clients. He was not… told to change the way he invested funds." This is an inaccurate and misleading characterisation of the FSA censure of 3 October 2006. The FSA noted in its

reasoning that (a) "suitability letters failed to draw the customer's attention to the risks associated with investment in a single asset class" and (b) the Company "failed to obtain sufficient personal and financial information about customers relevant to the provision of advice"; and (c) "failed to ensure that customer reviews were sufficiently frequent and adequately comprehensive in nature to mitigate the risks to customers identified above". That meant that the way in which investments were decided upon was directly criticised. Even the limited evidence I have heard showed glimpses of lives ruined and at least one grown man reduced to tears by deterioration in their personal finances (especially finances planned for retirement) following Mr Tancred's advice. The evidence of both Mr and Mrs Tancred undermined their credibility by understating the gravity of the business's shortcomings - as further demonstrated by the multiple high-value awards in contested cases before the FOS. The FSA Decision Letter of 3 October 2006 (at which point not all the effects of Mr Tancred's conduct, as subsequently found by the FOS, were established) already noted, as an aggravating factor, "Following the FSA's report of 19 October 2005, [the Company's] understanding of the FSA's concerns remained poor as reflected in the customer file reviews carried out after that date". The Company's sole directors were, at that point, Mr and Mrs Tancred. The FSA did not conclude, in October 2006, that the contraventions were "deliberate or reckless" but, in my judgment, the persistence of both Mr and Mrs Tancred in understating and mischaracterising Mr Tancred's failings before me, in the face of the findings both of the FSA and of the FOS, was deliberate. They are both intelligent enough to understand the reality of matters so important.

21. On the Claimant side, much of Richard Ash's evidence consisted of commentary on documents or reference to evidence given to me at first hand by others. He readily made concessions when cogent points were put to him in cross examination, which enhanced his credibility. His brother Nicholas Ash was not shaken in cross examination and I am willing to accept his evidence as far as it goes. The key dispute of fact on which he gave evidence was about whether he was shown the FSA file, which I will deal with below.

22. Edith Winter was an excellent witness. She worked for the Company from 1999 and both the sellers and the buyers were keen for her to continue after the sale, which she did, so she was also an independent witness; she had no axe to grind. She was clearly efficient. Her evidence was meticulous, clear, precise, and honest about what she knew and what she did not know. In my judgment, it was both credible and reliable.

23. Maureen McKenna was also impressive and independent. She frankly stated that, having sold her business some years ago, she did not have the advantage of her own records to assist her recollection, but the evidence she gave was, nevertheless, clear, confident, and credible.

24. The client witnesses (Antony Aldous and his wife Judith; Susan Vickers; David Holloway; Paul Marriott and Malcolm Smith) were also convincing. They were not only consistent in their own evidence but painted a picture which was consistent across all of them of their dealings with the Tancreds. I saw no reason to find them anything other than honest and conscientious witnesses, although I made allowances for varying confidence in recollection which was natural given the passage of time. I was therefore attentive to the documentary evidence which was also presented in relation to each of them. This did not undermine their evidence but it did give me

some further assurance in some respects which I will deal with in relation to particular issues.

25. The only independent witness who I found to be less than satisfactory was James Hudson. He was partisan, including both in his written and in his oral evidence prejudicial evidence by way of adverse comment on matters which he admitted he had no direct knowledge of. He denied points which were established by other evidence (for example, Mr Tancred's patronisation of women to their face and to their husbands, which was attested by a number of credible client witnesses). He conflicted with other more credible witnesses on other matters, such as whether he spoke to Susan Vickers. He clearly disliked the Ash brothers (he makes dark but unsubstantiated insinuations against them in his witness statement) and this may have coloured his evidence. He also told me that he had suffered two strokes in the last two years and that this has affected his memory, although later he said it affected only his short time memory. Whatever the reason for its weaknesses, by the end of his evidence I decided that I could not rely on it unless it was supported by other credible evidence.

The provisions of the SPA

26. For the purposes of the Preliminary Issue, the relevant provisions of the SPA fall into three categories: (1) general provisions about warranties, (2) the warranties themselves, and (3) provisions for a contractual limitation period, including the exception for wilful concealment relied upon in this case.

(1) General provisions about warranties in the SPA

27. The SPA contained the following general provisions about warranties given by Mr and Mrs Tancred, as Sellers, to the Claimant, as Buyer. The "Warranties" were defined as "the representations and warranties in clause 7 and Schedule 4".

28. Clause 7.1:

> "The Buyer is entering into this agreement on the basis of, and in reliance on, the Warranties"

29. Clause 7.2:

> "The Sellers warrant to the Buyer that each Warranty is true and accurate on the date of this agreement except as Disclosed"

30. "Disclosed" was defined as:

> "fairly and accurately disclosed with sufficient details to identify the nature and scope of the matter disclosed in or under the Disclosure Letter."

31. The Disclosure Letter itself listed various matters as "disclosed or deemed disclosed to the Buyer". These included:

> "7. All matters disclosed to the Buyer its accountants and other advisors or which have been revealed in the course of the investigation of the Company by the Buyer and such accountants and other advisors.
>
> 8. All matters which would be revealed by a search of the registers and documents maintained by… the Financial Services Authority in respect of the Company and any employee of the Company at the date of this letter."

32. The Disclosure Letter also contained "specific disclosures… made in relation to the Warranties". These included, in relation to the warranty in paragraph 4 of Schedule 4 of the SPA (quoted below), the following identified and annexed documents:-

> "(a) details of complaints from clients which have been brought to the attention of the Company;
>
> (b) copy Settlement Agreement between the Financial Services Authority (1) and the Company (2) dated 27th September 2006;
>
> (c) copy Final Notice from the Financial Services Authority to the company dated 17th October 2006."

33. In relation to the Warranties in paragraphs 6.2 and 8.2 of Schedule 4, the Disclosure Letter said:

> "There are annexed details of complaints from clients of the Company since 2002. The Buyer has been given the opportunity of inspecting all complaints files and has taken advantage of such opportunity. Mr Towers is currently appealing to the Financial Ombudsman's Service's ruling in favour of the Company."

34. Clause 7.4 of the SPA applied to all the Warranties, with the exception of the warranty in paragraph 21.3 of Schedule 4, and said:

> "Warranties qualified by the expression **so far as the Sellers are aware** or any similar expression are deemed to be given to the best of the knowledge, information and belief of the Sellers after they have made all reasonable and careful enquiries."

35. Clause 7.7:

> "With the exception of the matters Disclosed, no information of which the Buyer could have discovered (whether by investigation made by the Buyer or made on its behalf) shall prejudice or prevent any Claim…"

(2) Specific warranties in the SPA

36. Specific Warranties were contained in Schedule 4 of the SPA. Those to which I have been particularly referred for the purposes of this case are as follows (all references are to paragraphs in Schedule 4).

37. Paragraph 4:

> "So far as the Sellers are aware, neither the Sellers nor the Company have received any written notice within the last three years [i.e. since 14 November 2004] that the Company has not conducted its business in accordance with all applicable laws and regulations."

38. Paragraph 5.2:

> "So far as the Company is aware, there is no reason why any of [its] licenses, consents, permits and authorities… should be suspended, cancelled, revoked or not renewed on the same terms."

39. Paragraph 6.2:

> "…no notice has been received by the Sellers of any circumstances likely to give rise to any claim under any of [its insurance] policies."

40. Paragraph 8.2:

> "…no notice has been received by the Sellers of any circumstances likely to give rise to any such proceedings [i.e. '…proceedings, investigation or inquiry as… mentioned in paragraph 8.1…']"

Paragraph 8.1 refers to "litigation" (which might be by clients), to "administrative" proceedings (which might include proceedings of the Financial Ombudsman Service) and to proceedings by "any governmental, administrative or regulatory body" (which might include the FSA).

41. Paragraph 21.3 (to which clause 7.4 of the general warranty provisions did not apply):

> "The Sellers, having complied and ensured the Company has complied, with the appropriate internal compliance procedures from time to time in force, have no actual knowledge that the Company has mis-sold any financial services product."

42. Paragraph 21.4 was in two parts, separated by 'and'. The Claimant relies on the two parts separately, so I will split the quotation into two parts for clarity:

> "Since the date of the Financial Services Authority censure, 360 Services has assumed compliance of all income drawdown products sold by the Company and"

> "the Company has no further liability to a client in respect of the Company's conduct as investigated by the Financial Services Authority that led to the public censure."

(3) The limitation period in the SPA

43. The contractual limitation period on which this Preliminary Issue turns was agreed in clause 8 of the SPA and its sub-clauses, entitled "Limitation of Claims". A number of the cross-references in this clause are wrong, but the correct references are obvious and both sides agree on the corrections to be made, so I will insert them in square brackets in place of the original references.

44. "Claim" is defined as "a claim for breach of any of the Warranties" (clause 8.1).

45. Clause 8.1 also states:-

> "A Claim is connected with another Claim… if they all arise out of the occurrence of the same event or relate to the same subject matter."

46. Clause 8.5 imposed a primary contractual limitation period which was, for the bringing of the Claims in this case, "eighteen months beginning with the Completion Date" (clause 8.5.2). Within that period, the Buyer had to give the Sellers "notice in writing of the Claim… summarising the nature of the Claim… as far as is known to the Buyer and the amount claimed" (clause 8.5). That did not happen in this case. Clause 8.5 also provided for a six month contractual limitation period for legal proceedings to be commenced after expiry of the primary 18 month limitation period for notification of Claims in clause 8.5.2 (it is accepted that the references to "clause 7.6.1 to 7.6.2" should have been to "clause 8.5.1 to 8.5.2"). That also did not happen in this case.

47. Therefore, the Claimant relies on the exclusion of these primary limitation periods in clause 8.6:

> "Nothing in clause [8.5] applies to a Claim… that arises or is delayed as a result of dishonesty, fraud or wilful concealment by the Sellers, their agents or advisors."

48. In the Preliminary Issue, the Claimant alleges wilful concealment by the Defendants themselves (paragraph 10 of the main Particulars of Claim; paragraph 21 of the PCPI).

Issue (i): Was the SPA a specialty within the meaning of section 8 of the Limitation Act 1980?

49. On behalf of the Defendants, objection was taken at an early stage that the Claimant's case was expanding beyond the bounds set by the Particulars of Claim: see paragraph 5 of the PDPI. At the start of the trial, the Defendants' Counsel maintained this position but pragmatically allowed the evidence to proceed in full on every point, while reserving his right to object in closing submissions.

50. I think it is correct that the Claimant's case as it was presented at trial was not fully pleaded in the Particulars of Claim, which were served on 7 March 2014 and never amended. Not even the PCPI perfectly represented the Claimant's case as it stood by the end of the trial. Counsel instructed at the trial had not drafted the pleadings.

51. However, it was not said that any deficiencies in the pleading caused any prejudice, which suggested to me that they could be dealt with by amendment if necessary. The witnesses were cross examined on the Claimant's full case, and it was not suggested that there would have been any difference in the disclosure given, or the witnesses called, or in their witness statements, if the matters objected to had been formally pleaded in the Particulars of Claim, rather than being indicated in the PCPI or in the Claimant's submissions in opening and during the course of the trial (which tended more to narrow and refine the case than to expand it).

52. After an exchange of written submissions at the end of the trial, the Defendants dropped any objection to amendment, but only if (as the Claimant contended) the statutory limitation period for these claims is 12 years (which has not expired) rather than the usual 6 years (which has).

53. That question has been left to me. It turns on whether the SPA (under which all the claims are made) is a specialty for the purposes of section 8 of the Limitation Act 1980.

54. The SPA was executed as a deed, but none of the parties impressed a seal upon it. Following the enactment of section 1 of the Law of Property (Miscellaneous Provisions) Act 1989, it would have been unusual if they had done so, because a seal is no longer necessary on a deed. It is right to say that the SPA was deemed to have been issued under the common seal of the Claimant company (by virtue of the deeming provision in section 36(A) of the Companies Act 1985 then in force) because it was signed by a director and secretary and expressed to be executed by the Claimant company. But that point does not deal with Mr and Mrs Tancred, who executed the SPA as individuals, adopting only the usual and sufficient formalities, in a modern deed, of signature and a formal, written attestation that the SPA was "EXECUTED as a DEED".

55. The question is, therefore, whether the SPA was, not only a deed but also a specialty, despite not being under seal, at least so far as Mr and Mrs Tancred were concerned. It arises because of the wording of section 8(1) of the Limitation Act 1980 which refers to "a specialty" rather than a "deed". Section 8(1) provides:-

> "An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued."

56. Specialty is not a word defined in the Limitation Act. It is usually understood to mean a document under seal and it certainly includes documents under seal. (It also includes, at least in some contexts, debts due from the Crown or under statute, with which I am not concerned: *R v Williams* [1942] AC 541, 555). The question is whether it should now include modern deeds which are not sealed. That question has not, so far as I am aware, been considered or decided before. I have no doubt that a deed which complies with the formalities in section 1 of the Law of Property

(Miscellaneous Provisions) Act 1989 is a specialty within the meaning of section 8 of the Limitation Act 1980 even if it has not been sealed. The 12 year limitation period therefore applies to such a deed in the same way as if it had been sealed. I will explain my reasons.

57. There was no special limitation period for specialties until the Civil Procedure Act 1833, which, in section 3, imposed "Limitation of Action of Debt on Specialties. &c." referring, in the body of section 3, to "Covenant or Debt upon any Bond or other Specialty…" The word 'specialty' was carried into section 2(3) of the Limitation Act 1939, which is the predecessor of section 8(1) of the Limitation Act 1980 and written in identical terms.

58. When the Limitation Acts were passed in 1939 and 1980, all deeds were executed under seal. It was in this context that Goddard LJ said, in the specific context of the Limitation Acts, "In my opinion… "specialties" must now be confined to deeds or contracts under seal.": *Leivers v Barber, Walker & Co Ltd* [1943] KB 385, 386.

59. The important point about a deed, as opposed to other legal commitments, including those made in writing, was its particular formality and solemnity. As Blackstone explained in his *Commentaries* (Book 2 Chapter 20 p 293):

> "A deed is a writing sealed and delivered by the parties… it is called a deed, in Latin *factum*... because it is the most solemn and authentic act that a man can possibly perform…"

60. The seal demonstrated that this degree of solemnity was intended. But, as long as that intent was evident, the Courts were generous about what they would accept as constituting a seal: *Re Sandilands* (1871) LR 6 CP 411 per Byles J at 413 ("…it may be done with the end of a ruler or anything else"), and per Bovill CJ at 413 ("To constitute a seal, neither wax, nor wafer, nor a piece of paper, nor even an impression is necessary"). Even a pre-printed circle with the letters "L.S." printed inside (for *locus sigilli*) would do: *First National Securities Ltd v Jones* [1978] Ch 109.

61. That the key question was intention, rather than form, was emphasised by Danckwerts J in *Stromdale & Ball Ltd v Burden* [1952] Ch 223, (at 230):

> "Meticulous persons executing a deed may still place their finger on the wax seal or wafer on the document, but it appears to me that, at the present day, if a party signs a document bearing wax or wafer or other indication of a seal, with the intention of executing the document as a deed, that is sufficient adoption or recognition of the seal to amount to due execution as a deed."

62. In *First National Securities v Jones* [1978] Ch 109 the Court of Appeal was unanimous in overturning a judge's finding of fact that there was no seal, but Sir David Cairns went further and suggested that no seal should be necessary at all, as long as the intent to execute as a deed was present. He said (at 121):-

> "I am sure that many documents intended by all parties to be deeds are now executed without any further formality than the

> signature opposite the words "Signed, sealed and delivered" usually in the presence of a witness, and I think it would be lamentable if the validity of documents so executed could be successfully challenged."

63. That position was made law by section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 to which I have already referred. There is no longer any need for a deed to be sealed.

64. A seal is no longer necessary to make a deed a "specialty" for the purposes of section 8 of the Limitation Act 1980, provided it complies with the formalities required of a deed by section 1 of the Law of Property (Miscellaneous Provisions) Act 1989. Those formalities are enough to demonstrate the necessary intent, and it is the intent to import the special solemnity of a deed, and not the presence of a seal, which makes the deed a specialty.

65. I am therefore going to allow the amendments and consider all the Claimant's claims, including those not fully pleaded in the original Particulars of Claim.

Issue (ii): Was there wilful concealment of the FSA letter dated 24 June 2005 and the letter in response dated 4 July 2005?

66. This issue was raised in paragraph 9(2) of the original Particulars of Claim.

67. The letter of 24 June 2005 was from the FSA, addressed to Mr Tancred at the Company. It fell within the 3 year period covered by the warranty in paragraph 4 of Schedule 4 of the SPA. It was headed "Advising on Pension Transfer/Opt Outs" and said, in part, as follows:-

> "According to our records your Firm's List of Approved Persons includes the customer function 'pension transfer specialist' (CF24) yet its Part IV Permission does not include the regulated activity 'advising on pension transfer/opt outs' business…
>
> If the Firm is carrying out 'advising on pension transfer/opt outs' business, without the 'advising on pension transfer/opt outs' permission, it will be doing so in breach of section 20 of the Financial Services and Markets Act 2000…"

68. The letter concluded by telling Mr Tancred how the Company could remedy the position, depending on the precise circumstances. It said a response, including completed forms and applications as appropriate, should be provided no later than 8 July 2005.

69. The response was dated 4 July 2005 and was signed by James Hudson, another Independent Financial Adviser at the Company, rather than Mr Tancred. It said, in part:

> "With reference to your letter dated 24 June 2005 we would like to thank you for bringing to our attention the oversight regarding the Pension Transfer Permission.
>
> We have completed the Variation of Permission Form via the firm's online website, and a copy of this is included with this letter. We have looked at our records to try and determine when this oversight occurred, as we had always assumed that we were covered for this level of advice. G D Tancred Financial Services Ltd has Mrs Maureen McKenna of McKenna Associates as our Pension Transfer Specialist. Mrs McKenna, who is a G60 Adviser, always oversees any advice given in this area. When we have enquired with the FSA as to how we cover this type of advice they have stated that Mrs McKenna is to be listed as one of the company's Authorised Persons and fees for her are paid to the FSA accordingly. Therefore she is listed under G D Tancred Financial Services Ltd as well as her own company of McKenna Associates. McKenna Associates have the relevant permissions to conduct transfer/opt out business and you informed us that this was adequate for our purposes. If the permission of pension transfer/opt out business is to be listed under G D Tancred Financial Services then we are more than happy for it to be so. Please be assured that Mrs McKenna has covered any advice given in this area…"

70. The first issue is whether this exchange of correspondence was, in fact, disclosed within the meaning of the SPA. I bear in mind that "Disclosed" was defined as "fairly and accurately disclosed with sufficient details to identify the nature and scope of the matter disclosed in or under the Disclosure Letter". I also bear in mind that (contrary to assertions made a number of times by Mr Tancred in his evidence), the onus was not on the Claimant to obtain disclosures by its own due diligence: the effect of clause 7.7 of the SPA was that, in relation to anything not Disclosed, whether or not the Buyer could have discovered it by carrying out its own investigation was agreed not to be relevant.

71. The exchange of correspondence was not specifically identified in the Disclosure Letter. However, it was argued that it was something disclosed on a particular occasion (which might bring it within paragraph 7 of the Disclosure Letter) or that would have been revealed by a search of the FSA's own records (so as to bring it within paragraph 8).

72. Whether it was disclosed on a particular occasion was the subject of a direct conflict of evidence between Mr and Mrs Tancred, who said it was, and Mr Nicholas Ash, who said it was not. Mr and Mrs Tancred's case was, however, weakened by inconsistency. The pleaded case said that the letters were "shown to the buyer when the FSA file was disclosed." Mrs Edith Winter agreed with the Ash brothers that there was no FSA file as such, and I accept their evidence on that. Mrs Tancred's witness statement had very little detail but continued to say that she "showed Nick Ash the administration files" and "I did not record which files he looked at." In cross examination, she said she indicated where the files were in broad terms but did not

maintain that he had actually looked at them; in fact, she said he did not want to. Mr Tancred's witness statement suggested that he was witness to the showing of the files by his wife to Nicholas Ash, but Mrs Tancred in cross examination said that he was upstairs at the time, while she and Nicholas Ash were downstairs. On balance, I reject the Tancreds' account and accept Nicholas Ash's evidence on this. I find that these two letters were not shown to him.

73. The next question is whether this exchange of correspondence "would be revealed by a search of the registers and documents maintained by the… Financial Services Authority in respect of the Company and any employee of the Company" (paragraph 8 of the Disclosure Letter). Nicholas Ash's evidence was that correspondence of this nature would not be available to the public on a search of FSA registers and documents. That seems plausible to me. It follows that the letters were not disclosed.

74. The next question is whether they should have been. The exchange of correspondence was said to be disclosable under paragraph 4 of the warranties in the SPA, saying that neither the Tancreds nor the Company had received "any written notice within the last three years [i.e. since 14 November 2004] that the Company has not conducted its business in accordance with all applicable laws and regulations." The FSA letter of 24 June 2005 is within this three year period and does indicate a breach of the law: specifically, section 20 of the Financial Services and Markets Act 2000. The reply from Mr Hudson dated 4 July 2005 does not appear to contest that, referring to an "oversight" and indicating how it will be put right.

75. The final question is whether this gives rise to a Claim which "arises" or was "delayed as a result of… wilful concealment" by the Defendants (clause 8.6 of the SPA). If the exchange of correspondence was wilfully concealed by the Defendants at the time of the SPA then this is a Claim which "arises" from that.

76. Was it wilfully concealed? Here the Defendants are on firmer ground. All three of their witnesses – James Hudson, and Mr and Mrs Tancred – explained that the requisite permission had always been in place, so far as papers were concerned, but Mr Hudson had mistakenly failed to reflect that in his electronic filing, which led to the tentative suggestion in the initial FSA letter that something was amiss. He corrected it by aligning the electronic filing with the actual fact, which was that the requisite permission was, indeed, in place. There is nothing in the papers to suggest that the course he took caused the FSA any concern. It is striking that there is no reference to this incident in any of the subsequent FSA documents which show the concerns they did have: namely, the FSA letter of 19 October 2005, and the subsequent correspondence, culminating in the Settlement Agreement of 27 September 2006 and the FSA Final Notice dated 17 October 2006. This supports the evidence that it was a minor breach, if it was a breach at all, which was resolved to the FSA's entire satisfaction.

77. It does not, therefore, seem to me likely that Mr Hudson (who wrote the reply letter) or Mr and Mrs Tancred would have thought this was something that merited disclosure, or that it was wilfully concealed.

78. I therefore find that Claims in relation to the letters of 24 June and 4 July 2005 were not subject to an extended limitation period under clause 8.6 of the SPA (the wilful

concealment clause) and, not having been brought within the primary limitation period of 18 months, cannot be pursued by the Claimant.

Issue (iii): Whether there was wilful concealment of the true extent of Ms McKenna's involvement in the Company's pension transfer transactions

79. The next issue is whether there was wilful concealment of the true extent of Ms McKenna's involvement in the Company's pension transfer transactions, as referred to in the 4 July 2005 letter. In particular, the Claimant says that four customer transactions (for customers surnamed Holloway, Aldous, Goodliffe and Cox) were either not signed off by Mrs McKenna or not referred to her at all.

80. Neither Mr Tancred himself, nor anyone else at the Company (such as Mr Hudson), had FSA approval to advise on pension transfers and opt outs. The Company relied, therefore, as stated in the letter of 4 July 2005, on the services of an outside consultant. The approval required was called G60. The outside consultant was Maureen McKenna, who gave evidence.

81. The Defendants' case (from Further Information dated 27 October 2016) is that "Maureen McKenna oversaw and signed off on 27 cases for 21 different clients as per Schedule 3 of the [PDPI]. The client's suitability letter, application form, copy quotation, Transfer Value Analysis Reports (where applicable), previous pension particulars and any other case specific information was sent to Maureen McKenna. She then returned all of this, with her signature for sign off dated and recorded on the documents. When this was received, the case was submitted to the new insurer. The relevant client files, the FSA File and compliance files and any relevant or associate documents were left in the Claimant's possession and control following Completion."

82. This last sentence refers to a running dispute in the evidence, between the Defendants, who say the Claimant has failed to disclose relevant documents which were left with it after its purchase of the Company, and the Claimant, which says that any gaps in paperwork were present when it took over the Company. Mrs Winter was efficient but she made it clear that hers was a subordinate role, and she could not make up deficiencies in documents for which she was not responsible. She said that Mr Tancred's files were "patchy and quite limited" and this is consistent with the FSA investigation which Mr Tancred himself acknowledged included criticism of his paperwork. Mrs Winter said that the new owners were more professional. I reject the Defendants' contention that there are documents that will have supported their case which the Claimant has failed to retain or disclose. I conclude that such key relevant documents as existed at the date of completion have been disclosed, and, where documents have not been disclosed, that is because they do not exist and did not exist at the date of completion. There are, however, two explanations for that. One is that they never existed. The other is that they did exist, but the Tancreds themselves failed to file or retain them. The first explanation would damage the Tancreds' case. The second explanation would be more helpful to them. I will look at the other evidence before reaching a conclusion.

83. Mrs McKenna sold her business in 2007 without retaining her own records but she gave me compelling, credible and in my judgment reliable evidence, without more confidence than was justified by her ability to recall. She said opting out of employer

pension schemes into private or income drawdown investments is quite rare and generally not advisable. She said her recollection of active involvement with the Tancreds was over a short period and in a small number of cases. In her witness statement she put the number that she signed off on as no more than 2 or 3. In cross examination she was shown papers from the Claimant's disclosure, and asked to accept that she signed off on 8 (including married couples as 2), but she insisted that to her recollection there were not as many as 5 or 6, let alone the 27 alleged. This evidence convinced me. It was consistent with the correspondence, which showed her querying and not signing off on a transaction which went ahead anyway (Mainwaring, for which she received payment), or letters addressed to her with no proof of sending, or receipt, or any response from her (Peacock and Frith-Robinson; Temple and Mr and Mrs Cox). There were only two cases for which there was direct documentary evidence that she did sign off, as shown by signatures and correspondence from her retained on the files (Falco and Nelson).

84. Mrs McKenna's evidence was supported by another aspect, which was the way she was paid. The Defendants' case is that she was paid by individual cheques for each case she approved, at a rate of 20% commission, and the Defendants rely on internal accounting records calculating this commission against the cases the Defendants say Mrs McKenna approved for them. These records were reflected in the audited accounts. The Defendants also produced some cheque stubs. They did not produce bank statements which, I was told, were not available. In the absence of signed approvals on file from Mrs McKenna, these payment details are the cornerstone of the Defendants' case in support of her signing off on 27 cases. The Defendants say she was paid commission because she had given her approval.

85. Mrs McKenna, unprompted, as soon as she began to be shown these internal documents, said she had not been paid individually for each case, but got a single, large cheque. She said she asked for a breakdown but did not get one. She said "I asked for that. When I got a cheque larger than I expected I rang Mr Tancred. He was not there. I did not elaborate to the receptionist. I never got a phone call back. I banked the cheque. I wish I did not. I knew it was far too much." She said "The cheque was £13,000 or something. It was a one-off cheque. I knew it was too much." When shown cheque stubs for some smaller amounts she said they did not reflect payments to her. "I don't recall any individual payments. That's just a cheque stub. I recall one case paid individually. I only recall getting a large cheque." The one case paid individually was identified as the case of Mainwaring (£744.77), in respect of whom there was a copy of the cheque (not a cheque stub) and a covering letter to Mrs McKenna on the file. But Mrs McKenna was steadfast in her evidence that, apart from that, she was paid only with the single large cheque. The figure she mentioned from memory (£13,000) matched the figure produced by adding up 13 payments which on the Defendants' case were made to her individually, as recorded in the internal record (£13,018.31). This supported her evidence about the single large cheque.

86. Mr Tancred, on the other hand, gave evidence that she had 13 cheques and not a single cheque, and that her evidence was "mistaken".

87. Since Mrs McKenna was a credible and independent witness, and Mr Tancred was neither independent nor credible, I prefer her evidence on this.

88. Mrs McKenna specifically denied signing off on the cases relied on by the Claimant on this issue: namely, transactions for Holloway, Aldous, Goodliffe and Cox. She was confident, not only that the number of cases that the Defendants said she signed off on was wrong, but that these individual cases had not been approved by her. I accept that evidence also.

89. I find the facts to be as follows. The first documented referral to Mrs McKenna was the case of Mainwaring, in respect of which she raised queries in a letter dated 14 February 2000. There is no record of these queries being answered, or of her approving the transaction, and I am satisfied she did not approve it. Nevertheless, the day after Mrs McKenna's letter of 14 February, a letter dated 15 February from Mr Tancred to Mr Mainwaring is on the file. There is no other. This transaction went ahead, apparently without taking any notice of her concerns. Some months later, she was sent a commission cheque, under cover of a letter of 27 June 2001.

90. Subsequent letters on file to other clients about other transactions were not signed off by her, but the letters themselves claimed that, although the writer did not have the G60 qualification, "advice given to you in this matter is being overseen and signed off by McKenna Associates, whose principal is Maureen McKenna" (cases of Covington and Frith-Robinson). That was not correct, with two exceptions (case of Falco, whose letter on file is signed and stamped by Mrs McKenna, and case of Nelson, for which Mrs McKenna gave her approval in a letter referring to having also signed the letter to the client).

91. There are letters on file submitting other cases to Mrs McKenna, but no record of her approving them (cases of Mr and Mrs Cox, and Temple). The Cox case went ahead, but Mrs McKenna did not know what was happening, because she enquired about its progress in a letter of 3 December 2003 referring to having "spent time on this and previous cases which have not proceeded and for which I have not forwarded an account".

92. Internal records shows the amounts earned by the Company on the transactions that went through, including those Mrs McKenna had not approved, and including 20% commissions due to Mrs McKenna. But she was not in fact (as I have found) paid those amounts as they arose. Then, suddenly, at a date (she told me) before 2007, Mrs McKenna was sent a single cheque, out of the blue, for the whole total of those amounts. When she rang to query this, she was ignored and never received an explanation. She knew the cheque was too big but, to her regret now, she did bank it.

93. My conclusion is that the Defendants created an audit trail suggesting that Mrs McKenna had given approvals which she had not, in fact, given. Mr Tancred had direct involvement, because he was writing to Mrs McKenna (along with a fellow IFA at the Company) and then proceeding without telling her, or taking any notice of her concerns. Mrs Tancred's evidence was that she wrote the cheques, photocopied them, typed accompanying letter headed sheets naming the clients and filed copies in Mrs McKenna's file. No such documents have been found by the Claimant on the files and I reject the evidence that she did all this; the evidence does, however, show that she was involved in the process of writing the cheque stubs. The audit trail made it appear that the business was being correctly run in respect of G60 approvals after the FSA censure, but the Defendants knew it was not. Mrs McKenna was then paid in one

lump sum at about the point when Mr Tancred was thinking of putting the business up for sale (which the evidence shows he had in mind for 2006, although the discussions with the Claimant began in 2007; Mrs McKenna said the big cheque came through before 2007).

94. I am satisfied that the true extent of Ms McKenna's involvement in the Company's pension transfer transactions was wilfully concealed by the Defendants in connection with their sale of the Company. The way in which they dealt with Mrs McKenna was a deliberate circumvention of the FSA requirement. It was important. It occurred over a period. It culminated in the single large cheque. The concealment of what actually happened has continued at trial, with reliance on cheque stubs and self-serving computer records of individual payments which misrepresent the true position. At the time of the SPA, FSA compliance was a critical element of the negotiation and of the SPA itself. The false narrative about Mrs McKenna cannot have been forgotten at the time of the SPA. The Defendants' failure to disclose it at that point was deliberate.

95. Claims in respect of failures to obtain G60 sign-offs from Mrs McKenna are, therefore, not subject to the 18 month primary limitation period and may be pursued by the Claimant. I note that a question has been raised about whether the Aldous business required G60 sign off. That is a matter that can be investigated, if still disputed, at trial.

Issue (iv) Whether there was wilful concealment of alleged breaches of the warranty in paragraph 21.4 of Schedule 4 of the SPA, which stated: "Since the date of the Financial Services Authority censure, 360 Services has assumed compliance of all income drawdown products sold by the Company…"

96. The Claimant alleges a breach of the warranty in paragraph 21.4 of Schedule 4 of the SPA, which stated: "Since the date of the Financial Services Authority censure, 360 Services has assumed compliance of all income drawdown products sold by the Company…" In particular, the Claimant relies on income drawdown products sold to customers surnamed Andrews, Brown, Burton, Fawcett, Goodliffe, Gower, Holloway, Jackson, Lambley, Lingard, Murray, Stuart, Wallis and Winspear.

97. Threesixty Services LLP ("360 Services") was an outside consultancy engaged by the Company to approve any income drawdown products sold by the Company. This was to comply with a requirement of the FSA, in paragraph 1(d) of the Settlement Agreement, which said: "[The Company] has agreed to vary its Part IV permission in the terms of the application attached to this Agreement at Annex B, so that all future sales of income withdrawal products by [the Company] will require a suitably qualified external compliance consultant to sign off on the sale of all income withdrawal products". This requirement was carried over into paragraph 4.6 of the FSA Decision Notice dated 3 October 2006 and paragraph 4.6 of the FSA Final Notice dated 17 October 2006.

98. Mr Russell Facer, who is now the Managing Director of 360 Services, gave evidence. At the material time, he was working in the 360 Services' compliance department and he was personally involved in 360 Services' dealings with the Company in the period before the sale. He was a witness independent of the Claimant or the Defendants in their present disputes. He gave calm, factual evidence which I saw no reason not to

accept in full. He clearly knows his business, and mentioned that he is a past Chairman of the Professional Association of Compliance Consultants.

99. Mr Facer explained that the Company referred to 360 Services, for approval, the Company's pensions advice to 14 clients. These matters all arose between October and November 2007. None of them were approved or signed off. Instead, 360 Services considered the papers and identified remedial action that was required for each proposal: I have been shown 26 pages of detailed written review and recommendation from 360 Services in relation to each of the 14 cases in question (Andrews, Brown, Burton, Fawcett, Goodliffe, Gower, Holloway, Jackson, Lambley, Lingard, Murray, Snart (presumably a misreading of Stuart), Wallis and Winspear).

100. 360 Services did not hear back in relation to any of the cases. Mr Facer was clear: "none of the investments proposed by [the Company] were approved or signed off by Threesixty". He said that, if the Company proceeded with any of the investments proposed without such approval or signing-off, it did so failing to comply with the terms of the censure and settlement with the FSA. In cross examination, he said it was up to the Company to come back to 360 Services. He said that, since the reviews showed that more information was required to make an assessment of suitability, it was impossible for 360 Services to sign off. He said that the same issues were being identified as late as 14 November 2007, which further suggested that action on 360 Services' advice was not being taken. 360 Services recommended training to the Tancreds and, in cross examination, he said the reason for that was clear evidence that they were not changing their approach. "The same issues came up." The offer of training was not taken up, either.

101. Mrs Edith Winter remembered papers being received from 360 Services. She said "We would give them to Mr Tancred to rectify. I do not recall anything going back to 360." This corroborates Mr Facer's evidence.

102. Mr Tancred's response was to say that 360 Services should have taken the initiative and chased the Company up, but I reject that. The papers I have seen show that 360 Services made it clear what was required for them to be able to review further, and it was not provided. It was up to Mr Tancred to provide it. If he did not pursue the matter with them in any particular case, they were entitled to assume he would not breach the FSA requirement by proceeding with the transaction anyway. It is accepted that the transactions did proceed.

103. Mr Tancred also suggested that he got approval on the telephone. That would explain the lack of documentary evidence of approval. But it seems to me incredible. The papers show that detailed fact finds (for example) were absent, and that was not the sort of deficiency which could be sorted out on the telephone. Undocumented telephone approval is also not consistent with the careful way in which 360 Services were (as one would expect) operating, with clear reasoned assessments setting out facts and conclusions in writing. I accept Mr Facer's evidence that there was no response, and no approval, whether on the telephone or otherwise.

104. These findings lead me to conclude with confidence that Mr Tancred wilfully concealed these Claims. He knew he was bound by the FSA Settlement Agreement to get 360 Services "to sign off on the sale of all income withdrawal products". He knew

that 360 Services had been asked to sign off and had refused to do so in 14 cases – that is, in every case. He knew that he had done nothing to respond to their requests for further information and action. He knew that the transactions had proceeded anyway. He knew this was important, both to the Company, and in relation to the SPA, being a regulatory matter. He knew that the Company's compliance was specifically warranted in the SPA. He is, as I have said, and as he acknowledged in cross examination, an intelligent man. No defence to the allegation of wilful concealment has been put forward, except to say there was nothing to conceal or that if Mr Tancred did not follow the correct procedure "this was done totally unintentionally". Not only have I found there was something to conceal; I have found that Mr Tancred's evidence about it is untrue. I am satisfied he knew what he was doing.

105. Mrs Tancred was cross examined about this, by reference to the papers. Her answers were evasive and unconvincing. It was put to her that the 360 Services documents could not have been seen as approval. She would not accept that. She said "360 Services never said they wanted anything different", which was demonstrably untrue, based on the very documents she was being shown. She did not accept any suggestion that further approval was required in relation to the 14 cases. She was shown a letter from 360 Services to Mr Tancred dated 18 April 2007 in which they provide detailed overall criticisms, including a statement in relation to suitability letter templates that "further enhancements need to be made as soon as possible, in order to meet the regulatory advice and record keeping requirements". She said she would have seen it at the time, but did not agree it was something that ought to have been shown to the buyers. She said, in relation to another letter from 360 Services dated 15 June 2007, "He says there are recurring issues, but he is not saying we are not following the correct procedure." That answer was not consistent with the content of the letter, which was short and clear. I conclude that Mrs Tancred knew the approach Mr Tancred was taking in relation to 360 Services, and she, like him, knew that it ought to have been disclosed to the Claimant but wilfully concealed it.

106. I am satisfied that the Claims arise out of wilful concealment by Mr and Mrs Tancred, within the meaning of clause 8.6 of the SPA. These Claims are not, therefore, subject to the primary 18 month limitation period and may be pursued.

Issue (v): Whether there was wilful concealment of a failure to comply with the requirement in the FSA Settlement that the Company should send a letter "in a form… signed off by an external compliance consultant, and to the satisfaction of the FSA, to all existing income withdrawal customers…"

107. Clause 1(c) of the FSA Settlement Agreement dated 27 September 2006 provided for the Company "to write, in a form of letter signed off by an external compliance consultant, and to the satisfaction of the FSA, to all existing income withdrawal customers", informing them of a number of matters. This requirement was carried over into paragraph 4.5 of the FSA Warning Notice dated 3 October 2006, paragraph 4.5 of the FSA Decision Notice dated 3 October 2006 and paragraph 4.5 of the FSA Final Notice dated 17 October 2006. Paragraph 4.5 of the FSA Final Notice read, in full:

> "[The Company] has agreed to write, in a form of letter signed off by an external compliance consultant, to all existing income withdrawal customers to inform them:
>
> (1) of the risks associated with income withdrawal as a product (including, in particular, an explanation of the important distinction between income withdrawal and an annuity);
>
> (2) of the risks of investing in a single asset class; and
>
> (3) that if on reading [the Company's] letter a customer wished to change the asset class(es) in which he has invested or purchase an annuity, [the Company] would resolve the matter to the customer's satisfaction at no cost to the customer."

108. The Claimant says the form of the letter allegedly sent out was not compliant. The Claimant also contends that no such letter was actually sent out at all, and relies, in particular, on evidence that it was not received by customers surnamed Aldous, Atkinson, Cox, Marriott, Smith, Temple, Torrance, Vickers and Westbrook.

109. As to the form of the letter, a draft was sent by Russell Facer (of 360 Services) by email of 26 October 2006 to the FSA which included, not only the draft letter itself, but also 15 pages of further explanation which it was proposed to enclose with each of the letters to be sent out. Mr Facer's email said:

> "Further to our conversations please find attached the proposed letter for issue to the firm's income drawdown clients. As agreed this does include specifics with regards to individual client's personal circumstance as to why they followed neither the income withdrawal option nor the reason why the client was or wasn't recommended to raise money. However, full guidance has been included with regards to the requirement to issue the letter following your review, the alternative options available to each client, including the advantages of each method, the risks associated with a single asset class and the opportunity for the clients to have their position reviewed at no cost.
>
> We trust that you find this satisfactory, but as previously highlighted the firm would welcome any comments you have to finalise the letter and resolve this matter as soon as possible.
>
> We look forward to hearing from you.
>
> Unfortunately I am away from the office tomorrow and will not have access to email. Can you please send any response directly to Gill Tancred and/or my colleague Steve Mythen at the above address?"

110. The FSA replied the next day, addressing their email to Mrs Tancred as requested. This email said (in part):

> "Dear Mrs Tancred
>
> Following our earlier telephone call I can confirm that I have discussed the letter you propose to send to your customers with my colleagues in supervision and we are happy with its contents. We discussed an amendment to the second paragraph so that it reads:
>
> "If, after having read this letter, you have any questions or would like advice about changing your choice of funds or purchasing an annuity, both being options that are presented to you each year at your annual review, then please contact me so this can be arranged at no cost to yourself."
>
> We agreed that it would be beneficial to underline this paragraph so that it stands out for the customer.
>
> I understand from our conversation that you are on holiday from next week and that the office staff will be issuing the letters to clients on Mr Tancred's behalf on Monday. We agreed that he will pre-sign these letters before you leave for your holiday…"

111. Mrs Tancred gave evidence that "The Admin Department should have placed copy of each of the letters we sent on the respective client file, as per our normal procedure." No customer has been identified who recalls receiving it, and so no letter actually sent out has been produced. So far as the file copies are concerned, I accept the Claimant's evidence that the only purported copies of the letter are on a relatively small number of files. I reject the suggestion (for example in Mr Tancred's evidence) that there were in the past other copies on the files which have been lost or which the Claimant has not disclosed.

112. Richard Ash exhibited the version of the letter which was found on the Johnson file. The name and address of the recipient, and the salutation, are, however, blanked out. It is dated 27 October 2006 and it has the reference "GDT/EW" which refers to Mr Tancred and to Edith Winter. It is not signed. The caption is "Income Drawdown Policy no." but it ends there, so no actual policy number is given.

113. Mrs Tancred exhibited what she said were examples of copies disclosed by the Claimant, and these were six complete copies, addressed to customers named Smith, Marriott, Vickers, Torrance, Westbrook and Cox, respectively ("the full copies"). They were identical to the version exhibited by Richard Ash (they had the same date 27 October 2006, and were unsigned, as well as the body of the letter being identical) except that nothing was blanked out and the name and address of the recipient was typed at the top, and the salutation (e.g. "Dear Mr Smith"), can be seen. They also had a policy number, different for each recipient, in the caption.

114. The date on the letters, 27 October 2006, was the date of the email response from the FSA addressed to Mrs Tancred which I have quoted above. It was a Friday. The FSA email response was timed at 4.17 pm on that day.

115. The body of the letter is identical in each of these versions but it is not identical to the final draft submitted by Mr Facer to the FSA and approved by them in their reply email to Mrs Tancred.

i) In the second paragraph, the last sentence of the draft submitted to the FSA by Mr Facer said: "However, it is important to read this summary as it provides further clarity of the position for you."

In the full copies, the last sentence reads: "However, for the sake of clarity we have summarised everything below for you."

ii) The draft submitted by Mr Facer to the FSA had a third paragraph which read:

"If, after having read this letter, you have any questions or would like advice about changing your choice of funds or purchasing an annuity, both being options that are presented to you each year at your annual review, then please contact me so this can be arranged at no cost to yourself. (additional text added by FSA 27/10/06)"

The FSA email proposed an amendment to what was clearly this paragraph (although the FSA referred to it as the second paragraph) so that, as well as being underlined, it read:

"If, after having read this letter, you have any questions or would like advice about changing your choice of funds or purchasing an annuity, both being options that are presented to you each year at your annual review, then please contact me so this can be arranged at no cost to yourself."

The full copies, however, omitted this paragraph at this point altogether.

iii) The draft submitted by Mr Facer to the FSA read, in the penultimate paragraph:

"If, after having read this letter, you decide that you wish to change your choice of funds or purchase an annuity, both being options that are presented to you each year at your annual review, then please contact me so this can be arranged at no additional cost to yourself."

It will be seen that this was very similar to the text which Mr Facer also had in the third paragraph, but it was not exactly the same. The FSA had no comment on this paragraph, although it had suggested the amendment and underlining of the similar text in the third paragraph which I have referred to above.

In the full copies, this paragraph was omitted, and replaced with the underlined text which the FSA had mandated for the third paragraph. The effect of this was that the underlined passage, instead of appearing on the first page, with

extra prominence conferred by the underlining, was now relegated almost to the end, on the third page of a three page letter.

116. The Defendants' case was that these differences were immaterial and that the relocation of the underlined paragraph was an innocent mistake. The Claimant, on the other hand, contended that moving the passage that the FSA had particularly wanted to emphasise (with underlining) from the first page to the last was a significant change which altered the prominence of important points. As Mr Facer said in cross examination, "They might not get to the end of the letter." I agree with this. I therefore do not consider that the letter as allegedly sent out complied with the requirement that it should have been "signed off by an external compliance consultant, and to the satisfaction of the FSA" as required by the FSA Settlement Agreement.

117. The similarity between the penultimate paragraph of the draft and the third paragraph of the draft makes it possible that the placing of the FSA text, with its underlining, at the end rather than the beginning could have been a mistake, which is what both Mr and Mrs Tancred say it was. The alteration of the second paragraph could not have been a mistake, and has clearly been done by way of editorial change which was not authorised by or known to the FSA. It might have seemed like a small change, but it is a change made in order to make a difference, and it did make a difference. Combined with the shifting of the underlined paragraph from the beginning to the end, the effect of the change was to remove the statement that it was "important to read this summary". However, given the larger concealments which I have already found proved, and other matters to which I will turn, I would be surprised if Mr or Mrs Tancred had these particular changes in mind when giving disclosures and warranties in relation to the SPA, and wilfully concealed them. I am not, therefore, satisfied that they were wilfully concealed for the purposes of the limitation period in the SPA.

118. That brings me to the question of whether the letters were ever sent out at all. The Defendants insist that they were; the Claimant alleges that they were not.

119. When deciding this question, the first striking point is that no-one has been found who can say that they actually received the letter. It is accepted that copies should have been sent to customers named Aldous, Atkinson, Cox, Marriott, Smith, Temple, Torrance, Vickers and Westbrook. Of these, I heard evidence from Mr Antony Aldous, Mrs Judith Aldous, Mr Paul Marriott, Mr Malcolm Smith and Mrs Susan Vickers. Mr Aldous's evidence that he never got the letter was compelling. He said he would have acted on the letter if he had got it, and he would have noticed its size and the number of enclosures. He said "I have kept all my papers since day one and have no such letter."

120. Mrs Vickers was equally convincing when giving evidence that neither she nor her husband got the letter. "If we'd had this letter suggesting we could have moved our fund, we would have moved it. The option was never offered. Never – never – never."

121. Mr Marriott and Mr Smith also said in their evidence in chief that they did not receive the letter. Mr Marriott in cross examination confirmed "I did not receive this letter." Mr Smith in cross examination initially confirmed that part of his evidence in chief, saying that he knew nothing about an FSA investigation. When, later, he was taken to

a version of the letter taken from the files which had his name and address on it, he said it was "A letter I may have received concerning the drawdown policy". He did not say he had received it and taking his evidence as a whole, along with the other evidence, I am satisfied he did not receive it.

122. Although the text of the letter encouraged them to do so, it was common ground that not a single person to whom the letter was allegedly sent made any contact or enquiry following up on the letter with the Company.

123. The next point is that all the versions I have referred to bear the typing reference of Edith Winter ("EW"). If she had typed such a letter, and having seen her give evidence, I would expect her to remember it. It was an important letter. It was being prepared under some pressure of time, since the FSA email came in at the end of the afternoon on which (Mr and Mrs Tancred contend) it was prepared and printed out. Every letter had to be individually tailored, with the name and address of recipient, a policy number for the caption, and the appropriate salutation, varying for each recipient. Mrs Winter's evidence was "I am absolutely positive that I did not type or prepare this letter although it has my initials at the top." In cross examination, she said "It would have had attachments, postage, a lot of letters, time, if I'd been involved I would have been aware. I am unaware of that letter being produced and sent out."

124. Mrs Winter gave other evidence in support of her conviction that she did not type the letters to which her initials were appended, and this evidence was not challenged. She said "I do not prepare letters in this way. The spacing is wrong. I never leave a space or line between Mr Tancred's name and the name of the company at the bottom. I always punctuate the name of the company."

125. I accept Mrs Winter's evidence on this point. She did not type any of the letters, in any of the versions I have been shown. She was not involved in any way, and she was never aware of them being produced.

126. A number of explanations were put forward to reconcile the initials with the evidence (which the Tancreds did not accept) that Mrs Winter did not type the letters. Mrs Tancred said that there were letter templates with Mrs Winter's initials on, from which they could have been carried over by mistake. Mrs Winter denied the existence of such templates and I accept her evidence. In cross examination, Mrs Tancred introduced a new explanation: "We changed the initials at the top to EW as she was mentioned in the letter." If that were the case, I would expect it to be one of the explanations offered (perhaps the only explanation to be offered) in her witness statements, but it did not appear there. It also seems inherently unlikely.

127. The Defendants' evidence about the preparation of the FSA mailing was inconsistent. Mr Tancred's first witness statement (of 27 January 2017) did not mention it. His supplementary statement, of the same date, addressed it at paragraphs 14-19. For the most part, he simply refers to his wife's evidence, but in paragraph 15 he adds: "As far as I was aware all Income Drawdown clients were sent the FSA driven letter within days of the requirement to do so. I had a very efficient Administrative staff who were used to doing mailshots to multiple clients, so this would have been treated in the same way. My staff would not have let me down on this." In cross examination, he said the letter was "A labour of love. We spent hours on it." Later, he said "I doubt

I looked at it." He said he "had a feeling it might have been signed by admin" but, when told his wife had said he signed it, he said "Probably was me." He said that Mrs Winter's initials would only have been on the letters because she had typed them (I have decided she did not). He said the blank copy was placed on file "to show it had been sent".

128. There was more detailed evidence from Mrs Tancred but this also lacked consistency. Her first witness statement, dated 17 January 2017, did not cover this topic. Her supplementary statement, dated 25 January 2017, did. It began by saying, in general terms, what would usually happen in the case of a mailshot. It then said that, for the FSA mailshot, "this procedure would have been the same". This approach suggested a non-existent or vague recollection of what actually happened. A number of details were then given which could be derived from disclosed documents, such as the FSA approval: a not uncommon and perfectly legitimate approach for a witness with a less than complete recollection. At this point, after 9 paragraphs of generic evidence of the type I have described, Mrs Tancred eventually began to convey an actual recollection of what was done. After referring to the changes made at the instigation of the FSA, Mrs Tancred says "Then Geoff and I stayed late to print the letters and Geoff signed them. The enclosures had already been printed. We left neat piles of letters, envelopes and the enclosures for the staff to bundle up and post when they were back in the office on the Monday." She then said it was up to the administrative staff to place "copy of each of the letters we sent on the respective client file, as per our normal procedure". In relation to the blanked out version of the letter, she said "I cannot explain where the blanked out letters have come from or why they exist", but denied that they were manufactured to go on client files regardless of whether they had been sent. I find this evidence incredible given Mrs Winter's lack of awareness of any mailing on this scale.

129. In her cross examination before me some 18 months later, Mrs Tancred introduced the name of Sue Wells, who she said had printed out the enclosures in the course of the previous week. On the question of Edith Winter's initials, she repeated the template theory, but also suggested that "one person might start a letter finished by others". She said that the final FSA change (the underlined paragraph) was done by Sue Wells, thereby placing Sue Wells with her and her husband after the FSA email on Friday afternoon, which she (and her husband) had not done in their witness statements. Indeed, this evidence conflicted with the witness statement suggestion that Edith Winter typed or may have typed the letter.

130. James Hudson's first witness statement dated 26 January 2017 referred to the FSA requirement for the letter to go out (paragraph 29), but said nothing about any knowledge of that requirement being implemented. His supplemental statement of the same date introduced some sketchy recollection on the point. He said he recalled that Mr and Mrs Tancred were on holiday so the letters were sent out by staff: "this would have been either Jane Sztykalo, Sue Wells or Edith Winter. I remember discussing the letters with Mrs Winter but I cannot remember which client this was with regard to." This is inconsistent with the evidence of Mrs Winter, which I have found to be credible. In cross examination, he said that he had seen the letters in a pile on the Monday morning and that he had said "What a big pile of letters". I have already said that I found him an unreliable witness in general and I found this sudden amplification of his witness statements particularly unconvincing.

131. Taking the evidence as a whole, I am quite satisfied that the letters were not sent at all, which means they were not sent to the clients Aldous, Atkinson, Cox, Marriott, Smith, Temple, Torrance, Vickers and Westbrook as they should have been. I am also satisfied that copies were produced to place on the file, and were placed on the file, to give the appearance (which has been relied on before me) that they had been sent. I am satisfied that this was done by Mr and Mrs Tancred, and that they used Edith Winter's initials, as the person who would ordinarily have typed such a letter, without her having any knowledge of this or of the letters being placed on the files. By not actually sending the letters out, Mr and Mrs Tancred avoided prompting clients on the points contained in the letter, and avoided having to deal with client responses to the letter.

132. The only purpose of this exercise was to give the impression that a key requirement of the FSA Settlement Agreement has been complied with, without actually complying with it. The Company's compliance with FSA requirements was critical to the sale of the business. The fact that the letter was not sent, but that copies had been placed on file to suggest that it had been sent, must have been in the Tancreds' minds as they negotiated the SPA. I am satisfied that these Claims arise from wilful concealment by Mr and Mrs Tancred, and have also been delayed as a result of wilful concealment by them. It follows that the primary limitation period does not apply and these Claims may be pursued.

Issue (vi): Whether there was wilful concealment of complaints alleged by the Claimant to have been made before the SPA

133. The Claimant also wishes to pursue Claims that there was wilful concealment of complaints alleged by the Claimant to have been made before the SPA by the customers surnamed Aldous, Fox, Holling, Isaacs, Johnson, Smith and Vickers.

134. The Disclosure Letter included "details of complaints from clients which have been brought to the attention of the Company". The customers surnamed Aldous, Fox, Holling, Isaacs, Johnson, Smith and Vickers are not included in those details. No details of complaints by them appeared on the complaints files. It is accepted that they were not disclosed.

135. The issue is whether they had, in fact, complained and, if so, whether their complaints were wilfully concealed by the Defendants.

136. Edith Winter's evidence was that Mr Tancred gave her clear instructions that "It was only to be treated as a complaint if it had been put in writing." I accept that evidence, although Mr Tancred and Mr Hudson denied it. It is common ground that complaints should have been logged and disclosed even if not put into writing by the client. Indeed, (as Mrs Winter accepted) there are two examples of verbal complaints specifically identified as such by Mrs Winter in the list of complaints provided with the SPA disclosure. They appear to be exceptional in a list of 72 complaints.

137. Mr Tancred in his evidence was dismissive of complaints in general. He did not admit to any fault on his part ever, apart from his minimising references to "sloppy paperwork" (which, however, he said had never caused any client to lose money). He said that he had done very well for his clients and that any losses were down to the markets and not to his advice. This cannot be reconciled with the FOS awards and

settlements against the Business running to hundreds of thousands of pounds. In particular, he showed no recognition of errors consistently identified by the FSA and by 360 Services: risky investment in a single asset class (notably commercial property), failure to explain risk, and failure to conduct sufficient fact-finds with clients before giving advice. Witnesses commented that Mr Tancred seemed confident and pleased with himself, and that was my observation too. He was a fast-talking salesman. This evidence lends credibility to a suggestion that Mr Tancred's response to any complaint would be to brush it aside rather than to take it seriously. That is, after all, what I have found he did when faced with criticism from the FSA, from 360 Services and from Mrs McKenna.

138. Mr Tancred placed emphasis on a distinction between what he called "hard" and "soft" complaints. He said that only "hard" complaints had to be recorded. However, the FCA definition of complaint is "any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provisions of, or failure to provide, a financial service, which alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience". It seemed to be accepted that this was also applicable at the material times. The *IFA's Guide to the FSA Handbook* says:

> "Under the FSA rules (DISP 1.2.1R) any dissatisfied customer is a complainant. A simple test here is: "did the customer sound cross?" If the answer is "yes", you have a complaint. The problem does arise that while the customer may definitely be dissatisfied, it is unclear whether he is dissatisfied with you. Clearly, any reference to the firm or any employee in this connection would answer that question. In the absence of such an indication, one is looking for the dissatisfaction to be linked in any way to a task undertaken or which should have been done by your firm. At its simplest, the customer may say that they are upset at the advice they were given. If your form was the adviser, the complaint is against you."

139. In relation to the distinction between "hard" and "soft" complaints, the same book says:

> "All expressions of dissatisfaction are complaints. However, strictly speaking, some of the key rules only apply to situations where the complaint involves "an allegation that the complainant has or may suffer financial loss, material distress or material inconvenience". These are hard complaints…
>
> A complaint will not be a "hard" one if it has been resolved by close of business the day after receipt.
>
> ...Firms using this distinction between soft and hard complaints need to appreciate that for soft cases, the firm is still required to have effective written procedures for receiving, responding to and investigating complaints and for referring dissatisfied clients of their right to refer the matter to the FOS."

140. In respect of those alleged to have complained before the SPA, without their complaints being recorded or disclosed, I heard evidence from Mr and Mrs Aldous, Mr Isaacs, Mr Smith and Mrs Vickers.

141. Mr Aldous strongly asserted that he was constantly complaining about the state of his finances, although he did not use the word "complaint". He said that he thought it would be rude to express himself differently but that Mr Tancred could have been in no doubt. Mrs Aldous supported his evidence. She said "My husband is very kind and gentle and would not have complained aggressively but certainly he was complaining; asking for advice and action, because he was very upset about his pension evaporating." "He was becoming agitated and depressed because of it so I suggest, yes, he was complaining, not just commenting on the market. Requesting advice and action is making a complaint." They were both credible witnesses and I accept what they said. Mr Tancred accepted that Mr Aldous had made complaints (after being shown correspondence) but said they were not hard complaints "because he was asked to persevere and agreed to." I do not agree. Mr Aldous was making constant complaints that were not resolved within a day and they should have been recorded.

142. Mrs Susan Vickers was a spirited witness who gave convincing evidence about her regular calls to the office as she saw her investments performing badly. Mr Tancred would not take her calls. She spoke to Mrs Winter and to Mr Hudson (who denied speaking to her, but I accept her evidence and reject his, because it is inherently likely and she was a more impressive witness overall). She "made it very clear to him that we were not happy, that we were losing money, not being advised or kept informed. I complained that we were not getting what we had signed up for and been assured of by Geoff Tancred. James listened but did not say very much. He agreed to pass on my complaints to Geoff Tancred but he never called me back". I accept that evidence.

143. Mr Isaacs said he was "very upset Standard Life was not performing and I made that clear to him. I saw Mr Tancred on regular occasions although there is no correspondence after 1999". To the suggestion that he never actually complained, he said "You cannot say that to me". He agreed that he and Mr Tancred would go for a beer, but said that did not mean he was happy with what he was doing. He said "Mr Tancred was in charge so if my funds are not doing well, it is the responsibility of the person in charge of the funds to ensure they are doing well. If they are not working or I say they are not working it's a complaint about his performance." I accept that evidence. Mr Tancred accepted only that there was a "soft" complaint from Mr Isaacs. He also said: "I don't think he was making a complaint. He was having a good old grumble because of his lifestyle." I disagree. Mr Isaacs was complaining and Mr Tancred's refusal to accept responsibility did not dispose of his complaints.

144. Malcolm Smith said he was persuaded and believed Mr Tancred was telling the truth and that nothing needed to be done, when Mr Smith expressed concerns to him. "He was giving the impression it was OK, but it was not OK, he was not interested." I accept that evidence. Mr Tancred recalled telephone calls, but said they "They're soft complaints". I disagree.

145. Fox, Holling and Johnson were not called as witnesses. There was, however, documentary evidence about them. Of Mr Fox, Mr Tancred said "His investments had fallen and, yes, he was unhappy. He did not make a complaint." The FSA letter of 19

October 2005 referred to a letter from Mr Johnson dated 11 September 2004, expressing concern that his income withdrawal income was lower than forecast, which had not been recorded on the complaints log. Mr Tancred said "It was not a complaint. He said why is it lower than forecast". The FSA letter of 19 October 2005 referred to a file note dated 2 May 2003 on the Holling file explaining that he had contacted the Company "because his income withdrawal income was lower than he was led to believe and that he was considering seeking compensation". This, too, was not recorded on the complaints log. Mr Tancred denied it was a complaint. He was referred to a written response to the FSA which said "The questions that were levied by the two clients were responded to by Geoff and the clients were satisfied with the replies."

146. The fact that complaints were made and not recorded in the SPA disclosure does not mean, of course, that they were wilfully concealed. The evidence is that Mrs Tancred was not involved with complaints and no witness implicated her in relation to them. Mr Tancred said "We were not aware of anyone who was likely to make a claim". This echoes the test ("likely to give rise to any claim…" and "likely to give rise to any… proceedings…") in paragraphs 6.2 and 8.2 of the specific warranties in Schedule 4.

147. My conclusion from the evidence is that Mr Tancred did not take complaints seriously. He talked his way past them, or he ignored them. If they went further, he regarded them as a nuisance, and he engaged with criticism only to the extent that it was forced upon him (and sometimes, as I have found in relation to the FSA mailing, and the McKenna and 360 Services assessments, not even then). His use of the "hard" and "soft" complaint terminology did not correspond to any technical definition, but seemed more apt to describe whether he thought the complaint could safely be ignored (a "soft" complaint) or whether it was a complaint that was being pursued effectively (a "hard" complaint). I have no doubt, on the evidence from him and from others, that he regarded the complaints of Aldous, Fox, Holling, Isaacs, Johnson, Smith and Vickers as "soft" complaints that he could safely ignore or talk over. He did not think anything would come of them. Only a written complaint expressed with a degree of formality could change his mind. Even then, as apparently occurred with Mr Holling when he said he was considering seeking compensation, Mr Tancred would first try and make the complaint go away rather than record it, and, if he did think he had made it go away, that would be that as far as he was concerned.

148. This was an unprofessional and irresponsible approach. However, it makes it, in my judgment, unlikely that Mr Tancred had these complaints in mind, and wilfully concealed them, when negotiating the SPA. I am, therefore, not satisfied that these Claims fall outside the 18 month limitation period in clause 8.5 of the SPA.

Issue (vii): Whether there was wilful concealment of matters which eventually gave rise to complaints made after the SPA

149. The Claimant also wishes to bring Claims based on clients who, they accept, did not complain before the SPA, but whose business before the SPA gave rise to claims which emerged after the SPA. Various warranties in the SPA, the Claimant says, made these matters disclosable, although the complaints themselves were not made

until subsequently. In particular, reliance is placed on paragraphs 5.2, 6.2, 8.2, 21.3 and 21.4 of the warranties in Schedule 4 of the SPA.

150. The Claimant relies on transactions with clients surnamed Allen, Bloodworth, Clarke, Drury, Holloway, Hornsby, Lingard, Smalley, Smith, Trout, Upex, Vesty and Vickers.

151. I have already mentioned the evidence I heard from Mr Smith and Mrs Vickers. Apart from them, the only other person I heard from was David Holloway, who was one of the cases included in Mrs McKenna's commission payment, although (as I have found) she did not approve the business done with him. He was also one of those who should have had but did not receive the FSA-mandated letter. He said he was mis-sold a transfer out of his final salary pension scheme to an insurance scheme. His evidence was, in fact, that he regularly raised concerns about the poor performance of his new investment with Mr Tancred before the date of the SPA. Mr Tancred said 'not to worry, it would bounce back'. "He said the same after commercial property began to suffer in 2007. When it did not recover and we saw him again to complain he told me I should go out and get a job. I had retired by then." In due course, Mr Holloway received maximum compensation from the FOS of £100,000, although this fell short of his actual losses of about £250,000. He told me that he and his wife (and their extended family) still suffer the effects of their losses as they "watch every penny" in retirement, unlike former Rebus colleagues who stayed in the final salary scheme.

152. For the other named clients, reliance is placed on documents and FOS decisions and settlements. Mr and Mrs Allen received a settlement of over £72,000 after an FOS decision; Mr Bloodworth received a settlement of £100,000 after an FOS decision; Mr and Mrs Clarke received a settlement of over £18,000 after an FOS decision; Mr and Mrs Drury received a settlement of over £11,000 after an FOS decision; Mr Holloway (as I have said) received the maximum settlement of £100,000 after an FOS decision; Mr and Mrs Hornsby received a settlement of just under £50,000 after an FOS decision; Mr Lingard received a settlement of over £49,000 after the FOS upheld a complaint; Mr Smalley received a settlement of over £7,000 after an FOS decision; Mr and Mrs Smith received a settlement of just under £40,000 after an FOS decision; Mr and Mrs Trout received a settlement of over £25,000 after an FOS decision; Chris and John Upex received a settlement of just under £6,000 after an FOS decision; Mr and Mrs Vesty received a settlement of over £3,000 after an FOS decision; and Mr and Mrs Vickers received a settlement of £100,000 after the FOS upheld a complaint. These awards all arose from advice given before the SPA.

153. Mr Tancred and Mr Hudson both gave evidence about these cases, and were cross examined on them. Mr Tancred's evidence in chief was very brief and did not cover each of the named clients; essentially, he said he was not aware of any complaint and could not comment without documentary evidence (paragraphs 130-131 of his first witness statement dated 27 January 2017). Mr Hudson's evidence in chief addressed the cases of Drury ("they did not complain to me pre-sale as their investments had performed well"), Upex ("no recollection"), Hornsby ("cannot remember any potential grounds for complaint pre-sale"), Trout ("cannot remember any potential grounds for complaint pre-sale") and Vesty ("cannot remember any potential grounds for complaint pre-sale"). His overall comment is "I have little recollection of the clients mentioned".

154. Mr Tancred was taken through some of these cases in cross examination. He said that the Allens were "soft complaints". He did not accept any blame; if anything, he seemed to blame the clients, which, in the light of the FOS proceedings, is unsustainable. Of Mr Bloodworth (who received the FOS maximum of £100,000) he said "If he had complained, I would have shot him down in flames". Of Mr Holloway, he said "He made a killing. He had no quarrel with me." Of Lingard "He did quite well". Of Smalley "he did very well before the crash". In short, Mr Tancred's evidence bore no relation to the situation established by the FOS proceedings.

155. I am in no doubt that these clients had substantial grounds for complaint, because of their vindication by the FOS. On the limited evidence I have been shown about them, I am satisfied that their complaints are likely to have arisen out of the same sort of professional incompetence that was directly flagged up by the FSA and, subsequently, by the comments of Mrs McKenna and of 360 Services, all of which Mr Tancred had ignored. But I have to ask myself, not whether there were undisclosed grounds for complaints which had not yet been made, but whether Mr and Mrs Tancred (or either of them) wilfully concealed them. Against that, is clear evidence that Mr Tancred was in a state of constant denial, as he still is, and that Mrs Tancred was not directly involved with these clients or with complaints generally.

156. My conclusion on this issue is similar to my conclusion on the issue of complaints made before the SPA. I am not satisfied that there was wilful concealment of these Claims, except to the extent that they fall within the matters I have already considered in relation to Mrs McKenna, 360 Services, and the mailing required by the FSA. Therefore, in relation to this issue, they fall within the 18 month limitation period in clause 8.5 of the SPA and cannot now be pursued.

Issue (viii): Whether the Claimant is entitled to pursue other similar claims

157. The Claimant in opening submitted that "the claim would not be barred by clause 8.5 if the claim arises or is delayed by the Defendants' wilful concealment even if some parts of the claim did not arise or were [not] delayed by the Defendants' wilful concealment". It takes issue with paragraph 3 of the PDPI, which says:

> "…on a proper construction of the [SPA], no individual claim for breach of any of the warranties may be brought by the Claimant in breach of the Claimant's obligations with regard to notice and the issue of proceedings contained in Clause 8.5 of the [SPA] unless the Claimant can establish that the complaint underlying specific individual claim was:-
>
> (a) Wilfully concealed by the Defendants; and
>
> (b) The specific individual claim arose or was delayed as a result of that wilful concealment."

158. No submission was made to me about any particular claim which, it was said, was in part not arising or delayed by wilful concealment but which could be brought in by reason of other parts which were (except, potentially, complaints). The argument was advanced in general terms rather than being developed from specific claims (see, for

example, paragraph 17 of the Claimant's written Closing Submissions). The hypothetical nature of the proposition makes it more difficult to address.

159. It is also not clear to me whether this point remains important given my findings on issues (ii) to (vii). Perhaps, if I had allowed Claims in relation to specific undisclosed complaints before the SPA to go through, for example, it might have been argued that other complaints could also be included on their coat-tails. But I have not allowed those Claims to proceed and I will not therefore consider the proposition in that context, and need give no indication about how I might have decided it in that context.

160. The Claims that I have allowed to proceed are those under issue (iii) (Mrs McKenna), those under issue (iv) (360 Services) and those under issue (v) (the FSA mailing). I am allowing all of those to proceed, and no others. The basis of those Claims is pleaded, and I have allowed all of them through (partly as a result of my decision on issue (i) which allows the amendments to the Particulars of Claim, as opposed to the PCPI, sought in paragraphs 2 and 8 of the Claimant's written submissions dated 6 August 2018).

161. I do not propose to embark on a theoretical consideration of what other Claims might or might not be permissible as a result of this judgment. Such an enquiry would be too abstract and imprecise to be useful. Any such additional Claims would have to be pleaded, and, in my judgment, would require permission to amend. The right time to consider whether such an amendment should be allowed will be if and when any application for such permission is made.