Appeal number: CMS/2017/0003

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
CLAIMS MANAGEMENT REGULATION

HELP YOUR CLAIM LIMITED **Appellant**

- and -

THE CLAIMS MANAGEMENT REGULATOR **Respondent**

TRIBUNAL: JUDGE ALISON MCKENNA
Mr IAN ABRAMS

Sitting in public at Alfred Place, London
on 6, 7, 8 and 9 March 2018

The Appellant was represented by Jeremy Barnett and Ayesha Smart, counsel

The Respondent was represented by Brendan McGurk, counsel

DECISION

1. The appeal is dismissed.

REASONS

2. The appellant company ("HYC") has appealed against the decision of the Claims Management Regulator ("the CMR") dated 10 March 2017 that it had failed to comply with the terms of its authorisation and the imposition of a financial penalty of £553,000 payable by 7 April 2017.

1. Background

3. HYC was authorised to provide regulated claims management services from July 2009. Its work concerns mis-sold payment protection insurance ("PPI"). Its office is in Manchester, from where it continues its work as an authorised Claims Management Company notwithstanding the matters discussed in this Decision.

4. The CMR audited HYC in 2012, 2013, 2014 (twice) and 2015, providing the company with an audit report on each occasion and returning to monitor progress on the areas of concern. Following the audit in February 2015, a formal letter of warning was sent to HYC. The CMR then opened a formal investigation, pursuant to regulation 35 of The Compensation (Claims Management Regulation) Regulations 2006, in August 2015.

5. The CMR sent HYC a "minded to" letter dated 22 February 2016[1]. This set out its conclusion that HYC had breached the Conduct of Authorised Persons Rules, compliance with which is a condition of its authorisation, and that a financial penalty was warranted. In particular, the CMR's letter stated that, although HYC had taken some action to remedy the breaches identified since the commencement of the formal investigation, it had allowed misconduct to continue for several months before making those changes and allowed other breaches to continue, despite the provision of advice and receipt of a warning from the CMR.

6. The CMR initially proposed a financial penalty of £690,000 which, having considered representations from HYC, was later reduced to £635,000 and finally in March 2017 reduced to £553,000. This equated to 4% of turnover for the relevant period. This is the penalty now appealed.

7. The issues for the Tribunal to decide in determining this appeal are: (i) whether the Appellant breached the terms of its authorisation; (ii) if so, whether a financial penalty is warranted in relation to that conduct; and (iii) if so, what is the correct level of penalty to be applied, having regard to the nature and seriousness of HYC's conduct. There is no dispute as to HYC's turnover from regulated activity during the period relevant to the assessment of a financial penalty.

[1] Page 4-622 open hearing bundle

2. Appeal to the Tribunal

8. The letter of 10 March 2017 ("the Decision Letter")[2] set out the CMR's findings as follows:

(i) The rule breaches identified in the "minded to" letter of 22 February 2016 were still relevant;

(ii) The financial penalty is warranted as a result of the historic and on-going breaches identified at audit;

(iii) HYC's activities have generated a significant number of complaints;

(iv) The breaches are widespread or potentially widespread and linked to systemic failures;

(v) HYC has failed to evidence the remedial action it had told the CMR it would take following its formal letter of warning;

(vi) There has been little or no improvement in the conduct of HYC's staff during the course of the statutory investigation, as evidenced by recent consumer complaints. Areas of concern are misleading statements, high-pressure selling, third party conference calls, impersonation of customers by staff, failure to advise customers to read and retain documents, and the incorrect dispositioning of calls so that when people asked not to be called back their number is not suppressed.

(vii) The Decision Letter was accompanied by:

Appendix 1, a schedule of all correspondence with HYC relating to the CMR's audits;

Appendix 2, a schedule of 39[3] complaints made to the CMR by HYC customers after HYC was made subject to the formal investigation, giving details of the customer name, the method of contact, a brief summary of the complaint and the particular Rule which it was said to breach;

Appendix 3, a schedule of statements made by HYC staff extracted from the call recordings listened to by the CMR.

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[2] Page 4-753 closed hearing bundle

[3] Two of these were no longer relied on by the CMR by the time of the hearing.

(viii) The nature of the breaches was considered "escalated" and the seriousness of the breaches scored at "medium", due to their systemic nature and the widespread or potential for further widespread impact on consumers and lenders.

9. The Appellant's challenge to the Decision letter, as set out in its Grounds of Appeal[4], was as follows:

(i) The telephone calls relied on by the CMR were "*unreliable and not supported by the evidence";*

(ii) HYC had taken all reasonable steps to comply with its regulatory obligations;

(iii) HYC had an "*overriding objective*" to further the interests of consumers against the banks;

(iv) The CMR wrongly relied on complaints from banks which were not disclosed to HYC;

(v) The CMR relied on inaccurate summaries of phone calls;

(vi) It is denied that HYC breached the terms of its authorisation;

(vii) It is denied that a financial penalty was warranted in all the circumstances;

(viii) The CMR had incorrectly applied the guidance when calculating the amount of penalty to be imposed.

10. HYC's skeleton argument produced for the substantive hearing in March 2018 ("the second skeleton") expressly incorporated the skeleton argument which had been prepared for the preliminary hearing in May 2017. That document ("the first skeleton") was 25 pages long and included numerous submissions directed towards a public law challenge to the decision letter. The first skeleton also submitted that the CMR bore the evidential burden in this appeal, so that it was required to produce the customers on whose calls it relied for cross-examination. The second skeleton helpfully fleshed out HYC's case in respect of its eight grounds of appeal referred to above.

11. The Appellant's second skeleton commenced with a "*disclaimer*" in which the Appellant's counsel stated that it's contents could "*not be taken as a binding statement of the Appellant's case*". The Tribunal told HYC's counsel that it found the inclusion of a disclaimer in a skeleton argument extraordinary and explained that counsel could not thereby seek to disclaim their professional obligations to the Tribunal or HYC's duty of co-operation under the overriding objective. This was accepted.

[4] Page 1-1 closed hearing bundle.

12. Although not pleaded as such, the appeal was understood by the CMR and the Tribunal to be one made pursuant to s. 13 (1A) (a) and (b) of the Compensation Act 2006 (see paragraph 27 below).

13. The CMR's grounds of opposition[5] to each of the grounds of appeal were, in summary, as follows:

(i) As to "*The telephone calls relied on by the CMR were "unreliable and not supported by the evidence"* the CMR stated that the Tribunal would be invited to listen to the tape recordings and form its conclusions on the evidence;

(ii) As to "*HYC had taken all reasonable steps to comply with its regulatory obligations*" the CMR stated that the facts showed that HYC had consistently and seriously failed to comply with its regulatory obligations over a number of years;

(iii) As to "*HYC had an "overriding objective" to further the interests of consumers against the banks"* the CMR stated that this contention was both factually incorrect and legally irrelevant. The motives of HYC are irrelevant in circumstances where its conduct amounts to a breach of the Rules;

(iv) As to "*The CMR wrongly relied on complaints from banks which were not disclosed to HYC*" the CMR stated that its decision to take enforcement action was taken as a result of its review of the telephone call recordings supplied by HYC. The complaints from financial institutions had been relied on when deciding to open the statutory investigation;

(v) As to "*The CMR relied on inaccurate summaries of phone calls*" the CMR stated that this is a matter for the Tribunal having heard the evidence;

(vi) And (vii) As to "*It is denied that HYC breached the terms of its authorisation*" and "*It is denied that a financial penalty was warranted in all the circumstances,"* the CMR stated that these are not properly to be regarded as discrete challenges to the Decision Letter but are suggested conclusions based on the earlier grounds;

(viii) As to "*The CMR incorrectly applied the guidance as to the amount of penalty to be imposed*" the CMR denied that the formula had been incorrectly applied and stated that it would defend its "nature" and "seriousness" scores before the Tribunal.

14. The CMR's skeleton ("opening observations") sought to reduce the dispute between the parties to its heart by asking (a) has there been a breach of HYC's conditions of authorisation and (b) if so, did the CMR correctly apply its Financial

[5] Page 1-334 open hearing bundle

Penalty Scheme Guidance in assessing the amount of penalty to impose. It asked the Tribunal to consider these questions in the light of the evidence.

15. The Tribunal held an oral hearing of the appeal over four days, from 6 to 9 March 2018 inclusive. The Tribunal heard oral evidence called on behalf of both the Appellant and the CMR. All witnesses had filed statements which stood as their evidence in chief and in relation to which they were cross examined and re-examined. The Tribunal is grateful to them all for their assistance. The Tribunal also considered an agreed bundle of documentary evidence comprising something in the region of 2000 pages. The hearing was professionally transcribed at the parties' cost and the transcript was provided to the Tribunal, for which we are grateful.

16. By agreement with the parties, the Tribunal listened to two CDs of recorded telephone conversations between HYC staff and members of the public in the course of its pre-reading. HYC selected the calls on one CD and the CMR selected the calls on the other CD. In view of the sensitive financial information discussed in the calls, the Tribunal directed that some of the evidence in the case should be filed in a separate bundle and be subject to a rule 14 (1) direction, so that it may not be disclosed to any other person or published. We have referred to members of the public, where necessary in this Decision, in an anonymised form, so as to give effect to that ruling and comply with rule 14 (10).

17. The Appellant commenced the hearing with representation by Jeremy Barnett as leading counsel and Ayesha Smart as his junior. During the hearing, Mr Barnett's instructions were withdrawn by HYC and so Ms Smart continued alone. In view of these changed circumstances, we adjourned at the close of evidence and invited closing submissions in writing. We are grateful to Ms Smart and Mr McGurk for their helpful oral and written submissions. We repeat here our verbal reassurance to HYC that Mr Barnett's conduct of its case has not reflected adversely on HYC and that we have reached our conclusions on the law and evidence alone.

3. The Law

(i) The Tribunal's Jurisdiction

18. The nature of the Tribunal's jurisdiction in relation to these issues is *de novo* i.e. we stand in the shoes of the CMR and take a fresh decision on the evidence before us, giving appropriate weight to the CMR's decision. The nature of an appeal by rehearing is described in *El Dupont v Nemours & Co v ST Dupont* [2003] EWCA Civ 1368 by May LJ at [96] [6]. This nature of the jurisdiction is made clear by the full range of powers exercisable by the Tribunal in the exercise of its own discretion – see s. 13(3) of the 2006 Act as amended at paragraph 28 below. See also, *Tribunal Practice and Procedure* Edward Jacobs, LAG third edition, chapter 4.

[6] http://www.bailii.org/ew/cases/EWCA/Civ/2003/1368.html

19. It follows that, in taking a fresh decision, the Tribunal is not required to undertake a reasonableness review of the CMR's investigation or its decision to impose a financial penalty. Any public law problems with CMR's investigation or conclusions may be cured by the Tribunal taking a fresh decision. The Tribunal has no supervisory jurisdiction – see *HMRC v Abdul Noor* [2013] UKUT 071 (TCC)[7].

20. Pursuant to rule 15 (2) (a) (ii) of the Tribunal's Rules[8], the Tribunal may when hearing an appeal admit evidence whether or not it was available to the previous decision maker. The burden of proof in a *de novo* appeal rests with the Appellant as the party seeking to disturb the status quo and the standard of proof to be applied by the Tribunal in making findings of fact is the balance of probabilities - see Edward Jacobs' book at paragraphs 14.88 and 14.107.

(ii) The Regulatory Framework

21. The regulatory framework within which HYC operates is as follows.

22. The primary legislative provision is the Compensation Act 2006 (as amended), which provides at s. 4 that a person may not provide regulated claims management services unless they are an authorised person, or an exempt person. An authorised person is one authorised by the CMR under s. 5 of the Act. The Schedule to the Act makes provision for Regulations to be issued, including Regulations for the conduct of authorised persons. The Financial Services (Banking Reform) Act 2013 introduced power for the CMR to impose financial penalties and the ability to appeal to the Tribunal against a penalty (see paragraph 29 below).

23. The Compensation (Claims Management Services) Regulations 2006 (amended in 2014) provide for the grant and refusal of authorisation and the imposition of conditions of authorisation for claims management businesses. Regulations 12(5)(a) and (b) impose a requirement to comply with the Rules and any applicable code of practice. This is a reference to the Conduct of Authorised Persons Rules 2014. Regulation 35 provides for the Claims Management Regulator to investigate complaints or suspicions of unprofessional conduct.

24. The Compensation (Claims Management Services) (Amendment) Regulations 2014 make provision for the imposition by the CMR of a financial penalty. The provisions relevant to this appeal are as follows:

Requirement to pay a penalty

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[7] http://taxandchancery_ut.decisions.tribunals.gov.uk/Documents/decisions/HMRC_v_Abdul_Noor.pdf

[8] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/367600/tribunal-procedure-rules-general-regulatory-chamber.pdf

48.—*(1) If, after investigation of an alleged or suspected failure by an authorised person to comply with a condition of authorisation that applies by virtue of regulation 12(5)(a), (b),(d), (h) or (i), the Regulator is satisfied that the authorised person has failed to comply with the condition the Regulator may require the authorised person to pay a penalty.*

Determining the amount of a penalty

49.—(1) The Regulator must determine the amount of any penalty that an authorised person is required to pay under regulation 48 in accordance with this regulation and regulation 50.

(2) The amount of the penalty must be—

(a) for an authorised person whose business has a relevant turnover of less than £500,000, no more than £100,000;

(b) for an authorised person whose business has a relevant turnover of £500,000 or more, no more than 20 per cent of that turnover.

(3) The amount of the penalty may be the same as or greater or less than the proposed amount set out in the notice under regulation 51(1)(b).

(4) When determining the amount of the penalty that an authorised person is required to pay under regulation 48(1), (2) or (4) the Regulator must have regard to—

(a) the nature and seriousness of the acts or omissions giving rise to the Regulator's decision to exercise the power to require the authorised person to pay a penalty; and (b) the relevant turnover of the business of the authorised person.

Relevant turnover

50.—(1) In this Part "relevant turnover" means the figure determined by the Regulator in accordance with this regulation.

(2) The Regulator must determine such figure as the Regulator considers appropriate for the turnover of the business of the authorised person.

(3) The turnover to be determined is the turnover of the authorised person's business from regulated claims management services.

(4) The turnover to be determined is for the period of 12 months prior to the date on which the Regulator gives the notice under regulation 51(1).

(5) When determining the relevant turnover of an authorised person under this regulation the Regulator must have regard to—

(a) any figure for the annual turnover or the expected annual turnover used by the Regulator for the purposes of calculating the authorised person's most recent fee for authorisation;

(b) any more up to date information on turnover.

(6) When determining the relevant turnover of an authorised person under this regulation the Regulator may estimate amounts.

Notice of proposed penalty and written submissions

51.(1) Before requiring an authorised person to pay a penalty, the Regulator must give written notice to the authorised person—

(a) stating that the Regulator proposes to require the authorised person to pay a penalty;

(b) setting out the proposed amount of the penalty;

(c) setting out the proposed date by which the penalty would be required to be paid or the proposed date by which each part of the penalty would be required to be paid;

(d) setting out the figure used by the Regulator for the relevant turnover and the basis on which the Regulator determined that figure;

(e) setting out the reasons for the Regulator's decision, and a summary of the evidence on which the Regulator relies;

(f) inviting the authorised person to make a written submission in relation to the

matters in the notice; and
(g) specifying a reasonable period within which the authorised person must do so.

(2) The Regulator must take into account any written submission made by the authorised person within the period allowed under paragraph (1)(g) or any further period allowed by the Regulator—
(a) in determining whether to require an authorised person to pay a penalty;
(b) in determining the amount of the penalty; and
(c) in determining the date by which the penalty is required to be paid or the date by which each part of the penalty is required to be paid.

Procedure for requiring an authorised person to pay a penalty
52.—(1) If the Regulator decides to require an authorised person to pay a penalty the Regulator must give written notice to the authorised person of that decision.
(2) The notice must specify—
(a) the amount of the penalty;
(b) the number of payments; and
(c) the date by which the penalty or each part of the penalty is required to be paid.
Treatment of unpaid penalty as a debt

53. If the whole or any part of a penalty imposed by the Regulator is not paid by the date by which it is required to be paid and either—
(a) no appeal relating to the penalty has been made under section 13 of the Act during the period within which such an appeal may be made; or(b) an appeal has been made under that section and has been determined or withdrawn, the Regulator may enforce as a debt due to the Regulator the penalty or that part of it.

25. The CMR also publishes guidance for authorised businesses. The CMR has advised claims management businesses to conduct robust checks to ensure that they are complying with The Privacy and Electronic Communications (EC Directive) Regulations 2003 and Data Protection Act 1998 ("PECR"), referring to guidance issued by the Information Commissioner. Regulation 21 of the PECR provides that unsolicited telemarketing calls should not be made to numbers on the Telephone Preference Service ("TPS") register. Such calls may, however, be made without the need to screen against the TPS where the caller has obtained prior consent. This requires claims management companies (or those acting on their behalf) to obtain a specific "opt in" from the consumer.

26. When making a decision to impose a financial penalty, the CMR must have regard to the "*nature and seriousness*" of the breach under Regulation 49 (4) (a) (see paragraph 24 above). The CMR has also published A Financial Penalty Scheme Guidance Note[9] and an Enforcement Policy, which together set out its approach to deploying a range of formal and informal regulatory enforcement tools.

(iii) Appeals to the Tribunal

27. The Compensation Act 2006 (as amended by the Tribunals Courts and Enforcement Act 2007 and the Financial Services (Banking Reform) Act 2013) provides at s. 13 for appeals to the Tribunal as follows:

[9] Authorities bundle.

(1) A person may appeal to the First-tier Tribunal ("the Tribunal") if the Regulator—

(a) refuses the person's application for authorisation,

(b) grants the person authorisation on terms or subject to conditions,

(c) imposes conditions on the person's authorisation,

(d) suspends the person's authorisation,

(e) cancels the person's authorisation, or

(f) imposes a penalty.

(1A) A person who is appealing to the Tribunal against a decision to impose a penalty may appeal against –

(a) The imposition of the penalty,

(b) the amount of the penalty, or

(c) any date by which the penalty, or any part of it, is required to be paid.

(2) ...

(3) On a reference or appeal under this section the Tribunal—

(a) may take any decision on an application for authorisation that the Regulator could have taken;

(b) may impose or remove conditions on a person's authorisation;

(c) may suspend a person's authorisation;

(d) may cancel a person's authorisation;

(da) may require a person to pay a penalty (which may be of a different amount from that of any penalty imposed by the Regulator);

(db) may vary any date by which a penalty, or any part of a penalty, is required to be paid;

(e) may remit a matter to the Regulator;

(f) may not award costs.

(3A)...

4. *Evidence*

(i) Witness Evidence called by the CMR

28. The CMR relied on witness statements made by Ms Moore and Mr Bolton. Ms Moore's witness statement set out the legal and regulatory framework within which HYC was required to operate. She was not asked to attend for cross-examination by HYC and the Tribunal had no questions for her.

29. Mr Bolton's witness statements[10] explained that he is a Principal Officer in the Claims Management Regulation Unit's Financial Claims Team. He explained that the investigation into HYC was carried out by officers who reported to him. Mr Bolton's evidence was that the audits in 2014 and 2015 were triggered by the volume of complaints made to the CMR about HYC. He exhibited the formal letter of warning issued to HYC in March 2015[11], which required HYC to put measures in place to ensure that its marketing calls did not breach the PECR, in particular by suppressing numbers when customers asked not to be called. Changes were required to the call script and the Appellant was warned about its practice of placing customers into a conference call with an HYC agent and the customer's bank. An audit report was issued the following month[12], outlining further rule breaches and containing specific advice. HYC agreed to take remedial action, including the implementation of its own pre-recorded message, but this did not happen. Mr Bolton stated that HYC stopped making the conference calls in September 2015.

30. Mr Bolton's evidence was that the CMR received 93 contacts from consumers about HYC between February and October 2015, and in July 2015 it received information from a financial institution that HYC agents were impersonating customers during calls to lenders. Mr Bolton's evidence was that HYC had accepted that members of its staff had impersonated customers in calls to banks. The CMR was informed that HYC had dismissed one member of staff for doing this.

31. Mr Bolton explained that the CMR conducts its investigative work on a risk-basis, so that a business such as HYC that has continued to generate a significant number of complaints after previous interactions with the CMR would merit a formal investigation. His evidence was that during the investigation, CMR officers listened to recorded phone calls with customers and its concerns about these led to the "minded to" letter being issued. One of the calls listened to, which became known as the "Grandma call", involved an HYC agent suggesting in a call to his grandmother that the usual working practices of HYC had been altered by management during the period of the CMR's audit.

32. Mr Bolton's evidence explained the CMR's concerns about the phone calls it had listened to, including examples of "*pushy*" behaviour by agents in keeping

[10] Pages 3-36 and 3-678 closed hearing bundle.

[11] Page 4-259 open hearing bundle

[12] Page 4-278 open bundle

customers on the line when they had said it was not convenient, for example customer G who was driving, H who was dyeing her hair, W who was at work, S who was out shopping, and one with a weak phone signal where the agent suggested calling her back on the same line.[13]

33. Mr Bolton explained that in accordance with Regulation 49 (4) (a) and the CMR's Financial Penalties Scheme Guidance, it was determined that the "*nature"* of the breaches of the Code in this case warranted a score of 2, which is "*escalated*". This was in view of HYC's failure to follow guidance given in the previous audits. A "*seriousness*" score of 4 was allocated because, although there was no evidence of direct detriment to any business or person, the breaches were felt to have the potential to cause moderate detriment to consumers. In his evidence to the Tribunal, Mr Bolton explained that HYC had appeared to the CMR to take a reactive rather than a proactive approach to compliance[14].

34. In cross examination, Mr Bolton was challenged[15] about the CMR's application of the penalty guidance, the history of the CMR's concern about the statements made to customers regarding the 8% statutory interest, the meaning of the banks' disclaimer in relation to the three-way conferencing calls, and allegations of high-pressure selling. Notably, he was not asked any questions about the calls listed in Appendix 2 to the Decision Letter.

(ii) Witness Evidence called by the Appellant

35. HYC relied on the witness statements made by Stuart Hogarty, Peter Anwar, and Kamran Ahmed (the shareholders of HYC) and their employee, Michelle Cleasby.

36. Mr Ahmed states in his first witness statement[16] that he is the Operations Manager at HYC and also the majority shareholder, with 70% of the shareholding. He describes the history of the business which he started (now employing 440 staff), and its engagement with the CMR from his own perspective. He describes a "*hands-on*" management style and states that "*Pete, Stuart and I are…heavily involved in policy and compliance and regularly listen to calls to ensure that they are reaching the standards that we require".* He describes the induction and on-going training of HYC's telephone agents, the reliance on an approved script for telephone agents to use and the process for quality control and feedback to agents. He states that the high standard of compliance at HYC is evidenced by the low number of complaints he receives from the public.

37. Mr Ahmed denied in his witness statement that HYC agents were aggressive, pushy, rude or persistent. He states that no complaints were received from customers

[13] See Bolton statement paragraph 38.

[14] Transcript day 4 page 163.

[15] Transcript day 4, pages 103 to 148.

[16] 3-65 closed hearing bundle.

in relation to any of the calls relied upon by the CMR. He asked the Tribunal to listen to certain specified telephone calls to support his evidence.

38. With respect to the specific Rules breaches alleged by the CMR, Mr Ahmed's witness statement denied that there was a problem with agents not telling customers to read or retain their documents (an alleged breach of Client Specific Rule 17a). He accepted that sales agents did not tell customers to read and retain documents when on the phone but stated that a covering letter was sent out which did tell them to "*check the details"* on the form sent for signature. He stated that HYC had not received complaints from customers about this so "*did not see this as an area of concern".*

39. In relation to the alleged misrepresentation by HYC agents of the amounts which could be obtained by customers as redress for mis-sold PPI (Client Specific Rule 1e), Mr Ahmed stated that the sales agent was able to access a drop-down box on their computer screen during the call to access accurate information about *"the average amount of redress from that institution".* Also, he stated that *"In the event that a customer was unable to recall exactly which institution they had dealt with the agent would provide them with the average across all of the institutions that we had recovered as an average".* He stated that an average of £2,000 or more was included in the agents' sales script. He asked the Tribunal to listen to certain specified telephone calls to support his evidence.

40. With regard to the CMR's concern about customers being coached by HYC agents to ignore the banks' recorded disclaimer (Client Specific Rule 1c) he stated that the disclaimer was a warning about the potential for some claims management firms to charge for putting customers through to the banks' helpline, which HYC did not do. In cross examination on this point, he said that he was aware about the practice of other claims management companies from talking to customers. He did not produce any evidence to support this claim (which was not included in either of his witness statements). He asked the Tribunal to listen to certain specified telephone calls to support his evidence. Turning to the further alleged breach of Client Specific Rule 1c, he described the CMR's concern here as ill-founded and said that customers had not been misled by agents into thinking that the 8% statutory interest was something that HYC only could obtain.

41. In relation to the alleged breach of General Rule 1 through the use of conference calls, he denied that customers were not informed that HYC agents would remain on the call whilst the customer checked with their bank whether they were entitled to PPI compensation.

42. In Mr Ahmed's second witness statement, he takes issue with Mr Bolton's witness statement on a number of points. The statement contains rather more argument rather than evidence. He does exhibit the quality scoring criteria used by HYC and a 2015 wages report to show that agents lost bonuses as a result of their failure to meet the quality criteria set by HYC. His exhibits were blank templates rather than worked examples of the system in operation.

43. In cross examination, Mr Ahmed accepted that neither he, Mr Anwar or Mr Hogarty had undertaken any legal or regulatory training in relation to the provision of claims management services. He accepted that he had overall responsibility for regulatory compliance but was unable to describe his responsibilities under the legislative framework or the Direct Marketing Association's Code of Practice[17].

44. In Mr Hogarty's first witness statement he explains that he is the Head of Sales at HYC. His evidence is that HYC makes 1.5 million calls a month and receives complaints in relation to only 3 or 4 of those calls per month. In cross examination he accepted that there had been some instances of HYC agents impersonating customers when speaking to banks[18] but he said that these "rogue agents" had been dealt with.

45. Mr Hogarty stated that in his role he oversees the specialist departments, holds training sessions, and listens to calls at random. He stated that the HYC agents' scripts were amended to comply with the CMR's suggestions at audit and that the conference calls with banks and customers were ceased in view of the CMR's concerns. In cross examination, he suggested that there were other documents used for staff training which had not been placed into the Tribunal's bundle[19].

46. Mr Hogarty commented in his first witness statement on the phone calls relied on by the CMR at Appendix 2 to the Decision Letter. He repeated the same sentence in relation to 21 of the 39 calls, namely: "*This was not a call from anyone at HYC"*. He adopted a different approach in his second witness statement, where he stated that it had been impossible to trace the calls because the CMR had not passed on the details.

47. In cross examination, Mr Hogarty said he did not know why his first witness statement said what it did, but that it should have said that he had not had enough evidence to investigate the calls. [20] He said he thought that details had been requested but could not point to any letter making that request. He thought that the CMR had failed to provide the details requested. In answer to Mr McGurk, he accepted that the numbers from which the customers said they were called were HYC numbers[21] and that it was unlikely that the complainants had made things up about HYC[22].

48. Mr Hogarty's evidence was that all of HYC's data is screened against the Telephone Preference Service so that HYC's agents cannot physically dial a TPS number. When asked in cross examination about complaints where TPS registered

[17] Transcript day 1 pages 72 and 76.

[18] Transcript day 4, page 11.

[19] Transcript day 4 pages 8 to 9.

[20] Transcript day 4, pages 13 to 21.

[21] Transcript day 4 page 21

[22] Transcript day 4, page 31.

numbers were called by HYC, he said that he was not able to be sure whether the call was made by HYC or whether the customer was indeed TPS registered as claimed.[23]

49. Mr Hogarty also confirmed in his witness statement that HYC does not give out a number to allow a person telephoned to make a complaint about its agents. In his second witness statement, Mr Hogarty confirmed that HYC *"do not give out a telephone number for customers to see where we obtained their number, instead the agent will pass the number to our complaints department who will source this info and pass it on to the customer, the reason being that our data sources are important from a business point of view and our sales agents don't need to know who we purchase data from, if they did there would be nothing stopping them contacting our suppliers and purchasing their own set".*

50. Peter Anwar's first witness statement[24] describes his role as the sole Director of HYC. He outlines HYC's remuneration system, whereby agents are awarded points which translate into bonuses, but have points deducted for "fails", "super fails" and "critical fails" in relation to their conduct when making calls to customers. The "fails" denote departures from the script. Mr Anwar explained that Michelle Cleasby is Head of the Quality Team, and that her team listens to recorded calls from the previous day. The individual agents' quality score from this process affects their remuneration, may result in their undergoing additional training, or could lead to their dismissal. In answer to a question from the Tribunal, Mr Ahmed later confirmed that of the 2000 calls made by each agent each month, twelve to fifteen calls per agent are listened to by management each month[25].

51. Mr Anwar's statement (twice) includes the comment that HYC had contacted the Information Commissioner's Office to confirm its position on the permissibility of three-way conference calls in which an HYC agent listens in while a customer gives financial and other information to their bank to confirm their eligibility for a PPI refund. He exhibited to his statement a communication[26] which he said showed that the ICO had no issues with the practice. He describes making other changes to HYC's practices in response to the CMR's suggestions and takes issues with the Rule breaches alleged in the Decision Letter. He asked the Tribunal to listen to certain specified telephone calls to support his evidence.

52. Mr Anwar found it difficult to explain in cross examination[27] why there were free-floating pages of guidance in the Tribunal's bundle[28] which appeared to be "updates" but which had not been incorporated in to the training manual in a way which made it clear that the new guidance superseded the previous guidance. He was

[23] Transcript day 4, page 47.

[24] Page 3-647 closed hearing bundle

[25] Transcript day 2, page 10.

[26] Pages 4-85 to 4-87 open hearing bundle

[27] Transcript day 3 page 39 - 46

[28] Page 4-262 open hearing bundle

also unclear whether the updated manual was provided to existing staff or only to new staff.[29]

53. In his second witness statement, Mr Anwar makes challenge to a number of matters in Mr Bolton's statement. This statement contains more argument than evidence.

54. Michelle Cleasby's witness statement[30] explained that she is Head of HYC's Quality Team. She has experience working in the team listening to phone call recordings and scoring them, but now primarily manages others undertaking that role. She explained that the function of listening to calls and awarding a quality score had recently been transferred by HYC to a company in Dubai. Concerns about any agents' performance are now e-mailed to her and she feeds back to the agents face-to-face in Manchester. She is also responsible for conducting the managers' training and for coaching the training teams.

55. In cross examination, Ms Cleasby confirmed that she had received no training in legal or regulatory compliance matters. She was unable to answer basic questions from Mr McGurk about the regulatory framework for which she had the responsibility to ensure HYC's compliance. She very fairly accepted that she was not well-qualified for her current role[31] in which she has been placed in charge of training others.

(iii) Documentary Evidence

56. The Tribunal's bundle had been prepared in accordance with standard directions in the General Regulatory Chamber, whereby the Regulator serves a draft index of documents on the Appellant and the Appellant is able to suggest the inclusion of additional documents.

57. The Tribunal listened to the CDs of the phone calls selected by the parties and also read the transcripts of many more calls. The CMR had prepared transcripts of the calls but HYC also prepared its own transcripts of some of them. We did not understand the content of the transcripts or the recordings to be in dispute, but we heard argument from counsel about the interpretation which should be placed on what was said.

58. The Tribunal considered carefully HYC's staff Manual ("Training and Introduction Guide")[32] which included an official script dated 13 August 2015. Attached to it were "Quality Updates" dated 17 July 2015, 17 August 2015, and 20 August 2015. It was unclear from the face of the documents how these updates became incorporated into the Guide, as the Guide was not versioned. It was also unclear how staff were trained on official guidance that had been superseded by new

[29] Transcript day 3 pages 16 to 17.

[30] Page 3-89 open hearing bundle.

[31] Transcript day 3 page 129.

[32] Page 4-1 open hearing bundle

official guidance, as the Manual had a space on the front for staff to sign and date it's receipt, but there was no such provision in relation to the updates.

5. Argument

59. We turn now to consider the arguments put to us in written closing submissions. We remind ourselves of the key issues we must determine, as set out at paragraph 7 above.

(i) The CMR's Closing Submissions

60. The CMR's case, as set out in its "minded to" letter and the Decision Letter, was that it was a condition of authorisation that HYC complied with Conduct of Authorised Persons Rules 2014 and that it had not only failed so to comply but also failed to remedy the breaches previously notified to it. By the close of evidence, the CMR described these breaches as follows:

(i) General Rule 3 requires that a claims management business shall be directed by people with the necessary competence and a working knowledge of the relevant legislation and rules. The CMR submitted that there was a considerable weight of evidence in this case which supported the view that General Rule 3 had been breached by HYC. In particular, it was submitted that the Tribunal heard from no one at HYC who even claimed to have, let alone demonstrated, a sound knowledge of the legislative and regulatory framework. In the absence of external training, the agents who work the phones rely entirely on the script and other internal procedures for their compliance, but the script was devised by people who themselves had insufficient knowledge to ensure regulatory compliance. The Tribunal was invited to draw adverse inferences from HYC's failure to call key witnesses and its failure to produce in evidence key documentation, such as a TPS licence. The Tribunal was asked to conclude that HYC's Manual was not fit for purpose: it is not versioned, it is not clear when or if updates are incorporated. It is not clear whether it is the sole training tool for staff or whether there are other documents not seen by the Tribunal. The Tribunal heard no evidence of how the points/bonus system had been implemented in practice to ensure any particular agent's compliance with the script, despite Mr Hogarty accepting in his evidence that some of the agents involved in the calls the Tribunal had heard were "*rogue"*[33].

(ii) General Rule 1 requires that a business conducts itself with honesty and integrity. The CMR relied here on the following breaches: (a) Mr Ahmed's acceptance[34] that the termination of a call by an agent at the point where the customer was about to be provided with information about how to make a direct claim would be poor practice. It was submitted that there is evidence

[33] Transcript day 4 page 11.

[34] Transcript day 1 pages 87 to 89.

before the Tribunal of HYC's agents cutting customers off at this point;[35] (b) The Tribunal had evidence before it of HYC agents impersonating customers when making contact with financial institutions in fourteen instances. This was accepted by Mr Ahmed[36] and Mr Hogarty[37]; (c) There was evidence before the Tribunal of customers being told before any check had taken place that they were entitled to a refund. Mr Ahmed accepted that this was wrong[38].

(iii) Client Specific Rule 1c requires that a business ensures that all information given to a client is clear, transparent, fair and not misleading. The CMR relied here on: (a) agents making misleading statements about the 8% interest. This concern relates to the wording of the script itself[39] and is said to have been made worse by the wording of the two 2015 updates, which state *"you will also receive an additional 8% statutory interest on top of your premiums paid from the bank"*[40] and *"you will also receive back 8% …"*. In this connection, the CMR also relied on the phone calls to customer M at closed hearing bundle 5-166, customer B at 5-55 and customer Y at 5-301; (b) misleading statements about the average amount of redress, where the problem was said to be written into the script itself, as the average figure included may not relate to the particular product and institution relevant to that customer. Further, because of the lack of "versioning", it was not possible for the Tribunal to be satisfied that the average amounts in the script had been up-dated when relevant. Mr Anwar's evidence[41] was that some agents quote the average for a business and others the average for a product; and (c) misleading customers into being placed into a three-way conference call with the agent staying on the line. Whilst this practice ceased in 2015, the Tribunal heard evidence which the CMR said did not make it sufficiently clear to customers what was happening. In particular, the CMR relied on calls to customer W at closed bundle 5-275 ("*pop you through to the PPI line"),* customer S at closed bundle 5-211(*"we have got a direct PPI line"),* customer B at closed bundle 5-51 *("I'll pop you through to that different adviser")* and, in a similar vein, conversations with customers S (5-215), C (5-130) and P (5-191). Mr Ahmed accepted[42] that these conversations were "*off script*". In relation to the conference calls, the CMR also relied on HYC's agents "coaching" customers to ignore the banks' disclaimer with the instruction "*just say you are happy to proceed".* In this regard, the CMR

[35] Page 4-110 open hearing bundle.

[36] Transcript day 1 pages 96 and 129.

[37] Transcript day 4 pages 10 to 11.

[38] Transcript day 1 page 115.

[39] Page 4-13 open hearing bundle.

[40] Page 4-33 open hearing bundle

[41] Transcript day 3 page 106.

[42] Transcript day 2 pages 7 to 12.

relied inter alia upon calls to the following customers: W at 5-275; S at 5-211; A at 5-544; R at 5-194; W at 5-287 and C at 5-130.

(iv) Client Specific Rule 3 requires that a business should not engage in high pressure selling. The CMR relied here on the examples taken from Appendix 2 to the Decision letter, including those where members of the public making a complaint had described HYC's agents as *"terribly pushy and rude"* (ref 351171), *"being talked at…being talked over"* (ref 353721), *"stated …pregnant and off work trying to relax… caller continued explaining the benefits of claiming"* (ref 364113), *"they constantly harass me…they will not take no for an answer"* (ref 368451). The CMR also relied upon evidence of failure to suppress telephone numbers at the request of customers as indicating high pressure selling, as it could lead to repeated calls. The Decision Letter had stated that 3.8% of calls (out of a total of 1 million calls per month) were found by the CMR to have been dispositioned incorrectly. This conclusion was not challenged by HYC. Mr Ahmed's evidence about this issue placed the blame for incorrect dispositioning on "*rogue*" agents.

(v) Client Specific Rule 17a requires a business to advise a client that all documentation should be carefully read and retained. The CMR submitted that it was clear from the script and the Manual that customers were not given this advice (open bundle 4-13, 4-18, 4-19 and 4-21). Mr Ahmed accepted in cross examination that this requirement had been missed.[43] He initially thought that this rule had not been present in the 2007 Rules but added later. He later accepted that he was wrong about that when it was shown to him.

61. Turning to HYC's pleaded grounds of appeal, the CMR noted that, in relation to ground 1, the Tribunal had heard no evidence of any discrepancy between the transcripts of calls relied upon by the CMR and those produced by HYC. Mr Bolton was not cross examined on the basis that the call transcripts were "*unreliable and not supported by evidence"* and it was submitted that ground one should not be regarded by the Tribunal as still in play at the close of the hearing. Similarly, ground 3 about HYC having an "*overriding objective*" was not put to Mr Bolton and it was submitted that it was no longer in play. Finally, ground 4's point about the CMR relying on complaints from financial institutions was submitted to be plainly misconceived and, in any event, Mr Bolton had confirmed that this was not the case in his evidence to the Tribunal. It was submitted that the Tribunal should therefore consider only HYC's grounds 2,5,6 and 7. These grounds collectively challenged whether there had been a breach, whether a financial penalty was warranted and if so at what level.

62. As to penalty, the CMR reminded the Tribunal that its minded-to letter and Decision Letter together explained the nature and seriousness scores it applied to the breaches it found HYC to have committed. A "nature" score of 2 was found to be appropriate in this case because it is an "escalated" score suitable (referring to the CMR's guidance) for cases in which the authorised person had not taken on board

[43] Transcript day 2 page 39.

previous advice or warnings. The CMR relied on a "seriousness" score of 4 because the breaches are likely to have affected a number of consumers and there is potential for further more widespread detriment if action is not taken.

(ii) HYC's Closing Submissions

63. In Ms Smart's written closing submissions, HYC asked the Tribunal to find that, in the majority of instances, the CMR was not entitled to find that HYC had breached its regulatory obligations. She also submitted that the breaches which were proven were trivial and administrative in nature and that HYC's substantial co-operation with the CMR should have led to a lesser sanction being imposed.

64. It was submitted that by the close of evidence the CMR no longer relied on complaints made by the banks, two customers in Appendix 2, the initial schedule of phone calls extracted on 19 August 2015, allegations of HYC agents impersonating customers, or the "Grandma" call.

65. As to the 39 alleged breaches listed in Appendix 2 to the Decision Letter, Ms Smart relied on a submission that the CMR had not provided sufficient details of the phone calls for HYC to be enabled to investigate them properly, further that the customer complaints detailed in that Appendix were hearsay and ought not to be given weight by the Tribunal. She made detailed submissions about four of the complainants which went to their reliability.

66. As to Appendix 3, Ms Smart challenged the CMR's reliance on excerpts of phone calls as giving a misleading impression to the Tribunal. It is further submitted that the estimates of redress were not "*vague"* but related to data available to the agent on HYC's computer system. She submitted that the recorded calls did not substantiate the CMR's allegations of high pressure selling, as the majority of the calls were to existing customers so were not sales calls. She submitted that the CMR had applied an overly-prescriptive approach to its analysis of the language used by 18-30 year old agents and that there was no evidence that any customer had actually been misled by their language in relation to conference calls, statutory interest, or the incorrect dispositioning of particular calls.

67. Ms Smart's submissions as to the coaching of customers to ignore the banks' disclaimer revealed a fundamental difference of view as between the CMR and HYC as to the nature and purpose of the banks' recorded message. HYC's submission is that it was intended to inform customers that they could be charged for the initial enquiry as to whether they were eligible for compensation. CMR's understanding of the disclaimer is that it warned customers that they could claim compensation without the paid-for assistance of a third party.

68. It was submitted that all of HYC's witnesses had shown that they were "*well-versed"* in their legal obligations and that there was no requirement for them to have received formal training. The Tribunal had heard evidence of HYC's training system and its points system which was said to encourage good practice by staff.

69. As to penalty, it was submitted that this was not a case in which a financial penalty was warranted because there had been no refusal by HYC to follow the CMR's guidance. On the contrary, HYC had co-operated fully in the audits and investigation. It was further submitted that if a financial penalty is warranted then the penalty imposed was excessive, given the minor nature of the breaches and their remediation by HYC. It was submitted that the penalty should have been in the lower band A with a total score of 3, resulting in a penalty calculated at 0.06% of turnover.

70. Finally, it was submitted that the CMR had failed to act in accordance with the Regulators Code by offering HYC advice.

71. Following the lodging of the written closing submissions, both parties sent e-mails to the Tribunal taking issue with the other's approach. We have taken these into consideration.

6. Conclusions

72. The Tribunal regretted that the preparation of HYC's case appeared to have been influenced in part by a misconception on the part of its legal advisers as to where the burden of proof lies in an appeal by way of rehearing. Mr Barnett initially attempted to persuade the Tribunal that it had to accept as proven any facts asserted by HYC unless the CMR had disproved them. This misapprehension may have led to HYC's witness statements being rather less detailed than they might ideally have been. Indeed, at times they consisted of argument and/or reliance on bare denials (see for example Mr Hogarty's repeated statement at paragraph 46 above), rather than evidence. HYC's witnesses also mentioned documents in their oral evidence which were not mentioned in their witness statements and which had not been placed before the Tribunal, although the witnesses said they were available and relevant to their case. The Tribunal also heard about senior HYC employees apparently in a position to help us with key issues (for example Kirsty Warburton, who we were told trains the new employees so presumably would have had a good knowledge of the script "versions", but she did not file a witness statement).

73. Notwithstanding these difficulties, we listened carefully to HYC's witnesses. Their evidence, given over a period of several days, related to the conclusions of a Decision Letter which had been in their possession for over a year by the time of the hearing, so they had had ample opportunity to prepare their evidence. The Decision Letter had explicitly relied on HYC's failure to take appropriate remedial action despite receiving numerous audits, a warning letter and being subject to a statutory investigation. Faced with an accusation of continuing failure, we would have expected HYC's appearance before the Tribunal to have been based around a positive and evidenced case as to the measures that it had taken to satisfy the CMR's concerns. Instead, the weight of evidence showed that HYC's owners and staff have a flawed understanding of its regulatory obligations and have taken inadequate and/or poorly-executed remedial action, despite repeated input from the CMR.

74. We concur with the CMR's finding that HYC breached the terms of its authorisation in the following respects.

(i) *General Rule 3*

75. General Rule 3 establishes the necessary foundation for a compliant business. In finding that it has been breached, we observe that, not only was the lack of regulatory knowledge amongst HYC's witnesses self-evident, but that it impacted adversely on their ability to recognise and resolve the regulatory problems which were pointed out to it by the CMR over a period of several years. This is evidenced by Appendix 1 to the Decision Letter, which sets out the history of breaches found at no less than nine interventions by the CMR in four years.

76. We gained the impression of an insular culture at HYC, in which the three shareholders were so "*hands-on*" that they had tried to do everything themselves and did not buy in external expertise about regulatory matters. They accepted that they did not have the requisite knowledge themselves and we reject the submission that they appeared "*well-versed"*. We were concerned that they may regard well-informed staff as a business threat (see Mr Hogarty's comments at paragraph 49 above), preferring those such as Michelle Cleasby, who are so poorly-equipped for their role that they do not challenge the status quo.

77. We find that some of the CMR's concerns were apparently dismissed out of hand (see paragraph 38 above). We also find that HYC misled itself into false reassurance following the receipt of generic advice in an inept communication with the ICO's helpline, indicating HYC's clear failure to understand the CMR's concerns about HYC agents listening to the personal data of customers during conference calls (see paragraph 51 above). It also misled itself into thinking that the low number of complaints made to it indicated that all was well (see paragraph 44 above), whereas the 93 complaints made directly to the CMR (by recipients of phone calls sufficiently motivated to find out who HYC's regulator was and contact it) told another story. We agree with Mr Bolton that HYC's behaviour in these respects paints a picture of HYC having a reactive rather than a proactive approach to compliance with its regulatory obligations.

78. We are also satisfied that legitimate issues of concern raised by the CMR were approached by HYC in a muddled and inadequate fashion. For example, Mr Hogarty (paragraph 45 above) and Mr Anwar (paragraph 51 above) both said that the agents' script was altered to deal with the CMR's concerns, but the evidence placed before the Tribunal simply failed to establish that process. The assertion that an updated script had been rolled out to the exclusion of past versions was not demonstrated by the evidence because the Manual was never properly "versioned". In fact, the guidance for agents was in such a muddle at the hearing that it was completely unclear to us which script was current, when and how the changes relied upon were made, and whether they had been cascaded to all staff or only to newcomers.

79. We conclude that many of the breaches that we describe in the following paragraphs are attributable to the absence of competent persons with appropriate knowledge at the helm of HYC. In those circumstances, we were not persuaded that

"*rogue agents*" alone can be blamed for HYC's failures because there was insufficient evidence before us of the ability or the willingness of HYC's owners and managers to ensure its regulatory compliance. We note the low number of agents' calls listened to (see paragraph 50 above) and the consequent ability of "*rogue agents*" to escape detection by HYC's management systems.

(ii) General Rule 1

80. General Rule 1 requires that a business conducts itself with honesty and integrity. The impersonation of customers on multiple occasions and "the Grandma call" were admitted by HYC's witnesses. It is difficult to see how HYC could have understood these allegations no longer to have been relied upon by the CMR in these circumstances. We are satisfied that the admitted impersonation of customers and the comments made in the "Grandma call" (see paragraph 31 above) are indicative both of dishonesty and a lack of integrity at HYC and we find this breach proven on that basis.

81. The CMR relied on evidence which it said demonstrated that HYC's agents cutting customers off at the point where they were to be informed that they could claim compensation for themselves. We certainly heard calls in which there was an unexpected cut-off, but we did not hear evidence to satisfy us on the balance of probabilities that this was deliberate on the part of HYC's agents or calculated to achieve a particular outcome. We reject the CMR's case on this point.

82. There was evidence before the Tribunal of customers being told before any check had taken place that they were entitled to a refund. We consider this further under Client Specific Rule 1c.

(iii) Client Specific Rule 1c

83. Client Specific Rule 1c requires that a business ensures that all information given to a client is clear, transparent, fair and not misleading. The CMR relied here on HYC's agents making what were said to be misleading statements about the 8% interest, so as to imply that HYC's fee was payable only in relation to the principal sum and not the interest. (We note here that this issue was raised with HYC in Appendix 3 to the Decision Letter (4-778), because it was repeatedly asserted at the hearing that HYC had no warning of CMR's reliance on this point). Having listened to or read the calls referred to at paragraph 60 (iii) (a) above, we are satisfied that the agents were misleading, because the script (and the amended script) was misleading.

84. We are also satisfied that misleading statements were made about the average amount of redress because the problem was written into the script itself. It is clearly misleading to quote an "average" where the figure given may not relate to the particular product and institution relevant to that customer. Mr Ahmed's evidence at paragraph 39 above illustrates this confusion.

85. We are satisfied by the evidence referred to at paragraph 60 (iii) (c) above that many of HYC's customers were placed into a three-way conference call with the agent staying on the line without understanding what was happening because they

were misled into thinking it was a process internal to HYC. In fact, it had the potentially serious consequence of placing customers in the position of having a conversation with their bank which they might not have wished an agent from HYC to listen to. We were pleased to hear that the conference calls have ceased and we take that into account, although we note that it took nearly six months for HYC to cease the practice after the CMR sent it an official letter of warning.

86. Also in relation to the discontinued practice of conference calls, we are satisfied that HYC's agents "coached" customers to ignore the banks' disclaimer and "*just say you are happy to proceed"* in the calls referred to at paragraph 60 (iii) (c) above. As we understand HYC's case on this point, it accepts that its agents coached the customers in this way but asserts that the coaching related to a different point to the one relied on by the CMR. Even if we were prepared to give HYC the benefit of the doubt about the meaning and purpose of the banks' disclaimer (and we note here that HYC's interpretation, based on the alleged conduct of other companies, was unsupported by evidence), we find that any form of coaching of a customer during a sales call cannot meet the standard of fairness required by this rule. We are satisfied that HYC's practice represented a breach of the Rule, regardless of the precise meaning of the disclaimer.

87. There was evidence before the Tribunal of customers being told before any check had taken place that they were entitled to a refund, see paragraph 60 (ii) (c) above. We accept that evidence and conclude that it constitutes misleading customers and so represents a breach of Client Specific Rule 1c.

(iv) Client Specific Rule 3

88. Client Specific Rule 3 requires that a business should not engage in high pressure selling. The CMR relied here on numerous examples taken from Appendix 2 to the Decision letter, including those where members of the public had complained about HYC's agents (see paragraph 60 (iv) above). We are satisfied that these calls demonstrate high pressure selling. We reject HYC's submission that they should be discounted because the pressure was applied to existing customers, or that we should accord low weight to hearsay because the customers themselves were not called to give evidence. The test of whether the rule has been breached is an objective one.

89. We note that the CMR no longer relied on two customers in Appendix 2 by the time of the hearing, but we reject HYC's case as to why we should disregard certain of the other callers in the absence of evidence to support its assertions. Even if we accept HYC's submissions about a small number of individual calls (about which we have some reservation in view of the failure to put the points to Mr Bolton in cross examination), there is clearly an overwhelming weight of evidence demonstrating the use of a high- pressure approach by HYC's agents.

90. The CMR also relied here upon evidence of failure to suppress numbers at the request of customers as indicating high pressure selling which breaches the Rule. The Decision Letter found that 3.8% of calls (out of a total of 1 million calls per month) were dispositioned incorrectly. This was not challenged by HYC. We find that this is

a high number of wrongly-dispositioned calls which evidences a corporate culture of enabling repeated calls to unwilling customers. Although we heard that some of the customers who complained to the CMR described themselves as being subscribers to the TPS, we find ourselves unable to find as a fact that this was the case on the basis of the evidence before us. Accordingly, we do not make a specific finding that HYC breached the PECR.

(v) Client Specific Rule 17 a

91. Client Specific Rule 17a requires a business to advise a client that all documentation should be carefully read and retained. The CMR submitted that it was clear from the script and the Manual that customers were not given this advice and HYC accepted the breach, explaining that the requirement had been missed (see paragraph 38 above and transcript day 2 page 39). This, yet again, illustrates the lack of competence and relevant knowledge in the management of HYC.

92. Finally, we make no finding on the historic allegations made by the financial institutions against HYC because these were not relied on in the Decision Letter with which we are concerned, but provided the backdrop to the CMR's decision to open a statutory investigation.

(b) Is a penalty warranted?

93. We have considered the business specific guidance which the CMR gave to HYC in its audit reports. We have also considered the generic advice given by the CMR to authorised businesses by way of bulletins.

94. We reject HYC's submission hat it took all reasonable steps to comply with its regulatory obligations and to address the CMR's concerns. We conclude that HYC did not follow the advice given to it by the CMR for the following reasons. In some instances, the advice was simply ignored (see paragraph 38 above). In other instances, it was misunderstood (see paragraph 51 above). In some respects, it was actioned in such an incompetent and inadequate manner that it failed to have the desired effect (see paragraphs 58 above). In one case it was actioned only after a delay of six months (see paragraph 85 above) and finally, in one instance an agreed step was not implemented at all (see paragraph 29 above).

95. We have considered the CMR's Financial Penalties Scheme Guidance which refers to the likely imposition of a financial penalty in circumstances where there has been a failure to comply with the Conduct of Authorised Persons Rules and in circumstances where breaches have continued despite previous advice or warnings. We are satisfied, as recorded above, that HYC was operating in breach of the Conduct of Authorised Persons Rules and that it failed to take heed of the CMR's advice and warnings as set out at paragraph 94 above.

96. In all the circumstances we conclude that a financial penalty was warranted in this case.

(c)What is the correct level of penalty?

97. There was no dispute before us that the Appellant's turnover for the relevant period was in excess of £500,000 so that the CMR was entitled to impose a penalty in excess of £100,000. The actual turnover figure for the relevant period was agreed. The CMR's "minded-to" letter of 22 February 2016 explained that the CMR intended to allocate a "*nature"* score of 2 and a "*seriousness*" score of 4, making a total score of 6 which resulted in a penalty band of 5-8% of turnover. It invited representations on this proposal, and eventually a penalty at 4% of turnover was imposed.

98. The CMR is required to have regard to the nature and seriousness of the acts or omissions in respect of which the penalty is to be imposed by Regulation 49 (4) (a). Mr Bolton explained to the Tribunal the CMR's analysis of this issue, having regard to its Financial Penalty Scheme Guidance Note (see paragraph 33 above).

99. We note that the Financial Penalties Scheme Guidance states that *"…specific penalty amounts will not be attributed to specific individual breaches of the rules but rather the overall nature and seriousness of a breach or collection of breaches".* We agree with the CMR that a "*nature*" score of 2 is the appropriate score in this case, having regard to all the circumstances and the CMR's Guidance. As we have found above, there are a number of factors causing concern in this case, including the CMR's finding in the Decision Letter (with which we agree) that HYC had not taken on board the advice previously given to it in the earlier audits. These circumstances are consistent with the guidance for awarding an "*escalated*" score of 2.

100. We are satisfied that the "*seriousness"* score of 4 was appropriate in all the circumstances of this case. The CMR based its case on the high number of complaints it received about HYC, and the likelihood that many other members of the public were affected or were likely to be affected by HYC's breaches of the rules. Our findings in this regard are consistent with the guidance for a "medium" score of 4.

101. We conclude that the nature and seriousness scores allocated by the CMR were appropriate and that the CMR's reduction of the initial penalty in response to representations was well-considered. We find that the amount of penalty finally imposed on HYC was correct. We dismiss the appeal in respect of this issue.

7. Outcome

67. For the above reasons, HYC's appeal is dismissed and it remains liable to pay the financial penalty of £553,000 by a date to be specified by the CMR on receipt of this Decision.

8. Post Script

102. During Mr Barnett's period of representation of HYC, it was suggested by him that the CMR had withheld material evidence from HYC and the Tribunal. He appeared unaware of HYC's entitlement to have applied under rule 15 for the Tribunal to direct that further relevant evidence be served. He relied (inappropriately)

upon the concept of "unused material" applicable in criminal proceedings. The CMR objected most strongly to his suggestion of a lack of candour on its part and particularly asked the Tribunal to make its findings clear on this point. As we have explained above, we have no supervisory jurisdiction so were not concerned to investigate the CMR's conduct of its investigation. Nevertheless, we are able to confirm here that we found no evidence to support this serious allegation.

(Signed)

ALISON MCKENNA **DATE: 23 April 2018**

PRINCIPAL JUDGE