IN THE FIRST-TIER TRIBUNAL **Case No. CCA/2012/0015**
(CONSUMER CREDIT)
GENERAL REGULATORY CHAMBER

On appeal from:

Office of Fair Trading's
Decision reference: ADJ/2316

Dated: 9th August 2012

Appellant: MCO Capital Limited

Respondent: Office of Fair Trading

Heard at: Royal Courts of Justice

Date of hearing: 1, 2 and 3 October 2013 (sitting in public)

Date of decision: 7 November 2013

Before

Regional Tribunal Judge Jacqueline Findlay (Chairman)
Neil Pardoe
John Randall

Attendances:

For the Appellant: Mr Robert Garson Instructed by McGuire Woods
Mr Juna Junila of McGuire Woods
Ms Susan Dunning of McGuire Woods

For the Respondent: Mr Peter Mantle
Instructed by
Office of Fair Trading

Observers: Mr Keith Thomas of MCO
Mr Alex Esterkin of MCO
Ms Sally Johnson of OFT
Ms Christine Loh of OFT
Ms Nadia Haq of OFT
Ms Maria Gawne of OFT

Subject matter: Appeal against the imposition by the Office of Fair Trading of a penalty of £544,505 under the Money Laundering Regulations 2007.

Cases referred to: John Dee Ltd v Customs and Excise Commissioners [1995] STC 941
James Paul (Car Sales) Ltd v The Commissioner for Her Majesty's Revenue & Customs LON 2005/0569
Mansell McTaggart Ltd v The OFT (Case No. CCA/2011/0013)
Napp v Pharmaceutical Holdings [2002] CAT 1
Turkish Bank (UK) Ltd FSA Decision Ref: 204566, dated 26 July 2012.
BAA Ltd v Competition Commission [2009] CAT 35 [137] Case No: 1110/6/8/09
CPS Nottinghamshire v Kevin Rose [2008] EWCA CRIM 239
R v Gareth Lee Whitwam [2008] EWCA CRIM 239

Legislation Referred to:

The Money Laundering Regulations 2007
Consumer Credit Act 1974
Value Added Tax Act 1994
Financial Services and Markets Act 2000
Tribunals, Courts and Enforcement Act 2007
European Convention of Human Rights
The Proceeds of Crime Act 2002
The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009

The Decision

1. The Unanimous decision of the Tribunal is that the appeal is dismissed.

The Decision under appeal

2. Following an investigation by the Office of Fair Trading ("OFT") and the taking of representations from the Appellant the OFT issued a determination

on 9 August 2012 a copy at which appears at Tab 26 of bundle 1. By that determination the OFT determined that the Appellant was not fit to conduct consumer credit business and its licence to do so was revoked. Further, by the same determination the OFT imposed a civil penalty under Regulation 42(1) of the Money Laundering Regulations 2007 ("the Regulations"). The amount of the penalty was £544,505.

The Appeal

3. By notice of appeal dated 6th September 2012 which appears at Tabs 13 and 14 of the hearing bundle the Appellant appealed against the whole of the determination of the OFT. On 26th October 2012 the OFT filed a response to the notice of appeal with supporting documentation (Tab 15 of the hearing bundle). On 29 October 2012 the Tribunal issued directions (Tab 9 of the hearing bundle). A case management hearing took place on 5 March 2013 and on that date the Tribunal accepted the Appellant's application to withdraw the appeal in respect of the licence revocation. This left as the remaining issue the appeal against the penalty, and that has been the issue before this Tribunal.

The Legislative Framework

4. The penalty is imposed under the Regulations, which were made on 24 July 2007, were laid before Parliament on 25 July 2007 and came into force on 15 December 2007. They are recited as having been made by H.M. Treasury in exercise of powers conferred by the European Communities Act 1972 and the Financial Services and Markets Act 2000. The power to impose a penalty is created and set out in regulation 42 of the Regulations. The right of appeal is created and set out in regulation 44 of the Regulations. The OFT's case is that the determination was appropriate because of the failure between June 2010 and October 2010 on the part of the Appellant to comply with regulations 7(1), 7(3), 8(1), 14(1) 20(1), 21 and 27 (4) of the Regulations. The alleged breaches are set out fully in the OFT notice at paragraphs 252 to 316 (d1/23) and the determination at paragraphs 43 to 61 (d1/26).

Proceedings

5. The Tribunal conducted an oral hearing at which the Appellant was represented by Mr Robert Garson instructed by McGuire Woods and the OFT was represented by Mr Peter Mantle. The Tribunal determined a preliminary issue the details of which are set out below and later heard oral evidence from Mr Lewis, called by the Appellant. The Tribunal heard oral argument from Counsel for both parties. The decision was reserved.

Preliminary Issue

6. The Appellant sought leave to adduce evidence from Mr Stephen Lewis of Mazars LLP by way of witness statement and oral evidence. The application was opposed by the OFT. This issue was determined by the Tribunal at the beginning of the hearing as a preliminary issue.

7. The Appellant submitted that the evidence from Mr Lewis went to the root of the argument in relation to turnover. The Appellant submitted that the OFT was not prejudiced as it had been given notice of Mr Lewis's evidence. The Appellant submitted that there would be prejudice if Mr Lewis's evidence were not admitted and that, if necessary, having heard his evidence, an adjournment could be granted to allow the OFT to adduce their own expert evidence. The Appellant submitted that the OFT had had ample opportunity with their large resources to adduce their own expert evidence if they had wished to do so.

8. The OFT opposed giving leave to adduce evidence from Mr Lewis on the grounds that no formal application had been made and that the OFT were prejudiced by the Appellant's failure to comply with the Directions of HH Judge Wulwik of 5 March 2013 and that the Appellant failed to observe their obligations under rule 2 of the Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009 ("the Tribunal Procedure Rules"). The OFT submitted that it was still not clear if Mr Lewis was an expert witness and the OFT were prejudiced by not being given the opportunity to instruct their own expert witness. The OFT invited the Tribunal to have regard to the Civil Procedure Rules 1998 and in particular Rules 35.5, 35.6, 35.7 and 35.10. The OFT submitted that the Tribunal should exercise its powers under rule 15(2)(b) of the Tribunal Procedure Rules on the grounds that the evidence was not provided within the time allowed by the direction of HH Judge Wulwik, the Appellant was seeking to adduce evidence in a manner that did not comply with the directions, and it would be unfair to admit that evidence.

9. The Tribunal determined the preliminary issue in favour of the Appellant and gave leave for the Appellant to adduce the evidence in question.

10. The Tribunal was influenced in making its determination by the following factors. Although it is regrettable that leave was not sought at an earlier stage the Tribunal considered that the prejudice suffered by the OFT was outweighed by the importance of allowing the Appellant to make its case as fully as possible. The probative value of the evidence was, for reasons appearing below, limited in any event and the Tribunal attached weight to the fact that the OFT is a sophisticated litigant well able to respond and counter the evidence as it thought fit despite the very late application. In the event the OFT did not seek to adduce counter evidence. We took the view that even if they had wished to do so and required an adjournment to do so the matter could have been adequately dealt with by way of a costs order. If the evidence had been excluded, however, the Appellant would have been denied any opportunity to rely on it. Overall, we concluded that the interests of justice required the admission of potentially relevant evidence and the prejudice likely to be caused to the Appellant by excluding it would exceed the prejudice caused to the OFT by admitting it. Although no formal application was made under the Tribunal Procedure Rules the Tribunal treated the written documentation and the oral submissions from Mr Garson as an application under rule 7 of the Tribunal Procedure Rules. The Tribunal waived the

requirements under rule 7(2)(a) of the Tribunal Procedure Rules as it considered it just to do so.

The Tribunal's Approach

11. In response to the Directions of the Tribunal the parties have helpfully provided a list of agreed issues. It has been necessary to make a formal determination on Issue 1 of the agreed list. We have gone on to determine Issue 2 in favour of the OFT. This means in our judgment that it is not necessary to make separate formal determinations in respect of the issues referred to at paragraphs 3.1 – 3.7. These matters, however, are discussed below to the extent that they have a bearing on our conclusions as to Issue 2.

I**ssue 1**

Submissions for the Appellant

12. The Appellant submitted that the correct approach to be applied by the Tribunal when deciding an appeal under Regulation 44(1) and (2)(c) and in deciding whether the amount of penalty is appropriate within the meaning of Regulation 42(1) and (1C) is by way of rehearing and that the Tribunal has the power to quash, vary, remit and give directions to the OFT as it sees fit. The Appellant submitted that the information leaflets issued by the First-tier Tribunal and the OFT made clear that there is a full right of appeal and it is obvious the First-tier Tribunal and OFT anticipated that the Tribunal would have full powers. The Appellant submitted that it was "obvious" that this was the legislative intention. The Transfer of Functions of the Consumer Credit Appeals Tribunal Order 2009 abolished the Consumer Credit Appeals Tribunal and transferred all its functions to the First-tier Tribunal. The Appellant submitted that although the Statutory Order that affirmed the First-tier Tribunal's powers on appeal did not expressly state that the same powers applied, it is logical that in the absence of language to the contrary the same powers should apply. The Appellant relies on the case of Mansall McTaggart Limited v OFT. Although the Tribunal in that case did not provide definitive guidance or adjudicate on the point the Tribunal gave a clear indication of their thinking. The Appellant relies on the Tribunal's expression of concern that to limit the powers of the Tribunal would place a significant burden on a successful appellant who may find himself going through the process of a determination and adjudication and a possible appeal for a second time. The general rule is that if at all possible, unless the justice of the case so requires, the appellate court should deal with the case itself rather then putting the parties to further expense. The Tribunal, in that case, indicated that it was their "instinctive preference" to have greater and more flexible powers. The Appellant invited this Tribunal to follow this direction. The Appellant relied also on the case of James Paul (Car Sales) Ltd v The Commissioners for Her Majesty's Revenue and Customs where the Tribunal held that in such a vacuum it had "full power to take its own decision about whether any penalty should be imposed and, if so, at what level". The Appellant submitted that it is open to the Tribunal to decide that there are no grounds to impose a penalty, or although such grounds exist no penalty should be imposed, or that

the amount of the penalty should be different from that fixed by the OFT in the determination. The Tribunal has the power to exercise its own judgement in respect to all these issues, including, in particular, a discretion in appropriate cases to substitute a different penalty from that imposed by the OFT. In the alternative the Appellant contended that the Tribunal has power to reconsider the penalty and, if it lacks jurisdiction to substitute an alternative penalty, it has power to remit the penalty determination to the OFT with directions as to the proper approach to be taken.

Submissions for the OFT

13. The OFT submitted that the Tribunal has jurisdiction to consider an appeal against the amount of the penalty by virtue of Regulation 44 (1)(b) and (2)(c). The OFT submitted that the Tribunal is entitled and required to come to its own conclusion on liability in relation to a penalty under Regulation 42. The OFT submitted that section 41 ZB of the Consumer Credit Act 1974 does not apply because penalties under Regulation 42 were not listed in the table set out at the end of section 41 of that Act. The OFT submitted that there is no express provision addressing the Tribunal's functions or powers in the legislation and it is not possible to infer the existence of powers. The OFT submitted that there is inconsistency in the legislation relating to appeals against penalties imposed under Regulation 42 and there are other instances where express powers have been included. The OFT referred to Regulation 43 and appeals against decisions made by HMRC against decisions under Regulation 42 where it is provided that the Tribunal has the power to quash the decision under appeal and substitute its own decision (including the power to reduce any penalty to such amount including nil) as it thinks proper. The OFT submitted that appeals against decisions under Regulation 42 made by the Financial Conduct Authority ("FCA") now go to the Upper-tier Tribunal and that the powers and functions of the Upper-tier are largely unchanged. They have the power to dismiss the appeal, or remit it back to the decision maker with a direction to reconsider and reach a decision in accordance with the findings of the Tribunal. The findings are limited to facts or law, the matters to be, or not to be, taken into account when making a decision and the procedural or other steps to be taken in connection with the making of the decision. The OFT submitted that the First-tier Tribunal was created by section 3(1) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007") and that its jurisdiction is derived wholly from that statute. The section refers to "the purpose of exercising the functions conferred on it or by virtue of this Act or any other Act". The OFT submitted that the Tribunal has an appellate function and that it is appropriate to examine the nature of the decision against which the appeal is brought. Regulation 42 (1) provides "A designated authority may impose a penalty of such amount it considers appropriate on a relevant person… who fails to comply with any requirement in [various identified paragraphs of the Regulations]… and, for this purpose "appropriate" means effective, proportionate and dissuasive".

14. The OFT identified two statutory conditions as follows:

Whether the appellant is (1) a relevant person who (2) has failed to comply with any requirement in the Regulations listed (if, unlike in this appeal, liability is a matter in dispute) and whether the amount of the penalty is an amount that the OFT considers to be appropriate.

15. The OFT submitted that it is these conditions which the Tribunal is required to examine and in particular whether the amount of the penalty is an amount which is "appropriate" (as defined). The OFT submitted that the right approach for the Tribunal is to consider whether the OFT acted in a way in which no reasonable authority could have acted, or took into account some irrelevant matter, or disregarded something to which it should have given weight including whether it erred in law. The OFT submitted that Parliament has empowered the OFT to decide the amount of the penalty and that the OFT is required to impose a penalty which it considers is "effective, proportionate and dissuasive". The OFT submitted that in the absence of any express power it would be wrong for the Tribunal to assume powers which had not been expressed, that Parliament could have provided for powers and chose not to do so and that the Tribunal does not have the power to substitute its own decision for that of the body whose decision is under appeal before it, because there is no express provision in the legislation. The OFT submitted that there would need to be express legislation to give a Tribunal the power to reach a fresh decision on the amount of the penalty and substitute its own decision for that of the supervisory authority. The OFT submitted that there can be no presumption that Parliament intended this Tribunal to have powers to make its own decision, in the absence of any express provision.

16. The OFT submitted, therefore, that the Tribunal has no jurisdiction to substitute an alternative penalty. Its powers are limited to considering whether grounds for imposing a penalty exist and, if so, considering whether the amount of the penalty is one that no reasonable authority could have imposed, or whether in imposing the penalty the OFT has taken into account some irrelevant matter or disregarded something to which it should have given weight. Further, the Tribunal has jurisdiction to consider whether the OFT has erred on a point of law in determining the amount of the penalty.

Authorities Considered

17. Mansell McTaggart Limited v OFT. In this case the Tribunal considered the jurisdiction of the Tribunal in an appeal but made no findings in relation to the Tribunal's powers and made no decision on the issue. The Appellant was unrepresented and the Tribunal heard submissions only from the OFT. The submissions put before the Tribunal were summarised and set out in paragraphs 58 to 66. On the issue of the function and power of the Tribunal the Tribunal stated at paragraphs 65 and 66:

Paragraph 65 – "*We appreciate that in this case the OFT may be looking at us for guidance on the issue to assist in future appeals, but we feel somewhat circumscribed in our ability to do so having had the benefit of argument from one side only*".

Paragraph 66 – "*In the event and for reasons we will now explain, on the particular facts of this case we do not consider it necessary to resolve this question of law.*"

The Tribunal acknowledged that the regime suggested by the OFT filled "*the apparent statutory lacuna"* and the Tribunal observed "*we are far from persuaded that its [sic] produces a sensible or workable structure"*. The Tribunal continued "*In particular it:*

seriously circumscribes the powers of the Tribunal on the hearing of an appeal of the present kind, and places a significant burden on a successful appellant, who may find himself having to go through the process of a determination by an adjudicator and a possible appeal for a second time. Whilst appeals leading to retrials in ordinary civil proceedings are of course far from unknown, the general rule is, that if at all possible and unless the justice of the case so requires, the appellate court should deal with the case itself rather then putting the parties to further expense. We freely admit that our instinctive preference would be for us to have rather greater and more flexible powers then Ms Simor's analysis would admit."

These are comments only by the Tribunal, at best obiter, and not binding on this Tribunal.

18. John Dee Ltd v Customs and Excise Commissioners. In this case the Court of Appeal in examining whether a statutory condition was satisfied held that the Tribunal had to consider whether the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted or whether they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. The Court of Appeal held that the Tribunal should also consider whether the Commissioners had erred on a point of law. However, the Tribunal could not exercise a fresh discretion and the protection of the Revenue was not a responsibility of the Tribunal or the Court.

19. James Paul (Car Sales) Ltd v The Commissioner for Her Majesty's Revenue and Customs. In this case the appellant company appealed against the penalty imposed on it by the Respondent, HMRC, under the Money Laundering Regulations 2003. The issue before the Tribunal was whether the Tribunal had full power itself to take again any decision imposing penalty, or whether its power was restricted to dealing with the matter only as a matter of review. The Tribunal was not required to adjudicate on this issue as HMRC accepted and agreed with the view of the Tribunal that it had full power to take its own decision about whether any penalty should be imposed and if so, at what level.

20. NAPP Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading. In this appeal the Competition Commission Appeal Tribunal had express statutory power to vary the amount of the penalty. The Tribunal held that it could decide afresh the amount of the Penalty and substitute its

decision on the amount on the grounds that Schedule 8, paragraph 3 (2) of the Competition Act 1998 provided that "the Tribunal may confirm or set aside the decision which is subject to the appeal, or any part of it, and may …(b) impose, or revoke or vary the amount of, a penalty … or (e) make any other decision which the Director could have made". The Tribunal considered the provisions of Article 6 (1) of the ECHR and in the context of the applicable statutory framework for this appeal were of the view that in accordance with Article 6 the appellant was entitled to have the penalty renewed *ab initio* by an impartial and independent Tribunal.

The Tribunal's Determination of Issue 1

21. The Tribunal agrees with the argument advanced on behalf of the OFT and rejects the argument advanced on behalf of the Appellant. The Tribunal finds that the Tribunal's powers on an appeal under Regulation 44 extend only to determining whether an appellant is liable to pay a penalty, whether the OFT has erred in law in determining the amount of the penalty, whether the amount of the penalty is one which no reasonable authority could have imposed, and whether in imposing the penalty the OFT has taken into account some irrelevant matter, or disregarded something to which it ought to have given weight. In the absence of any such defect the Tribunal does not have the power to substitute its own decision as to penalty. If the Tribunal were to conclude that there was some relevant defect, the only course open to it would be to allow the appeal and issue guidance to the OFT as to how the matter of penalty should be approached. In the absence of an express power, setting the amount of the penalty to be imposed is not the function of this Tribunal.

Reasons for the Tribunal's Decision

22. There is no binding authority on this issue. Under earlier legislation this Tribunal used to have express powers including the power to reduce the penalty, to extend the period within which the penalty was to be paid, and to remit the matter to the OFT for reconsideration and determination in accordance with any directions given by the Tribunal. These powers were not conferred on this Tribunal when the legislation was repealed. This Tribunal was created by s 3(1) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007") "*for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act."* The jurisdiction of this Tribunal is derived wholly from statute. Parliament could have provided express powers to the Tribunal. Parliament did not do so. Mr Garson has submitted that this was a mistake and that "they" must have intended that the Tribunal retain the same powers and functions. In our view it is more likely that the opposite is the case. Had Parliament intended the Tribunal to have powers it would have said so. The fact that no powers are expressed suggests strongly that the intention was that the Tribunal would not have the express powers it had before the legislation was repealed. Indeed it is noted that before the repeal, the Money Laundering Regulations 2007 at Regulation 44(5) made the provisions of Section 41 of the Consumer Credit Act 1974 applicable to the dealing of appeals before the Consumer Credit Appeals Tribunal under Regulation 44. The effect was to confer on the Consumer

Credit Appeals Tribunal the power of rehearing the determination appealed against, by virtue of Section 41(1C). However the Transfer of Functions of the Consumer Credit Appeals Tribunal Order 2009/1835 at Schedule 2, specifically required Regulation 44(5) to be omitted, creating the effect that the provisions of Section 41 of the Consumer Credit Act 1974 no longer apply to an Appeal under Regulation 44. It follows that it is no longer possible to link the powers of Section 41ZB (1) and (2), via Section 41, to Regulation 44. Rather than there being a "mistake" in not conferring the powers of Section 41ZB on the First-tier Tribunal it is clear that the removal of those powers was the intention behind the specific omitting of Regulation 44(5). It is not open to the Tribunal to write into the legislation words that are not there. The Tribunal is further fortified in its position by the fact that express powers are conferred in appeals against penalties imposed by other regulatory bodies. For example, in appeals against decisions under Regulation 42 made by HMRC the Tribunal has the power (Regulation 43(4)) to quash the decision under appeal and substitute its own decision "*including the power to reduce any penalty to such amount (including nil) as it thinks proper.*"

23. It is in the Tribunal's view highly unlikely that Parliament would include express powers in the legislation in respect of an appeal against a penalty made by one body and simply forget to include it for another.

24. The Tribunal have attached weight to the findings of the Court of Appeal in John Dee Ltd v Customs and Excise Commissioners where Neill LJ stated *"…in my view the function and powers of a tribunal in each case will depend in large measure on the nature of the decision appealed against and of course on any special statutory provisions."* In the absence of any special statutory provisions it would be wrong in the Tribunal's view to invent any. In relation to the nature of the decision appealed against the Tribunal agrees with the OFT that Parliament has empowered the OFT to decide the amount of the penalty and it is required to impose a penalty which it considers "*effective, proportionate and dissuasive.*" The OFT as the supervisory authority for consumer credit financial institutions is particularly well positioned to assess the amount of a penalty taking into account these requirements.

25. The opinion of the Tribunal expressed on this issue in Mansell McTaggart Limited v OFT is understandable. The Tribunal used to have this power and members of a Tribunal who had exercised such powers in the past may find it hard to accept that powers have been removed. The function of the Tribunal, however, is to interpret legislation not to make it or re-write it as the Tribunal would like it to be.

26. The Appellant has not pointed to anything that would suggest that it was the intention of the legislature to include powers or that it was an oversight that certain powers were omitted. The Appellant has had every opportunity to do so.

27. The Tribunal concluded that it does not have any power to conduct in effect a judicial review of the OFT's policy.

Issue 2

28. The issue before the Tribunal is whether by imposing the penalty on the Appellant the OFT erred in law, acted in a way in which no reasonable authority could have acted, or took into account some irrelevant matter, or disregarded something to which it should have given weight.

29. **The Appellant's Submission**

a. The Appellant submitted that by imposing the Penalty the OFT acted in a way in which no reasonable authority could have acted and used an irrelevant factor namely turnover as the basis for its calculation. Without further and proper definition, the OFT's turnover "formula" was a blunt instrument and does not properly reflect the Appellant's actual financial standing. No other regulatory body which imposes penalties pursuant to the Regulations uses turnover as the starting point and, therefore, by using turnover as the starting point the decision is rendered unreasonable. There is no legislative requirement to use turnover rather than disgorgement of profits and this does not accord with the OFT's expressed aim of eliminating any financial gain or benefit from non-compliance.

b. The Appellant submitted that if turnover were deemed to be a reasonable basis for the calculation of a penalty the lack of a coherent policy on how to identify "relevant turnover" is unreasonable.

c. The Appellant has put forward various inconsistent arguments as to what should be the proper approach to assessing turnover, if, contrary to their primary submission turnover is to be treated as relevant in the calculation of penalty. It has contended that the profit figure should be treated as "turnover". It has argued that turnover should be confined to the value of the genuine loans, and at other times it has contended that turnover should be limited to the fraudulent loans. It has argued that turnover should not have been calculated until adjusted figures were available. We note in passing that no adjusted figures have been put before this tribunal. The Appellant's final position as put in oral submissions at the hearing was that turnover should be taken as represented by the relatively modest figure of approximately £52,000 being the total amount of recovered loans although it is not possible to say with precision how much of this relates to the principal and how much to charges.

d. The OFT acted unreasonably in not making clear at all stages how the penalty would be calculated and what figures were required from the Appellant.

e. The Appellant submitted that the OFT had historically had a different approach to the calculation of turnover. The Appellant refers to the OFT's Guidance as to the appropriate amount of penalty in Competition Law Circumstances (2004). This Guidance contemplates circumstances where the relevant turnover is zero. When the OFT requested figures from the Appellant it failed to give any indication or guidance about which aspects were to be

included or excluded. Under the formula advanced by the OFT there could never be a zero figure starting point and this is unreasonable.

f. The Appellant submitted that the OFT erred and acted unreasonably in not requesting from the Appellant an updated figure for turnover and in failing to consider whether figures would be adjusted at a later date in accordance with proper accounting practice.

g. The Appellant submitted that a large amount of the loans in question never reached the intended bank accounts. The OFT in using a turnover formula takes into account projected fees and charges which bear no relation to the reality of the situation and can, therefore, only serve as a punitive measure.

h. The Appellant submitted that the Accounts showed a loss for the year ended 31 December 2010 of £7,127,719 and that the penalty was disproportionate taking into account the substantial loss already suffered by the Appellant.

i. The OFT acted unreasonably in not affording the Appellant the opportunity of reducing the penalty by an early settlement.

j. The penalty in this case is out of step with the penalties imposed by other regulatory authorities. In the Turkish Bank (UK) Ltd case the Financial Services Authority ("FSA") imposed a penalty of £420,000. The Appellant agreed to settle at an early stage of the FSA's investigations and qualified for a 30% discount under the FSA's executive settlement procedures. The final penalty was therefore £294,000 for breaches of the Money Laundering Regulations.

k. The Appellant submitted that this was a disproportionate penalty predicated on a flawed policy which had been misapplied and that as this was the first penalty imposed by the OFT under the new Regulations it was a "headline" penalty. The Appellant contended that it is troubling that for the imposition of its first penalty in this area the OFT did not reference other regulatory authorities to assure itself that it was acting proportionately.

l. The Appellant submitted that the OFT's guidance as to the appropriate amount of a penalty in relation to Competition Law (2004) contemplated a scenario where there was no turnover. Section 2.13 states that "*in exceptional circumstances, where the relevant turnover of an undertaking is zero (for example, in the case of buying cartels) and the penalty figure reached after the calculation in Steps 1 and 2 is therefore zero, the OFT may adjust the amount of this penalty at this step*". The base figure of the test in this case identified as turnover was far too high and formed the basis of a disproportionate penalty.

m. The Appellant submitted that the OFT is inconsistent it its approach to calculating turnover. In this case the OFT has used projected fees, costs, charges and interest from the provision of all loans, whether fraudulent or genuine whereas in the Competition Law Guidance 2004, referred to above, relevant turnover is referred to as "*the turnover of the undertaking in the relevant market and relevant geographic market affected by the infringement in the*

undertaking's last business year". The Guidance does not refer to projected or figurative turnover but actual turnover and states "*relevant turnover will be calculated after deduction of sales rebates, value added tax and other taxes directly related to turnover"*.

n. The Appellant submitted that a rigorous application of the OFT's 4 Step test in determining penalty should have led to a proportionate penalty. When compared to the penalty in the Turkish Bank UK case, this penalty is manifestly excessive.

o. The Appellant submitted that the penalty does not take into account that their pay day loan business operated for ten years in multiple jurisdictions without once breaching Regulations.

p. The Appellant submitted the size of the penalty serves only as a punishment.

q. The Appellant submitted that the OFT asked the wrong question of the Appellant at the beginning of the investigations about the business turnover which resulted in the wrong figures being provided.

r. The Appellant submitted that the turnover figure used by the OFT is out of step with standard accounting practice as issued by the Accounting Standards Board and international accounting standards.

s. The Appellant submitted that when the OFT's Interim Policy was formulated the OFT did not consider the eventuality of imposing a civil penalty on a company that made a loss out of any regulatory breaches and consequently the Interim Policy is found wanting.

t. The Appellant urged the Tribunal to attach weight to Mr Stephen Lewis' evidence which was put forward as "opinion" evidence not expert evidence.

u. Mr Lewis gave the opinion that turnover should be calculated on the basis of the Accounting Standards Board's ("ASB") Financial Reporting Standard ("FRS") as amended by Amendment to FRS 5 ("FRS 5"), "Reporting the Substance of Transactions", Revenue Recognition. FRS 5 states that "performance" is "the fulfilment of the seller's contractual obligations to a customer through the supply of goods and services." Mr Lewis gave the opinion that when a lender paid money into the bank account of a person borrowing money, or unknowingly an unconnected bank account, this was performance under the ASB's standards, and the lender would be entitled to charge a fee.

v. Mr Lewis gave the opinion that turnover should be defined as in FRS 5 as "the revenue resulting from exchange transactions under which a seller supplies to customers the goods or services that it is in business to provide."

w. Mr Lewis gave the opinion that in the present case where loan proceeds were returned or withheld by an intermediary bank before being paid to the customers' bank accounts the Appellant would not have met its performance obligations under FRS 5 to the customer as it had not loaned any money to the customer at this stage. Therefore the Appellant would not have the right to

charge interest or other fees associated with the provision of the loan. Hence any interest, fees or charges arising from such transactions should not be recognised as turnover.

x. Mr Lewis gave the opinion that in accordance with G9 of FRS 5 if there were a significant risk that there would be a default on the amount of consideration, as in the Appellant's case in relation to some loans, and the effect was material to reported revenue, an adjustment would be necessary "to arrive at the amount of revenue to be recognised."

y. Mr Lewis gave the opinion that it was the correct procedure for profit and loss accounts to be re-stated when it became clear that any money owed would not be recovered and that in accordance with G10 of FRS 5 "subsequent adjustments to a debtor as a result of changes in the time value of money and credit risk should not be included within revenue."

z. Mr Lewis gave the opinion that there were three alternatives using appropriate accounting treatment in circumstances where there is bad debt. In the first where it was likely that loans were tainted by fraud and the value was not as good as originally thought, the figures in the profit and loss accounts would remain unchanged but prudence would demand that provision should be made for the bad debt. The second approach would be to reduce the turnover figures by removing the charges and interest which would not be received and insert detailed notes in the accounts to understand the adjustments made. The third alternative would be appropriate where income relating to a fraudulent loan had already been recognised in the statutory financial statements for a prior accounting period. In these circumstances this would need to be restated by way of a prior year adjustment in accordance with FRS 3.

aa. Mr Lewis gave the opinion that on the basis that the interest, fees and charges relating to fraudulent loans had been accurately identified in accordance with UK Generally Accepted Accounting Practice ("UK GAPP") turnover of £2,444,207 should be credited against the total turnover of £6,050,051 giving a turnover of £3,605,844.

30. **The OFT's Submission**

a. OFT submitted that Regulation 42(1) permits the OFT to impose a penalty "of such amount as it considers appropriate" and Regulation 42(1) states "appropriate" means "effective, proportionate and dissuasive."

b. The OFT submitted that it did not act in a way in which no reasonable authority could have acted in fixing the amount of the penalty at £544,505. The OFT acted reasonably in applying the 4 Step approach which it took when determining the amount of the penalty, and reasonably at each of the 3 Steps which were pertinent. The OFT did not take into account any irrelevant matter, or disregard something to which it should have given weight. The OFT was entitled to consider the amount of £544,505 appropriate.

c. The OFT submitted that the penalty was not disproportionate in comparison with the Penalty imposed by the FSA in Turkish Bank (UK) Ltd.

d. The OFT did not act unreasonably by following the 4 step approach set out in the Interim Penalty Policy. That approach is rational and fully in accord with the purpose of setting an "appropriate" penalty as defined in Regulation 42.

e. The OFT submitted that Step 4 of the Interim Penalty Policy expressly required the prospective amount of the Penalty arrived at by the preceding steps to be reviewed by the OFT to ensure that the amount was "appropriate" within the meaning of Regulation 42, including that it was proportionate.

f. The OFT submitted that it would have been an error in principle for the OFT to have based the penalty on the amount imposed by the FSA in another case. The amount of the penalty should only be considered with reference to the facts and circumstances of this case. The OFT were not obliged to follow the approach of the FSA or take account of the approach of the FSA. A comparative exercise is unhelpful and not appropriate.

g. The OFT submitted that it would be wrong to use a "disgorgement" based approach to assess the penalty. A "disgorgement" based approach is an approach based on depriving the person in breach of the Regulations of the benefit it has derived from that breach.

h. The OFT submitted that Regulation 42 does not confine the amount of the penalty to be imposed to the benefit derived from the breach of the Regulations by the person in breach. It requires that the penalty amount be fixed so as to make the penalty effective, proportionate and dissuasive.

i. The OFT submitted that a penalty limited to the amount of the benefit derived from the breach would be unlikely to be effective and dissuasive because the person in breach would be left no worse off financially than if he had complied with the Regulations. In a case where there had been breaches of the Regulations, but no benefit had resulted, the amount would be nil and no penalty could be imposed. Accordingly, a disgorgement based approach would defeat the purpose of Regulation 42 in the majority of cases.

j. The OFT submits that the Appellant has fallen into error in relying on, and misunderstanding, the FSA's Decision Procedure and Penalties Manual ("DEPP").

k. The OFT submitted that the FSA's approach in the DEPP is similar in principal to the OFT's approach in the Interim Penalty Policy in that the FSA in Step 2 use an amount based on a percentage of turnover.

l. The OFT submitted that the approach of the FSA and the OFT do differ in that the DEPP has a step for removing benefit whereas the OFT's Interim Penalty Policy has no equivalent step.

m. The OFT submitted that the OFT does not treat benefit as irrelevant and it can be taken into account in the course of the Interim Penalty Policy's 4 steps.

n. The OFT submitted that it did take into account the loss suffered by the appellant.

o. The OFT submitted that "relevant turnover" is addressed in the Interim Penalty Policy which states that "turnover" is the revenue received or accrued during a given period, but that "relevant turnover" will need be decided on a case by case basis given that the consumer credit lending sector has many different business models.

p. The OFT submitted that the figure taken from the turnover figures provided by the Appellant and the breakdown of the turnover was the best estimate.

q. The OFT submitted that the Appellant had been given ample opportunity to make relevant representations and provide different turnover figures had it wished to do so.

r. The OFT submitted that they were not in any way unreasonable in not requesting a revised turnover figure shortly prior to the determination rather than relying on figures provided over a year before.

s. The OFT submitted that in March 2012 it was under an obligation to offer the Appellant the right to make representations and that offer was made. The OFT was under no legal obligation to seek further information from the Appellant and the Appellant could have advanced revised figures at any time and failed to do so.

t. The OFT submitted that it was appropriate to include interest, fees and charges relating to fraudulent loans in the turnover figure which was used. This approach was appropriate because it measured the effective scale of all the lending activities of the appellant from June to October 2010.

u. The OFT submitted that the Appellant's failures to comply with the requirements of the regulations related to the entirety of its lending activities.

v. The OFT submitted that its approach to relevant turnover best serves the purpose of Regulation 42 in working towards a penalty that is "effective, proportionate and dissuasive".

w. The OFT submitted that the position of the Appellant had been inconsistent in relation to what should or should not be used for calculating "relevant turnover".

x. The OFT agrees with the FSA's DEPP which states that the amount of revenue generated by an undertaking from a particular business area is indicative of the harm or the potential harm that a breach of regulations may cause, hence of the seriousness of the breach. The OFT agrees also with the

FSA's approach that the amount of revenue is relevant in terms of the size of the financial penalty necessary to act as a credible deterrent.

y. The OFT submitted that it acted reasonably in including turnover both from legitimate and fraudulent loans. It is submitted that if it had excluded turnover from fraudulent loans this would have led to an inadequate measure of the scale of the Appellant's activities to which its breaches of the Regulations applied and would have resulted in an inapposite figure on which to proceed.

z. The OFT submitted that it acted reasonably in determining the amount of the penalty and it acted reasonably in selecting a figure of 10 per cent in step 1 in its approach.

aa. The OFT submitted that a discount is available only where agreement is reached before the Determination is given.

bb. The OFT submitted that Regulation 42 does not refer to or require the possibility of a reduction of the amount of the penalty for "early settlement" of a penalty proposed under Regulation 42.

cc. The OFT submitted that it was not compulsory to adopt the policy in the DEPP and that there was a procedure in step 3 of the Interim Penalty Policy to take into account mitigating factors including cooperation with the OFT after the breach. Cooperation with the OFT was a significant factor and was taken into consideration by the OFT in the reduction of the penalty by 20 per cent to take into account mitigating factors.

dd. The OFT submitted that it acted reasonably in determining the amount of the penalty, and it acted reasonably in not offering an early settlement discount.

ee. The OFT submitted that it acted reasonably in determining the amount of the penalty at 10% of turnover at Step 1, and at Step 3 in adding 10 per cent of the figure reached at the end of step 1 on account of aggravating factors, and in subtracting 20 per cent from the figure reached at the end of step 1 on account of mitigating factors.

ff. The OFT submitted that it acted reasonably in addressing mitigating and aggravating factors and not limiting itself to consideration of the factors listed in the Interim Penalty Policy which were put forward as examples only.

gg. In relation to the deterrence component of the decision the OFT submitted that the purpose of Regulation 42 clearly encompasses fixing a penalty which the decision maker considers to be an effective deterrent.

hh. The OFT submitted that the Notice and the Determination show that a figure was produced by Step 1, then reduced at Step 3, then reconsidered at Step 4 to address whether the amount produced at the end of Step 3 was "appropriate" within the meaning of Regulation 42 taking into account deterrence. No reduction was made in Step 4 on the basis that the amount produced at the end of Step 3 was "appropriate".

ii. The OFT submitted that Regulation 42 envisages a single financial penalty in an amount that takes into account, combines, and serves the purpose of effectiveness, and of proportionality and of dissuasiveness.

jj. The OFT submitted that there was no improper "conflation" in the determination of the amount of the penalty.

kk. The OFT submitted that it was right to take an overview at Step 4 and that it acted reasonably when considering dissuasiveness, proportionality and effectiveness, and by maintaining, rather then increasing or reducing the amount of the penalty at Step 4.

ll. The OFT submitted that the Appellant's breaches of the Regulations were serious and showed systemic and profound failings in its approach to meeting the requirements of the Regulations. The OFT were entitled to come to the decision that a penalty of the amount imposed was appropriate. The OFT did not act in a way in which no reasonable authority could have acted and did not take into account any irrelevant matter, or disregard something to which it should have given weight.

Findings of Fact

31. The Appellant appeals against the OFT decision to impose a penalty in the amount of £544,505.00. The penalty was imposed for failure to comply with requirements of the Regulations, pursuant to regulation 42 of the Regulations.

32. The Appellant carried on the business of making "pay day" loans in the United Kingdom from June 2010.

33. The Appellant failed to comply with requirements in the Regulations between June 2010 and October 2010. The Appellant accepts that it is liable to a penalty under regulation 42.

34. The OFT revoked the Appellant's Consumer Credit Licence. In March 2013 the Appellant decided not to pursue both its appeal against this revocation and a directly related appeal on variation of the licence.

35. The OFT, after investigations, issued on 15 September 2011 a notice stating that (amongst other things) it was minded to impose a penalty under the Regulations.

36. The Appellant made its First Representations by letter dated 7 November 2011 and its Second Representations in the form of a Status Report entitled "Fraud 2010 - Current Status" dated January 2012.

37. By a Notice dated 13 March 2012 the OFT withdrew the earlier Notice and gave fresh Notice that it was minded to impose a penalty, taking into account the Representations made by the Appellant.

38. The Appellant made its Third Representations by letter dated 2 May 2012.

39. The decision to impose the penalty now appealed against was notified by the Determination Notice dated 9 August 2012.

40. The Appellant failed to comply with Regulations 7(1), 7(3), 8(1), 14(1), 20(1), 21 and 27(4).

41. The Appellant did not carry out any proper risk assessment in relation to money laundering and its intended transactions before commencing its "pay day lending" business in the United Kingdom and this remained the position from June 2010 to October 2010 and beyond.

42. The Appellant failed to apply appropriate customer due diligence measures ("CDD").

43. The Appellant failed to appreciate or address the risks that existed in the transactions which it undertook. In the initial period of trading the Appellant required only the most basic personal details from its customers. It required the number of a bank account into which the Appellant would make payments, but there was no requirement for the loan applicant to be the holder of that bank account. No steps were taken to require that the name on the bank account matched the name of the applicant. The Appellant engaged Experian to provide a loan applicant identity authentication check on the basis of that basic information but the Appellant declined to use other additional services offered to it by Experian.

44. A high proportion of the loan transactions the Appellant entered into were entered into with fraudsters, including persons engaged in organised crime. In short, such loan transactions came about because fraudsters had stolen the identities of persons whose names were then used to apply for loans. The circumstances described in the paragraph above meant that loans were duly granted, but the monies were paid (or were in the process of being paid) into bank accounts of the fraudsters and not to the "named" persons who were totally unaware that their identities had been stolen.

45. The Appellant failed to establish or maintain appropriate risk sensitive policies and procedures as required by the Regulations.

46. For the year ended 31 December 2010 the Appellant's account shows a loss of £7,127,719.00 for the financial year.

The Tribunal's determination of Issue 2

47. The Tribunal determined that the facts were such that the Appellant was liable to a penalty under Regulation 42.

48. In determining the amount of the penalty the OFT did not err on a point of law.

49. The amount of penalty is not one which no reasonable authority could have imposed, and in imposing it the OFT did not take into account any relevant matter or disregard anything to which it should have given weight.

Reasons for the Tribunal's determination of Issue 2

50. The OFT has the statutory authority to impose a penalty "of such amount as it considers appropriate" and Regulation 42(1) states "appropriate" means "effective, proportionate and dissuasive."

51. The OFT launched a consultation on its future supervisory approach under the Money Laundering Regulations in February 2010. This consultation included a section on the way the OFT would exercise its power to impose civil financial penalties. In the consultation the OFT stated its preference for a case by case approach to penalties for breaches of the Regulations. The Interim Penalty Policy ("IPP") was developed after consultation and in line with the responses received.

52. The Tribunal's view was that the word "turnover" in its natural and ordinary meaning has been correctly applied by the OFT in its approach in this case, namely to refer to the gross revenue for the relevant period to include charges and interest but not repayment of capital. The Tribunal considers that this is not only in line with the sense in which the word "turnover" is most commonly used in everyday language, but is also the best figure to use in assessing the overall scale of the relevant operation. The Tribunal considers that it represents a more rational approach than the various definitions put forward on behalf of the Appellant at different stages of the decision making and appellate process.

53. The Tribunal was not persuaded by Mr Lewis' evidence that the OFT should have applied the principles of the UK GAPP when assessing turnover. The objective of UK GAPP *"is to require reporting entities falling within its scope to highlight a range of important components of financial performance to aid users in understanding the performance achieved by a reporting entity in a period and to assist them in forming a basis for their assessment of future results and cash flows."*

54. The aim of the OFT in assessing turnover is completely different from the aim of UK GAPP in defining turnover. In the Tribunal's view there is nothing inconsistent or incorrect in using a different method to calculate turnover for the purpose of assessing penalty as opposed to the method used to define turnover for revenue recognition purposes.

55. The OFT is not bound to apply the FSA's DEPP. It would be odd if they were so bound.

56. The OFT issued to the Appellant before applying the penalty a formal notice which included all the information required under 2.3 of the IPP.

57. The OFT stated in the IPP that it had adopted a 4 Step process for setting financial penalties and that the penalty to be applied would be assessed on a case by case basis using the following steps as a guide:

    Step 1 – deciding percentage of relevant turnover as a penalty

    Step 2 – adjustment for duration of non compliance

    Step 3 – adjustment for aggravating and/or mitigating factors

    Step 4 – consideration of whether the level of penalty is appropriate.

58. The Tribunal is of the view that these steps are broadly consistent with the approaches adopted by other supervisory authorities such as the FSA and HMRC and takes into account the OFT's own penalty setting regime under the Competition Act 1998.

    The IPP states in relation to relevant turnover:

    4.3 In order to embark on step one of the process "relevant turnover" has to be determined.

    4.4 Turnover itself is the revenue received or accrued during a given period, for consumer credit lenders turnover is the revenue from the credit lending activity, for example – this may be the interest, charges and fees earned on transactions but would not include repayment of the principal amount loaned.

    4.5 "Relevant turnover" arises from business activity covered by the Regulations within the UK market.

    The OFT states in the IPP that it *"will clarify "relevant turnover" in each case as appropriate because the consumer credit financial institution sector contains many different business models and "relevant turnover" will need to be assessed in the light of these different models and the circumstances of the individual case."*

59. The view of the Tribunal is that this stated aim provides the OFT with flexibility to deal with different scenarios and is clear and unambiguous.

60. Different regulatory authorities deal with different sectors and types of business. Different factors are involved and it would not be appropriate for all regulatory authorities to have the same approach to assessing and fixing an appropriate penalty. The situations and markets are so varied it is entirely appropriate for there to be a case by case approach within an overall stated and clear policy.

61. The consumer credit market has its own characteristics and markets. In these circumstances it is entirely appropriate for the OFT to formulate its own policy in the approach to fixing penalties. It would be wholly inappropriate to

follow the approach of the FSA which is dealing with an entirely different set of breaches, markets and business models.

62. The OFT followed the 4 Step process. In assessing "relevant turnover" it was reasonable for the OFT to use as a base the interest, charges and fees that the Appellant expected to earn. It was reasonable for the OFT to rely on the figures produced to it by the Appellant.

63. The Appellant has its own legal advisers. It could have put forward alternative figures at any time. It could have afforded itself the opportunity to meet with the Adjudicator. The Appellant chose not to do so. The Appellant has at various times put forward different figures as "relevant turnover" with various proposals for calculating that turnover.

64. It is the view of the Tribunal that it is irrelevant that for other purposes the turnover would be a different figure or that adjustments could be made to the accounts and those adjustments would have been made if accounts had not been frozen.

65. If the OFT used only the turnover figure for the genuine loans or only the figure for the fraudulent loans then the starting figure would be reduced. But this would be illogical. The appropriate figure used for turnover is the amount of revenue the Appellant anticipated making from the business in the UK. The amount of profit that the Appellant could be expected to generate from the activities affected by the breach (which is related to turnover) is a matter relevant to deterrence.

66. The OFT did made an adjustment for mitigating factors in accordance with the IPP.

67. In accordance with Step 4 the OFT acted in accordance with the IPP which states at 4.15 *"the penalty has to be large enough to be dissuasive when set against any actual or potential profits of the supervised activity of the business. The financial penalty also has to act as a deterrent to other similar businesses in the UK market."*

68. The OFT did not act unreasonably in following the IPP. It was entitled to formulate the IPP in the terms that it did and implement its provisions.

69. The OFT did not err in law. It has the statutory authority to act as it did.

70. The OFT did not act in a way in which no reasonable authority could have acted. The OFT formulated a policy to assess penalties and correctly followed that policy. The IPP makes no provision for "early settlement discount". The OFT was not bound to adopt the policy of other regulatory authorities and offer an early settlement discount. The OFT acted reasonably in taking into account the matters raised by the Appellant in the Third Representations.

71. The OFT did not take into account some irrelevant matter. The OFT assessed turnover in accordance with the IPP and on the basis of the evidence provided

to it by the Appellant. The OFT acted reasonably in addressing aggravating and mitigating factors in accordance with the IPP. It was reasonable for the OFT to take into account acts and omissions of the Appellant and take into account the level of seriousness of the breaches and that the breaches were reckless. The acts and omissions of the Appellant placed at further risk individuals whose identity and banking details had already been stolen. Those acts and omissions were also reckless in relation to the risk that funds could be diverted to finance terrorism or support criminal activity. The OFT reflected appropriately the seriousness of these actual and potential consequences of the acts and omissions in determining the penalty.

72. The OFT did not disregard something to which it should have given weight. The Appellant argues that the OFT did not attach weight to the fact that it suffered a large loss. The Tribunal finds that the OFT did take this into account in accordance with the provisions of the IPP. Also the OFT did take into account the co-operation with the OFT in the reduction of the penalty by 20 per cent as a mitigating factor.

73. **Issue 3**

As indicated at paragraph 11 above three issues were to be considered by the Tribunal. Having dealt with Issues 1 and 2, for completeness Issue 3 is detailed as follows:

Issue 3.1 Was the penalty disproportionate?

Issue 3.2 Should the amount of the penalty have been ascertained using a disgorgement-based approach rather than an approach which took into account turnover?

Issue 3.3 Did the OFT use an incorrect approach to and assessment of turnover and thereby err?

Issue 3.3.1 Should the OFT have requested a revised turnover figure shortly prior to the determination, rather than rely on figures provided over a year prior?

Issue 3.3.2 Did the OFT err by including interest, fees and charges relating to fraudulent loans in the turnover figure which it used?

Issue 3.3.3 Did the OFT err by including interest, fees and charges relating to incomplete loans in this appeal?

Issue 3.4 Did the OFT set the amount of the penalty using too high a percentage of the MCO's turnover?

Issue 3.5 Should a facility for early settlement discount have been afforded to MCO?

Issue 3.6 Was there a proper assessment of aggravating and mitigating factors?

Issue 3.7 Was the deterrence component of the decision on the amount of the penalty improperly conflated with the turnover calculation or a projected profits calculation resulting in a disproportionate penalty?

74. Having decided that the Tribunal's powers are limited in the manner contended by the OFT and that the OFT's approach to the calculation of penalty is not to be criticised on any of the limited grounds on which it is open to the Tribunal to criticise it, the decision of the Tribunal to uphold the penalty is inevitable. It has accordingly not been necessary to make findings on any of the elements of Issue 3 except to the extent that they are discussed above in relation to Issue 2, but even if we had come to a different conclusion on Issue 1 and assumed wider powers to reconsider the penalty de novo we would nevertheless have upheld the penalty.

J R Findlay
Tribunal Judge, First-tier Tribunal (Consumer Credit)

7 November 2013