[2015 Gib LR 435]

COMPSON v. FINANCIAL SERVICES COMMISSIONER

WEAL v. FINANCIAL SERVICES COMMISSIONER

SUPREME COURT (Jack, J.): April 29th, 2015

Financial Services—Financial Services Commission—appeals—court to defer to Commission if issues on appeal require specialist expertise—if issue within court's knowledge and experience, e.g. director's compliance with private placement memorandum, only usual to defer for decision-makers at first instance—on appeal against sanctions, court not to interfere unless Commission clearly wrong or took account of irrelevant considerations

Financial Services—Financial Services Commission—sanctions—principles to determine whether director fit and proper to carry out investment business under Financial Services (Investment and Fiduciary Services) Act 1989, s.35(1A): (a) director under continuing duty to acquire and maintain knowledge and understanding of company's business; (b) duty to supervise discharge of delegated functions; and (c) extent of duty to supervise depends on facts particularly director's role in management of company—principles on imputation of director's knowledge to company irrelevant

Financial Services—Financial Services Commission—sanctions—Commission best placed to determine appropriate sanctions to further objectives—if director seriously breaches private placement memorandum and approves disadvantageous contract causing significant losses to investors, Commission may impose severe sanction to protect Gibraltar's financial reputation, protect consumers and deter financial crime—irrelevant that other professional bodies might also impose sanctions

The appellants appealed against the decision of the Financial Services Commission to impose sanctions on them in respect of their activities as directors of Advalorem Value Asset Fund Ltd.

Advalorem Value Asset Fund Ltd. ("Advalorem") was an experienced investor fund that accepted investments on the basis of a private placement memorandum ("the PPM") with the aim of achieving capital growth through investment in distressed assets, *i.e.* property put up for sale at a value that was severely depressed for a reason particular to the seller and not due to general market conditions. The PPM stipulated that any

property sought to be acquired as a distressed asset would be reported on by two independent qualified surveyors before any investment was made.

Advalorem had two natural directors, Mr. Redford and Mr. Stark, and one corporate director, Advalorem Asset Mangement Ltd. ("AAML"). AAML had two directors, the first appellant and her husband, Mr. Compson. Mr. Stark resigned and was replaced by the second appellant.

The investigations by the Financial Services Commission ("FSC") into Advalorem related to its purchase of a piece of land, the Kirkintilloch land, and its agreement to purchase two pieces of land, the Easterhill land and the Sluidubh land. Its directors obtained valuation reports prepared by the same surveyor valuing the Kirkintilloch land at approximately £10.3m., the Easterhill land at approximately £15m. and the Sluidubh land at approximately £6m. These valuations were based on three special assumptions, the most important of which was that the land was in receipt, at the date of valuation, of suitable planning permission that would allow development potential, and consequently value, to be maximized.

On the basis of these valuations, Advalorem's directors resolved to purchase all three pieces of land. The first appellant approved the three purchases, whereas the second appellant only became a director after the purchase of the Kirkintilloch land had been agreed and therefore approved only the purchase of the Easterhill and Sluidubh land.

The terms of the sale and purchase agreement for the Kirkintilloch land were unusual and risky: Advalorem was required to make a very large non-refundable deposit; the deposit comprised almost all the money that it had obtained from investors; its ability to complete the purchase depended on further funds being forthcoming; and unless such funds were forthcoming, the deposit would be lost.

In March 2013, the FSC raised issues about the Kirkintilloch land with the first appellant. She told the FSC that the land had been purchased at a price at which it could be sold and that it had been valued on the basis that it did not have planning permission. Both of these statements were false. Valuations obtained by the FSC indicated that, without the special assumptions, the value of each piece of land was less than £200,000.

Further, a member of the public gave the FSC information about a brochure he had received from Advalorem that made various promises about returns to be made on investments in it, none of which had any basis in fact. It was accepted that this constituted a breach of the Financial Services (Advertisements) Regulations 1991.

In response, the FSC issued directions under s.35(1A) of the Financial Services (Investment and Fiduciary Services) Act 1989 prohibiting the first appellant from performing various functions in relation to any entity carrying out investment business, and prohibiting the second appellant from being the director of any experienced investor fund without the permission of the FSC and subject to compliance with a number of conditions.

The FSC found, *inter alia*, that the first appellant had failed to ensure that Advalorem was being operated in a manner that was not detrimental

to the interests of its investors and in compliance with the PPM in that (a) it had purchased the Kirkintilloch land and had agreed to purchase the Easterhill and Sluidubh land at a significant and contrived overvaluation following consideration by its directors of manifestly inappropriate property valuations based on unrealistic special assumptions; (b) the sale and purchase agreement for the Kirkintilloch land was manifestly inappropriate and highly unusual; and (c) Advalorem was marketed (through the brochure) in breach of the Financial Services (Advertisements) Regulations 1991. The FSC further held that the first appellant furnished misleading or inaccurate information to the FSC in March 2013. Similar findings were made against the second appellant but in respect only of the agreement to purchase the Easterhill and Sluidubh land.

The appellants appealed against the findings of the FSC, submitting that (a) the FSC could not impose sanctions without proof that they had knowledge of its findings, such knowledge could not be assumed or attributed to them on the basis of the knowledge of other directors of Advalorem, and the FSC could not prove that they had such knowledge; (b) in agreeing to purchase all three pieces of land, they were entitled to and did rely on the expertise of Mr. Compson and Mr. Redford, both of whom had particular knowledge of the property market; (c) the first appellant had no involvement in the production of the brochure; (d) the first appellant's false statements to the FSC in March 2013 were the result of an innocent mistake; and (e) the sanctions imposed on them were excessive, particularly given that, in the case of the first appellant, further sanctions could be imposed on her by professional bodies in South Africa and Switzerland, as she was registered as a chartered accountant in those countries and was obliged to self-report the decision of the FSC to the relevant professional bodies.

The FSC submitted in reply, *inter alia*, that (a) the appellants did have sufficient personal knowledge to render themselves liable; (b) they were not able to exclude their own liability for misfeasance by reliance on their fellow directors; (c) the first appellant knowingly furnished false information to the FSC in March 2013; and (d) the court should pay significant deference to decisions of the FSC.

Held, allowing the first appellant's appeal in part; dismissing the second appellant's appeal:

(1) The FSC had been entitled to find that the first appellant had knowledge of the following facts concerning the Kirkintilloch land: (a) only one valuation had been obtained in respect of that land, in breach of the PPM; (b) that valuation did not assess the market value of the land; (c) it was based on three special assumptions; (d) it said nothing about whether the special assumptions were realistic or reasonable; (e) it said nothing about any application for or enquiries made into obtaining planning permission for the site and did not provide any adequate comfort that the special assumptions were realistic; (f) there was no evidence that the land was a distressed asset as required by the PPM; and (g) the terms

of the contract for the sale and purchase the land were unusual and disadvantageous to Advalorem and its investors. The first appellant therefore had sufficient knowledge to justify the FSC in holding that she had failed to ensure that Advalorem was being operated in a manner that was not detrimental to the interest of its investors and in compliance with the PPM. Neither of the appellants was entitled to rely on the property expertise of Mr. Compson and Mr. Redford because the key issues for the purpose of compliance with the PPM were whether the land was a distressed asset and whether the land was being purchased at a price below market value as certified by two valuation reports, and Mr. Compson and Mr. Redford's expertise was not relevant to those questions. The FSC's finding that the first appellant failed to act with due skill, care and diligence would therefore be upheld and her appeal would be dismissed (paras. 73–76; para. 86).

(2) The special assumptions on which the valuation of the Kirkintilloch land was based were pure fantasy and the valuations were bogus, since all but a small part of the land had been designated as green belt, a flood risk area, and an important wildlife corridor, meaning that there was no prospect of obtaining planning permission. There was not necessarily any impropriety in a surveyor valuing land on the basis of special assumptions, but a valuer should be aware of the danger of valuations based on special assumptions being misused, particularly where the special assumptions were unrealistic. The surveyor knew that the special assumptions were unrealistic and he had tried to mislead the FSC, and a copy of this judgment would therefore be sent to the President of the Royal Institution of Chartered Surveyors for investigation. However, it did not necessarily follow that the first appellant was on notice of the surveyor's misconduct. She would be given the benefit of the doubt and the court would not hold that she had knowledge of the surveyor's misconduct (paras. 81–84).

(3) Further, the FSC was entitled to find that the following facts concerning the Sluidubh and Easterhill land were known to both appellants: (a) the valuations did not assess the market value of the land; (b) they were based on three special assumptions; (c) they did not say whether the special assumptions were realistic, but they did give some comfort that some development might be realistic; (d) they said nothing about any application for or enquiries made into obtaining planning permission for the sites; and (e) there was no evidence that the pieces of land were distressed assets. The appellants therefore had sufficient knowledge to justify the FSC in holding that they had failed to ensure that Advalorem was being operated in a manner that was not detrimental to the interests of its investors and in compliance with the PPM, the FSC's finding that they failed to act with due skill, care and diligence would be upheld and their appeals would be dismissed (paras. 91–92).

(4) There was evidence justifying the FSC in holding that the first appellant had furnished false, misleading and inaccurate information to the FSC in March 2013, but there was no evidence that she deliberately

lied. The FSC made no finding of dishonesty against her and, given the seriousness of the allegation, it would not be appropriate for the appeal court to make a finding of dishonesty (para. 99).

(5) There was no evidence that the first appellant had any involvement in the production of the misleading brochure from Advalorem. The brochure had been produced solely by Mr. Compson. The fact that the first appellant and Mr. Compson were husband and wife working in the same business created a suspicion that she would have known what he was doing as regards the brochure, but that did not amount to proof that she did in fact know. The FSC's finding that the she was responsible for the fact that the brochure was distributed in breach of the Financial Services (Advertisements) Regulations 1991 would therefore be quashed (paras. 71–72).

(6) The sanctions imposed on both appellants would be upheld. The FSC was better placed than the court to determine what sanctions were appropriate to further its regulatory objectives. The sanctions imposed on the first appellant were severe but justified: in relation to the Kirkintilloch land, her failure to ensure that valuations satisfying the requirements of the PPM were obtained was extremely serious and could result in significant losses to investors, and she had approved the unusual and disadvantageous terms of the contract for that land. Unless a severe sanction were imposed, it was likely that the good reputation of Gibraltar as a financial centre would be damaged, and the FSC was fully entitled to decide that the sanction was necessary to protect consumers and to reduce financial crime. Deterrence of other directors from failing properly to monitor the activities of their companies was a justifiable regulatory consideration. The fact that further sanctions might be imposed on the first appellant by her professional bodies abroad was of little weight. The second appellant's failure to ensure that proper valuations were obtained that complied with the PPM in respect of the Sluidubh and Easterhill land was similarly a serious breach of his duties; however, he was less involved in Advalorem than the first appellant, no investor lost money as a result of his actions, and his less serious sanction would therefore be upheld (paras. 106–109).

(7) The appeal from the decision of the FSC would be by way of a review whereby the court would engage with the merits of the appeal but would accord appropriate respect to the decision of the FSC. The extent to which the court would pay especially high deference to the judgment of the FSC depended on the extent to which the issue for determination turned on questions requiring detailed expertise. The substantive issues in the present case, such as the appropriateness of the valuation reports, were within the knowledge and experience of the court, and it would therefore treat the FSC's decision with no more than the usual deference given to first instance decision-makers. By contrast, in relation to the sanctions imposed, the FSC was likely to be better placed than the court to

determine what measures were necessary to achieve its regulatory objectives and the court would therefore be reluctant to interfere with a sanction imposed by it unless it was clearly wrong or the FSC had taken into account irrelevant considerations (para. 55; paras. 57–59).

(8) The following principles concerning directors' duties were relevant to the FSC's decision as to whether a person was not fit and proper to carry out any function in relation to investment business for the purposes of s.35(1A) of the 1989 Act: (a) directors had a continuing duty to acquire and maintain sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors; (b) whilst directors were entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence to a reasonable extent, the exercise of the power of delegation did not absolve a director from the duty to supervise the discharge of the delegated functions; and (c) the extent of this duty to supervise and the question of whether it had been discharged depended on the facts of each case, including the director's role in the management of the company. Principles concerning the imputation of directors' knowledge to a company were not relevant (paras. 66–68).

Cases cited:

(1) *Baker* v. *Trade & Indus. Secy.*, [2001] BCC 273; [2000] 1 BCLC 523, followed.

(2) *Belmont Fin. Corp. Ltd.* v. *Williams Furniture Ltd.*, [1979] Ch. 250; [1978] 3 W.L.R. 712; [1979] 1 All E.R. 118, distinguished.

(3) *Council for the Regulation of Health Care Professionals* v. *General Medical Council*, [2005] 1 W.L.R. 717; [2005] Lloyd's Rep. Med. 65; [2005] A.C.D. 99; [2004] EWCA Civ 1356, referred to.

(4) *Du Pont de Nemours (E.I.) & Co.* v. *S.T. Du Pont*, [2006] 1 W.L.R. 2793; [2006] C.P. Rep. 25; [2004] F.S.R. 15; [2003] EWCA Civ 1368, applied.

(5) *El-Ajou* v. *Dollar Land Holdings plc*, [1994] 2 All E.R. 685; [1994] BCC 143; [1994] 1 BCLC 464; [1993] N.P.C. 165, distinguished.

(6) *Meadow* v. *General Medical Council*, [2007] Q.B. 462; [2007] 2 W.L.R. 286; [2007] 1 All E.R. 1; [2007] I.C.R. 701; [2007] 1 F.L.R. 1398; [2006] 3 F.C.R. 447; (2006), 92 B.M.L.R. 51; [2007] Fam. Law 214; [2006] EWCA Civ 1390, considered.

Legislation construed:

Financial Services (Investment and Fiduciary Services) Act 1989, s.35: The relevant terms of this section are set out at para. 46.

s.45(1): The relevant terms of this sub-section are set out at para. 47.

Civil Procedure Rules (S.I. 1998/3132), r.52.11: The relevant terms of this sub-rule are set out at para. 51.

I. Winter, Q.C. and *C. Gomez* for the appellants;
Sir Peter Caruana, Q.C. and *C. Allan* for the respondent.

1 **JACK, J.:** This is an appeal against two directions of the Chief Executive of the Financial Services Commission ("FSC"), both dated December 12th, 2014, arising from an investigation in respect of Advalorem Value Asset Fund Ltd. ("Advalorem"). The two appellants are Minette Compson ("Mrs. Compson") and Brian Weal ("Mr. Weal").

2 In respect of Mrs. Compson, the Chief Executive made a direction under s.35(1A) of the Financial Services (Investment and Fiduciary Services) Act 1989 ("the Act") that Mrs. Compson—

> ". . . be under an obligation not to perform the following functions in relation to any of [three named] companies or any other person licensed under the Act to carry out investment business or a controlled activity (in both cases as defined in the Act):
>
> Shareholder controller
>
> Director
>
> Any other function, responsibility or requirement of the Financial Services (Conduct of Fiduciary Services Business) Regulations 2006."

3 The direction in respect of Mr. Weal was:

> "4.1 You shall not be a director of any experienced investor fund, other than Temple Rock Fund PCC Limited, without the [FSC's] prior consent to each such directorship.
>
> 4.2 The [FSC's] consent to such further directorships and your continuation as a director of Temple Rock PCC Limited shall both depend on and be subject to the following conditions:
>
> (i) that you undertake a programme of continued professional development in relation to the functions, duties and responsibilities of a company director and in particular of companies carrying on business in the field of financial services to be identified and specified by the [FSC];
>
> (ii) that you document to the satisfaction of the [FSC] how you will ensure compliance with the Gibraltar Funds and Investments Association's Corporate Governance Code;
>
> (iii) that you satisfy the [FSC] following completion of the programme, including by conduct of an interview, that your corporate governance skills meet the required standards in accordance with the legal requirements and current industry best practices; and

> (iv) if all the above conditions are not met to the satisfaction of the [FSC] within the period of six months from the date of this notice letter the licence shall be cancelled under s.11 of the Act."

4 By order of March 11th, 2015, I directed that the appeals be consolidated and an early hearing date was found.

The facts

5 Advalorem is an experienced investor fund ("EIF"), authorized under the Financial Services (Experienced Investor Funds) Regulations 2012, which in turn are made under the Financial Services (Collective Investment Schemes) Act 2011. Advalorem was registered as an EIF on July 26th, 2012. Investments were accepted by Advalorem on the basis of a private placement memorandum ("the PPM").

6 The PPM is a long and detailed document. The investment objective is defined as being "to achieve capital growth through direct and indirect investment in distressed assets, whether by way of acquisition thereof or otherwise by way of investment through loans secured on the distressed assets or other financial instruments."

7 "Distressed assets" are defined as meaning "any property which is put up for sale at a value which, in the opinion of the investment director, is considered to be severely depressed for a reason particular to the seller not a reason attributable to general market conditions."

8 Investments in distressed assets could be made by Advalorem either directly, or via a special purpose vehicle ("SPV"), or by lending to an SPV. Only the second route is relevant in this case. Paragraph 5.2.2 of the PPM in such cases provides:

> "The investment director will identify and assess potential SPVs acquiring and/or owning distressed assets.
>
> The fund [Advalorem] will engage professional advisors as may be required for the assessment, including risk assessments, of the potential capital investment in the SPV and its underlying assets and to comment on the potential of success and the ultimate profitability of the SPV. The SPV's underlying assets (being acquired or in the process of being acquired) will be inspected and reported upon by two (2) independent qualified surveyors, being members of RICS [Royal Institution of Chartered Surveyors], who will be engaged by the fund as and when required.
>
> The investment director will have sole and absolute discretion to recommend to the fund any specific capital investment in an SPV which in its judgment should be directly acquired by the fund. Such a

> recommendation will be made at a meeting of the directors at which the investment director will also provide the reports of the two (2) independent qualified surveyors (as per above) and the reports of such other professional advisors as may be required.
>
> The directors will consider the above when deciding whether to make a capital investment in an SPV."

9 Paragraph 5.2.2 is not as detailed as para. 5.2.1, which governs the direct acquisition of distressed assets, but both Mr. Winter, Q.C., who appeared for the appellants, and Sir Peter Caruana, Q.C., who appeared for the respondent, agreed that reference back to para. 5.2.1 was legitimate, so as to apply various requirements of that sub-sub-paragraph in situations where the distressed asset was being acquired through an SPV. Paragraph 5.2.1 provides:

> "The directors may by resolution approve the purchase of the selected distressed asset (having considered the two (2) surveyor reports and the advice of such other professional advisors), thereby permitting the fund to attempt to purchase the recommended distressed asset at an advantageous price (which shall not be above market price) to allow the end distressed asset value and investor returns to be maximized.
>
> The fund intends to purchase distressed assets being property which has already obtained planning permission and having been constructed upon or being in the early stages of construction in accordance with the planning permission and/or distressed assets solely having obtained planning permission and/or distressed assets in the early stages of the planning application."

"Market price" is defined in the PPM very slightly differently from the definition in the Red Book, which is the definitive RICS guide to valuation, but nothing turns on the difference.

10 Moving outside the chronology temporarily, after the board meeting on December 17th, 2012, when the decision to purchase the Kirkintilloch land was made, and the board meeting on March 13th, 2013, where a decision in respect of the Easterhill and Sluidubh land was made, the requirement for two surveyors' reports was reduced to one.

11 From its date of registration, Advalorem had two natural directors, William Francis Redford ("Mr. Redford") and Robert Stuart Stark ("Mr. Stark"), and one corporate director, Advalorem Asset Management Ltd. ("AAML"), which was the investment director for the purposes of the PPM. Mr. Stark resigned from the board on February 19th, 2013 and on the same day was replaced by Mr. Weal.

12 AAML had only two directors, Mrs. Compson and her husband, Mark Gary Compson ("Mr. Compson"). Mrs. Compson dealt with the accounts and administration. She is admitted as a chartered accountant in South Africa and is also authorized in Switzerland. Her husband dealt with the property side of the business.

13 The idea for Advalorem came from a man called Michael Kane ("Mr. Kane"). He approached Mr. and Mrs. Compson, who set up the various legal entities necessary for the scheme to function. Mr. Kane introduced various properties to Advalorem, but at no time had any formal agreement with Advalorem or any other associated entity, nor was he an officer of Advalorem. He had no professional qualifications but is said to have experience in the property industry.

14 Mr. Weal's involvement in the matters of which the FSC complains is less than that of Mrs. Compson. He was not a property expert. The only meeting of directors of Advalorem which he attended was on March 18th, 2013, after the purchase of the SPVs holding the Kirkintilloch land had completed. The allegations against him are limited to the Easterhill and the Sluidubh land, which were discussed at the March meeting. By contrast, Mrs. Compson attended (in her capacity as a director of AAML) both that meeting and the meeting of the board of Advalorem on December 17th, 2012, where the decision was made to purchase for £6m. the SPVs holding the Kirkintilloch land on terms which I shall describe shortly.

15 Kirkintilloch is a town about nine miles north-east of Glasgow. To its north is the river Kelvin. To the south of the river is the A803. On the north of the A803 is residential property, at the back of which, running down to the river, are three contiguous plots ("Sites 1, 2 and 3") totalling some 36 acres ("the Kirkintilloch land"). The Kirkintilloch land is, save for a very small part, in the green belt.

16 At the meeting on December 17th, 2012, the directors had two valuation reports both dated November 30th, 2012 and both prepared by Graeme McGartland MRICS ("Mr. McGartland") of the Black Partnership. The valuations were addressed to AAML, not to Advalorem. The Black Partnership is a trading name of Black Gilmour McGartland LLP. The other principal in the Black Partnership who had involvement with matters relevant to this case was Stuart J. Black ("Mr. Black") himself. The board did not, at this stage, have valuations from another valuer, as required by the PPM. It had a draft report from the Black Partnership, with no indication of its author or addressee. The draft reports optimistically on possible planning prospects, although the report is internally inconsistent in that it specifically points to the land being in the green belt and being subject to flooding, both of which (as the report states) are a counter-indicator to planning permission being granted.

17 Mr. McGartland's valuations valued Site 1 at £3.2m. and Sites 2 and 3 at £7.1m. The valuations are based on three special assumptions:

(a) That the sites were "in receipt, at the date of valuation, of a suitable planning permission that would allow development potential, and consequently value, to be maximized";

(b) That there were no adverse ground conditions that would have an adverse effect on value; and

(c) That there were no issues regarding access for development.

18 I shall return to these valuations, the background to them and the involvement of the Black Partnership below.

19 The Kirkintilloch land had earlier been owned by the Stewart Milne Group. It had, in 2000, unsuccessfully applied for planning permission and took the view that no one was likely to obtain planning permission. In 2008, the Group sold the land to Hucey International Ltd. ("Hucey"), a company incorporated in the British Virgin Islands beneficially owned and controlled by Gregory Hugh King ("Mr. King"), for £305,000 plus VAT. Hucey subsequently transferred the land to two special purpose vehicles, Polyburn Ltd. ("Polyburn") and Tripod Ltd. ("Tripod"), both Gibraltarian companies. The shares in Polyburn and Tripod were held by Thistle Holdings Ltd. ("Thistle"), which was also beneficially owned and controlled by Mr. King. Mr. King and Mr. Kane knew each other, but the precise relationship between the two is unknown.

20 The solicitors acting for Advalorem were Linder Myers, a Manchester firm of solicitors. Although the price paid by Hucey was available to the public by inspection of the Scottish title register, Linder Myers did not carry out such a search. Equally, the Black Partnership could have easily found the price, in the unlikely event that it did not already know it. There is no suggestion that Mrs. Compson knew of the price paid by Hucey or the earlier history involving the Stewart Milne Group. Her knowledge of Mr. King is unclear, but there is no suggestion she was aware of any impropriety in relation to him.

21 On December 12th, 2012, Linder Myers sent Thistle's solicitors, TSN, in Gibraltar, a standard due diligence questionnaire for the acquisition of the shares in Polyburn and Tripod. On December 14th, 2012, Mr. Kane sent an email from his advalem.com email address to Linder Myers in which he said:

> "[W]e are satisfied with our real estate DD [due diligence], and warranties relating to things like the manufacture or sale of defective goods are not relevant issues for us, so we can very happily live without them. We are convening a board meeting first thing on

> Monday morning, and my intention is to have this agreed before I sign off this evening."

The email was not copied to Mrs. Compson or the other directors and there is no evidence she was aware of it.

22 The sale and purchase agreement provided for Thistle to sell and DB Holdings Ltd. ("DBH") to purchase the shares in Polyburn and Tripod. The price was £6m. Of this, £2.1m. was to be paid immediately as a non-refundable deposit. The balance was to be paid in such instalments as might be agreed by the parties with completion by June 14th, 2013, the instalments again to be non-refundable. DBH was a wholly owned subsidiary of Advalorem.

23 The board meeting of Advalorem on December 17th, 2012 was attended by Mr. Redford and Mr. Stark and by AAML, represented by both Mr. Compson (who chaired the meeting) and Mrs. Compson. The minutes noted that a quorum was present. Under the entry "Purchase of Fund Assets," the minutes said:

> "The chairman noted that the valuation reports for development land at Sites 1, 2 & 3 Glasgow Road, Kirkintilloch, Scotland together with a share purchase agreement to be signed by [DBH] had been circulated for approval.
>
> [Mr. Stark] noted that there was no ground conditions reports and was concerned at the potential risk of flooding. [Mrs. Compson] reported that given the current weather conditions in the UK and that flood warnings had been issued for most areas the fact that no flooding had taken place so far it was unlikely to happen in the future.
>
> IT WAS RESOLVED THAT the purchase of the land be approved and THAT Advalorem . . . execute the purchase agreement to complete the purchase."

24 The sale and purchase agreement was executed the same day. The initial payment was followed by four instalments, with the last on February 18th, 2013. Thus, on that day, the total non-refundable deposit was £4,658,406. Completion was effected on February 27th, 2013 with a final payment of £1,341,594.

25 The terms of the sale and purchase agreement were unusual and potentially very detrimental to investors in Advalorem. The deposit was very large and indeed comprised almost all the money which Advalorem had obtained from investors at that time. The ability to complete on the purchase depended on further funds being forthcoming. Unless such funds were forthcoming, the £2.1m. deposit could be lost completely. There was no reason to make the further instalment payments, which would simply

be putting further money at risk in the event that DHB (or, for that matter, Thistle) could not complete. There was no advantage in completing on February 27th, 2013, when the contractual completion date was June 14th, 2013.

26 The moneys paid by DBH to Thistle were advanced by Advalorem. In turn, Advalorem received moneys from four pension schemes in the United Kingdom administered by Marley Administration Services Ltd. ("Marley"). All the moneys paid to DBH came in this way. A total of £7,760,500 was advanced to Advalorem from the pension schemes.

27 When the agreement was made on December 17th, 2012, AAML had not obtained valuation reports from a second valuer. Mr. Compson, on February 4th, 2013, instructed Whitelaw Baikie Figes to value the Kirkintilloch land on the same special assumptions as had been used by Mr. McGartland. Mr. Compson backdated his letter of instruction to November 23rd, 2012. On the special assumptions, the firm valued Site 1 at £3.15m. and Sites 2 and 3 at £7m.

28 On February 12th, 2013, the UK pension regulator warned the FSC about Marley's activities. The regulator was investigating Marley in respect of a "pension liberation scheme." The nature of such schemes is this. In the United Kingdom, investors can generally access the funds in their private pensions when they reach the age of 55. Any earlier access to such moneys incurs a punitive rate of tax.

29 Sir Peter Caruana, Q.C. confirmed that the suspicion in the current case was that moneys coming from Marley pension funds were to be "invested" in grossly overpriced assets, such as potentially the Kirkintilloch land. The overpayment (less moneys payable to those running the scam) was then funnelled back to the pension holders by way of pension liberation, but without the punitive tax being paid. This was, however, no part of the FSC's case against the current appellants. There is no suggestion that either of them had any knowledge or indeed suspicion that such a fraud on the UK Revenue was taking place and no proof of such a fraud has been put before the court.

30 The FSC did not take any immediate steps against Advalorem and did not warn Advalorem about Marley. As a result, Mr. Weal joined the board of Advalorem in ignorance of this development.

31 At the board meeting on March 13th, 2013, there were two valuation reports, both dated February 19th, 2013, from Mr. McGartland, one in respect of land at Sluidubh, Glenalmond in Perthshire, the other in respect of land at Easterhill, Gartmore. Both of these reports were based on precisely the same special assumptions as had been used for the Kirkintilloch land. Sluidubh was valued at £6,072,000 and Easterhill at

£15,078,000. This stands to be contrasted with the purchase prices in 2008 of £180,000 and £140,000 respectively.

32 The three directors, AAML, Mr. Redford and Mr. Weal, were present. AAML was represented by Mr. and Mrs. Compson. Mrs. Compson chaired the meeting. The minutes say:

> "The chairman reminded the board that the valuation reports attached and forming part of these minutes had been circulated for review. The directors discussed the valuation reports and it was agreed that valuation reports be accepted and the purchase of the land be approved."

33 There is an issue as to whether the decision at this meeting was for final approval of the purchase of Sluidubh and Easterhill land, or whether it was merely an approval in principle. I shall come back to this point.

34 On March 18th, 2013, the FSC met Mrs. Compson and Mr. Redford and Advalorem's lawyers, Triay & Triay, to discuss a proposal made by Advalorem to change its status from an EIF to a protected cell company. At the meeting, the FSC raised issues about the Kirkintilloch land and was told that it had been purchased at a price at which it could be sold and that it had been valued on the basis that it did not have planning permission. Mrs. Compson subsequently said through her lawyers that she had been taken by surprise by the FSC.

35 Shortly afterwards, at the FSC's request, AAML sent copies of the valuation reports to the FSC. The discovery that the valuations were made on the basis of special assumptions prompted the FSC to make further enquiries.

36 On March 22nd, 2013, the FSC issued a direction preventing Advalorem conducting any further investment activity.

37 Initially, Advalorem, AAML, Mr. and Mrs. Compson and Mr. Weal were all represented by Charles Gomez & Co. The initial strategy of Charles Gomez & Co. on behalf of its then five clients was to show that the transaction with the Kirkintilloch land and the proposed transactions with the Sluidubh and Easterhill land were all proper commercial purchases, and that, even if they were not, its clients had no knowledge of that. The argument was that, even if there were technical breaches of the PPM or of good corporate management, these were venial sins which could not affect the suitability of the parties to be licensed under the Act.

38 On April 11th, 2013, Mr. Killick, the then Chief Executive of the FSC, and Ms. Beiso, also of the FSC, met Mr. Gomez, Mr. Compson and Mr. Black. Mr. Black is recorded as saying:

> "East Dunbartonshire county council was effectively skint and there was a huge demand for housing. Although nothing was certain the

> fact that there was great support within the county council for social housing and '*green field*' to be contrasted with '*green belt*' sites were being allocated for housing. There was no longer any available brown field sites in the area . . . There was a very great demand for two and three bedroom apartments." [Emphasis in original.]

He then produced a graph showing how green field sites were more and more being opened up for development. He said that he had no doubt that the site was ripe for development and did not think that there would be any problems. He said that the value was probably around £12m.

39 The FSC did not accept this assertion of value. Advalorem obtained a further valuation from Knight Frank. This firm said that the market value of the Kirkintilloch land was £182,000, but that with the special assumptions it was £19.75m. (A Savilles valuation obtained by the FSC gave a market value of £190,000.)

40 On May 2nd, 2013, a member of the public in Scotland, Mr. John Ballantine ("Mr. Ballantine"), gave the FSC information. Mr. Ballantine said that Yardstick Marketing (the trading name of Yardstick Consulting Ltd.) had approached him with a brochure from Advalorem. Mr. Ballantine was not an "experienced investor." The brochure makes various promises about returns to be made on investments in Advalorem, none of which have any basis in fact. There was therefore a breach of the Financial Services (Advertisements) Regulations 1991. I shall come back to the evidence regarding Mrs. Compson's involvement in the brochure.

41 On June 6th, 2013, a further direction freezing Advalorem's assets was made. The same day, Ms. Beiso and a partner in Grant Thornton (Gibraltar) Ltd. were appointed as examiners and they carried out further investigations. On August 12th, 2013, the FSC served a tentative findings report on Advalorem and its directors.

42 Charles Gomez & Co., still acting for all of Advalorem, Mr. and Mrs. Compson and Mr. Weal, made representations, and on October 10th, 2013 the examiners made a final report. On November 29th, 2013, the FSC produced a Chief Executive's committee paper recommending sanctions against the appellants. On June 17th, 2014, the current Chief Executive of the FSC invited further representations from the appellants. It is common ground that the steps taken by the FSC complied with the procedural obligations under s.44 of the Act.

The decisions and the grounds of appeal

43 On December 12th, 2014, after consideration of the further representations, the Chief Executive of the FSC made the directions set out at the start of this judgment. The letter to Mrs. Compson gave reasons as follows:

"5.1 [AAML] (for the conduct of whose business you were as a director responsible) itself and collectively as a member of the board of directors of Advalorem . . . failed to ensure that Advalorem was being operated in a manner that was not detrimental to the interests of its participants or potential participants and in compliance with [the PPM] in that:

(1) Advalorem purchased land and agreed to purchase further land at a significant and contrived overvaluation following consideration by the board of manifestly inappropriate property valuations (including but not limited to their basis on special assumptions that were inapplicable to the land in question and thus unrealistic) that do not reflect a *bona fide* purchase and sale transaction between two parties at arm's length and at a fair and realistic value, as to the timing, basis of valuations and valuations;

(2) Advalorem purchased two land owning companies pursuant to a contract of sale and purchase considered and approved by the board of directors which was manifestly inappropriate and highly unusual and unlikely for a transaction of its nature between parties at arm's length;

(3) The board of directors of Advalorem failed to give sufficient or any proper consideration to the propriety and prudence of the purchase of the land by Advalorem, or to practise sufficient or any diligence in relation thereto and thus failed to have sufficient or any proper regard to the interests of Advalorem or of its participants or potential participants;

(4) Advalorem was marketed in breach of the Financial Services (Advertisements) Regulations 1991;

(5) Advalorem breached the provisions of its [PPM] relating to investment objectives and the nature of property that it could or would purchase; the process for the approval by the directors of such purchase and the number of property valuations required; and the provisions related to risk management.

5.2 You furnished misleading or inaccurate information to the [FSC] under or for the purposes of the Financial Services (Collective Investment Schemes) Act in that at a meeting with the previous Chief Executive Officer of the FSC, on March 18th, 2013, you provided him with false and misleading information in respect of the basis upon which property valuations had been sought and obtained by Advalorem.

5.3 Accordingly, you have not acted in the conduct of the affairs of Advalorem with due skill, care and diligence, in consequence of

> which I consider that it [is] desirable for the protection of investors, of the public and the reputation of Gibraltar as a financial centre that you should not carry out any of the functions that form the subject-matter of this notice and direction."

44 The reasons given in the letter to Mr. Weal were shorter. Paragraphs 5.1(1) and (3) cited above were reproduced word for word as paras. 6.1(1) and (2) of this letter, save that para. 6.1(1) read "Advalorem agreed to purchase land" rather than "Advalorem purchased land and agreed to purchase further land" as in the reasons given to Mrs. Compson. Paragraph 6.1(3) said:

> "In agreeing the said land purchase you and the board of directors of Advalorem failed to comply with and adhere to the provisions of its [PPM] relating to investment objectives and the nature of property that it could or would purchase, the process the approval by the directors of such purchase and the number of property valuations required; and the provisions related to risk management."

The letter continued:

> "6.2 Accordingly, you have not acted in the conduct of the affairs of Advalorem with due skill care and diligence, in consequence of which I consider that it [is] desirable for the protection of investors, of the public and the reputation of Gibraltar as a financial centre to impose the conditions."

45 Both Mrs. Compson and Mr. Weal appealed against these decisions. Both put forward two grounds. The first was "The decision to issue the direction was wrong; was without any evidential or other proper basis of fact; and was one that no reasonable Chief Executive Officer of the FSC could have issued such that it should be quashed pursuant to s.45(4) of the Act." The second was an averment that the respective sanctions imposed were "excessive, unnecessary, unreasonable and/or unjustified in all the circumstances of the case . . ."

The law

46 The Act provides for those involved in the investment industry in Gibraltar to be licensed by the FSC. Section 11 of the Act gives the Chief Executive of the FSC ("the Authority") the power (subject to s.44) to cancel, suspend or alter a licence. Section 35 provides:

> "(1) If it appears to the Authority that there are grounds for the cancellation or suspension of a licence under section 11 the Authority may impose any of the conditions provided for in section 10(2) by way of directions.

> (1A) If it appears to the Authority that a person is not fit and proper to carry out any function in relation to investment business or a controlled activity carried on by a person licensed under this Act . . . the Authority may direct that the person is under an obligation not to perform a specified function, any function falling within a specified description, or any function as stated in the direction."

47 Section 44 sets out the procedure for making a direction under s.35. This involves giving notice in writing and considering representations in writing. It was common ground in the current case that the procedure satisfied s.44. Section 45(1) provides:

> "A person aggrieved—
>
> (a) by a decision of the Authority to which section 44 applies . . .
>
> may appeal to the Supreme Court."

Section 45(4) gives full power to the Supreme Court to quash, confirm or vary the Chief Executive's decisions. It is pursuant to this provision that the appellants appeal to this court. It is apparently the first time such an appeal has been brought.

The nature of the appeal

48 The Act itself makes no provision as to the nature of the appeal. Appeals can take various forms. At one extreme, an appeal can take the form of a complete rehearing. An example of this is an appeal against conviction from a magistrates' court to the Crown Court in England and Wales under s.108 of the Magistrates' Courts Act 1980 (UK). The prosecution goes first and bears the burden of proving the case against the defendant from scratch to the criminal standard of proof.

49 A less extreme form of rehearing was the former practice in England and Wales in relation to appeals from the master to the judge under RSC, O.58, r.1(1). Such an appeal was—

> ". . . dealt with by way of an actual rehearing of the application . . . and the Judge treats the matter as though it came before him for the first time, save that the party appealing, even though the original application was not by him but against him, has the right as well as the obligation to open the appeal. The Judge 'will of course give the weight it deserves to the previous decision of the Master; but he is in no way bound by it' (*per* Lord Atkin in *Evans* v. *Bartlam* [1937] A.C. 473, at 478)": see *The Supreme Court Practice 1999*, para. 58/1/3.

This is probably the approach which the court would take if it decided to treat an appeal as one by way of rehearing but I do not need to decide the point.

50 At the other extreme is an appeal solely on a point of law.

51 More common than any of the above in civil matters is an appeal by way of review. The Civil Procedure Rules, r.52.11 provides:

"(1) Every appeal will be limited to a review of the decision of the lower court unless—

(a) a practice direction makes different provision for a particular category of appeal; or

(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

(2) Unless it orders otherwise, the appeal court will not receive—

(a) oral evidence; or

(b) evidence which was not before the lower court.

(3) The appeal court will allow an appeal where the decision of the lower court was—

(a) wrong; or

(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

(4) The appeal court may draw any inference of fact which it considers justified on the evidence.

(5) At the hearing of the appeal a party may not rely on a matter not contained in his appeal notice unless the appeal court gives permission."

52 In *E.I. Du Pont de Nemours & Co.* v. *S.T. Du Pont* (4) ([2006] 1 W.L.R. 2793, at para. 94), "review" under the CPR, r.52.11 is defined as being—

". . . closely akin to, although not conceptually identical with, the scope of an appeal to the Court of Appeal under the former Rules of the Supreme Court. The review will engage the merits of the appeal. It will accord appropriate respect to the decision of the lower court. Appropriate respect will be tempered by the nature of the lower court and its decision making process. There will also be a spectrum of appropriate respect depending on the nature of the decision of the lower court which is challenged. At one end of the spectrum will be decisions of primary fact reached after an evaluation of oral evidence where credibility is in issue and purely discretionary decisions. Further along the spectrum will be multi-factorial decisions often dependent on inferences and an analysis of documentary material."

53 The Gibraltar Supreme Court Rules 2000 make provision, in rr. 13–24, for appeals from the Master (in practice, the Registrar) to the Chief Justice or an Additional Judge (now Puisne Judge). Rule 21 provides that no evidence shall be admitted at the hearing of an appeal except with permission of the court. Rule 22 limits an appeal to the grounds set out in the notice of appeal. Rule 31 provides that, in the case of any enactment providing for an appeal from a person, such as the Chief Executive here, in a civil matter, rr. 13–24 shall apply "with such modifications as may be necessary." Rule 32 gives the person against whom the appeal is brought the right to appear in opposition. It is pursuant to this rule that the Chief Executive appears.

54 Rule 6(1) provides that the English rules of procedure and practice shall apply insofar as the Supreme Court Rules do not otherwise provide. Paragraph (c) of Schedule 2 excludes the English rules insofar as they apply to appeals to the Court of Appeal, but that does not exclude the application of the CPR, Part 52 insofar as it governs appeals to the High Court.

55 In my judgment, an appeal from the Chief Executive should be by way of a review in the sense articulated in the above passage from *Du Pont* (4), unless, pursuant to the CPR, r.52.11(1)(b), "in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing." No one suggested in the current case that the appeal should be dealt with by way of rehearing, so I shall consider this appeal as a review.

56 This leads to a second point as to the degree of respect to be afforded to the Chief Executive's decision. Sir Peter Caruana, Q.C. relied on two cases for the proposition that particular deference should be paid by an appeal court to decisions of specialist tribunals: *Council for the Regulation of Health Care Professionals* v. *General Medical Council* (3) and *Meadow* v. *General Medical Council* (6).

57 The extent to which especially high deference should be paid to a specialist tribunal, or a person such as the Chief Executive, depends, in my judgment, on the extent to which the issue for determination turns on questions requiring detailed expertise. In the *General Medical Council* cases, the fitness to practice panel which makes the determination has at least one medical member and is thus "in general better able than the courts to assess evidence of professional practice": *Meadow* ([2007] Q.B. 462, at para. 120).

58 In the current case, the substantive issues for determination, for example the appropriateness or otherwise of the valuation reports, are matters well within the knowledge and experience of the court. In some cases, it is possible to imagine that the Chief Executive has specialist knowledge available to her which would mean that greater deference should be paid to her decision. An example discussed in argument was

where a difficult issue of actuarial science might arise. In the current case, however, there is no reason in my judgment for the court to extend to the Chief Executive's decisions any more than the usual deference given to first instance decision-makers.

59 The position is different in relation to the sanctions imposed by the Chief Executive. The FSC and its Chief Executive are likely to be better placed than the court to determine what measures are necessary in order to protect the good reputation of Gibraltar, to protect consumers and to reduce financial crime, as well as the other regulatory objectives of the FSC as set out in s.7(2) of the Financial Services Commission Act 2007. The court, in my judgment, should be reluctant to interfere with a sanction imposed by the Chief Executive, unless it is clearly wrong or the Chief Executive has taken irrelevant considerations into account.

The substantive appeals

60 The appellants' primary case on the substantive appeal, as developed in argument by Mr. Winter, Q.C., is that the FSC's decision was that Advalorem—

> ". . . was being operated by its board in a manner detrimental to the interests of its participants; that it bought an asset (the site at Kirkintilloch) and had agreed to purchase two sites (at Easterhill and Sluidubh) at contrived overvaluations; such that the transactions were not *bona fide* or arm's length and were probably part of a fraud, or attempted fraud against investors in Advalorem . . . Before an order with penal consequences can be made against either appellant it is thus necessary to prove that each appellant possessed knowledge of those facts. It is not possible as a matter of law to assume that either appellant possessed such knowledge or to attribute such knowledge to them on the basis of what other directors Advalorem knew or indeed on the basis of what Advalorem itself might have known."

61 The secondary case advanced on behalf of the appellants is that, in agreeing to the resolutions of the board on December 17th, 2012 and March 13th, 2013, they were entitled to, and did, rely on the expertise of Mr. Compson and Mr. Redford, both of whom had particular knowledge of the property market.

62 Sir Peter Caruana, Q.C. submitted that the appellants did have sufficient personal knowledge to render themselves liable in any event and that, on the facts of the current case, the appellants were not able to exclude their own liability for misfeasance by any reliance on their fellow directors. He also sought, particularly against Mrs. Compson, to rely on other matters which he said showed her unfitness to be licensed.

63 Although not a separate ground of appeal, it is in fact difficult to determine precisely what the Chief Executive did decide the appellants' knowledge was and for what particular matters each individual appellant was blameworthy. There is some explanation for this in that, as I have set out above, the case being put forward initially to the FSC by Charles Gomez & Co. was that all the transactions were above board. It is only later that a form of cut-throat defence was developed, whereby Mrs. Compson and Mr. Weal were blaming Mr. Compson and Mr. Redford. Nonetheless, it would be much better if the FSC, in documents like, in the current case, the final report, had sections dealing with each director individually and the Chief Executive made clear in her decision letter in greater detail what allegations were found proved against that particular director.

Directors' duties

64 Both counsel made submissions on the law relating to directors' duties and the extent to which one director can rely on the expertise of other directors. The appellants' primary argument was that knowledge could be attributed to Advalorem only if "the natural person . . . having management and control *in relation to the act or omission in point*" had knowledge, citing *El-Ajou* v. *Dollar Land Holdings plc* (5) ([1994] 2 All E.R. at 696). [Emphasis supplied.] Since, the appellants argued, only Mr. Compson and Mr. Redford, as the directors' expert in property matters, had relevant knowledge of the inappropriateness of the valuation evidence, it was wrong to tar Mrs. Compson and Mr. Weal with knowledge, either actual or constructive, of that.

65 There is a secondary argument which applies only to Mrs. Compson. She attended the two relevant meetings of the board of Advalorem solely in her capacity as a director of AAML. As such, it can be argued, she did not owe the duties of a director to Advalorem, but only to AAML.

66 Sir Peter Caruana, Q.C. did not accept that knowledge in the *El-Ajou* sense was legally relevant to the decision as to whether the appellants were fit and proper persons to be involved in the financial services industry in Gibraltar. Although Sir Peter cited an extensive range of English and Australian authority, the point of principle is most conveniently set out in the judgment of Jonathan Parker, J. (as he then was), as approved on appeal by the English Court of Appeal in *Baker* v. *Trade & Indus. Secy.* (1) ([2001] BCC 273, at para. 36), where he said:

> "(i) Directors have, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors.

(ii) Whilst directors are entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated functions.

(iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, must depend on the facts of each particular case, including the director's role in the management of the company."

67 As is apparent, the issue as to the extent to which an individual director can rely on the expertise of other directors is fact-sensitive. In some cases it will be appropriate; in other cases it will not be.

68 *Baker* itself was a case under the Company Directors Disqualification Act 1986 (UK) where the issue was whether the respondent's "conduct as a director of [the relevant] company . . . makes him unfit to be concerned in the management of a company" (see s.6(1)(b)). The question of "fitness" is very similar to that which the Chief Executive of the FSC needs to consider under s.35(1A) of the Act. Thus, in my judgment, *Baker* and the other cases on directors' duties on which Sir Peter relies are applicable to cases under the Act under consideration, rather than the *El-Ajou* line of authority. *El-Ajou* (5) and *Belmont Fin. Corp. Ltd.* v. *Williams Furniture Ltd.* (2), on which Mr. Winter relied, are not cases on the fitness of directors; rather they are concerned with whether knowledge of the directors can be imputed to the company. This is also the answer to the point that Mrs. Compson was a director of AAML rather than of Advalorem: her fitness to be involved in the financial services industry is independent of those considerations.

69 In fact, as will be seen, on the view I take of the facts as found by the Chief Executive, it is irrelevant which line of authority is correct.

Mrs. Compson, the brochure and the Kirkintilloch land

70 I shall consider what the knowledge of each appellant must have been. I shall start with Mrs. Compson's knowledge.

71 One matter can be dealt with fairly quickly. The final report outlines in paras. 184–191 the FSC's conclusions regarding the brochure. It recites the answers which Advalorem gave to the FSC's formal questions of July 21st, 2013 to the effect that "only Mr. Compson was involved in the marketing of the fund . . . Mr. Compson wrote the brochure and . . . it was never formally approved by the board of directors of Advalorem." There is no evidence to disprove these answers given by Advalorem.

72 There is naturally a suspicion that, as husband and wife working in the same business, Mrs. Compson would have known what Mr. Compson was doing. That does not, however, in my judgment, amount to proof that she did know. I find that there is no evidence that Mrs. Compson had any involvement in the production of the brochure. Accordingly, her appeal against para. 5.1(4) of the Chief Executive's decision is allowed.

73 I turn then to the other allegations found proved in para. 5.1. These are all aspects of the purchase of the Kirkintilloch land and the Sluidubh and Easterhill land. It is convenient to start by considering the Kirkintilloch land. The following is, in my judgment, indisputable in relation to this land:

(a) Only one valuation was obtained in respect of each part of the Kirkintilloch land. This was a breach of the PPM, which at that time required two valuations.

(b) The Black Partnership valuation does not assess the market value, as defined either in the PPM or in the Red Book.

(c) The valuation was based on three special assumptions.

(d) The valuation itself says nothing about whether the special assumptions are realistic or reasonable.

(e) The valuation itself said nothing about whether any application or enquiries had been made into obtaining planning permission for the site. The draft report on planning matters is not addressed to Advalorem (or anyone else), is not signed and does not provide any adequate comfort for Advalorem that the special assumptions were realistic or reasonable.

(f) There was no documentary or other evidence that the land was a distressed asset. There was no discussion at the board meeting about whether the Kirkintilloch land was a distressed asset.

(g) The terms of the contract for the purchase of Polyburn and Tripod are unusual and disadvantageous to Advalorem and its investors.

74 The Chief Executive was entitled to find that these facts were known to Mrs. Compson. Indeed, it would be surprising if the Chief Executive had found anything else. Mrs. Compson was familiar with the documentation because she was able to tell Mr. Stark at the board meeting that there was no flood risk. All the documentation served as part of the board papers and the minutes of the meeting demonstrate the above propositions. I should add that, even on the assumption (which I refuse to draw) that she did not know these facts, her failure to read the documentation would, in my judgment, have been grossly negligent and a breach of her duties as a director of AAML.

75 The Kirkintilloch land is, in my judgment, plainly not a distressed asset. For it to be such, AAML would have to consider that the price was "severely depressed for a reason particular to the seller not a reason attributable to general market conditions." There is no evidence that AAML ever reached such a conclusion or that Thistle, Polyburn, Tripod or Mr. King had any reasons "particular to themselves" to sell at a depressed price.

76 This is the answer to the argument that the appellants were entitled to rely on Mr. Compson and Mr. Redford. Some matters, such as the commercial attractiveness of the land, could perhaps be the subject of reliance on those gentlemen. But the key issues for the purpose of the PPM were, in relation to the Kirkintilloch land: (a) was the land a distressed asset, and (b) was the land being purchased at below market value, as certified by two valuation reports? Mrs. Compson could not have been satisfied as to either matter. Further, she must have known that the terms of the sale and purchase agreement were unusual and disadvantageous.

77 There is an additional point, namely that the Black Partnership valuations are addressed to AAML, not to Advalorem as required by the PPM. Accordingly, the Black Partnership owed no duty of care to Advalorem. However, this does not appear to be a point picked up by the FSC in its final report, so I shall not consider it further.

The Black Partnership valuations

78 The background to the Black Partnership valuations is complicated. Mr. McGartland was originally instructed in 2011 by Raynell International Ltd. ("Raynell"), a BVI company beneficially owned by Mr. King. Raynell held mortgages over the Kirkintilloch land. Thus, Mr. King was both beneficial mortgagor and beneficial mortgagee. Mr. Black produced valuations dated May 5th, 2011 for Raynell. On November 30th, 2012, the same day as Mr. McGartland signed the valuations for AAML, he signed valuations addressed to Raynell.

79 There are important differences between the valuations addressed to AAML and those to Raynell. The Raynell valuation for Site 1 states:

> "*Flood Risk Assessment*
>
> We have made enquiries of the SEPA website which confirms that the site is at risk of flooding. This flood risk also applies to the existing residential accommodation situated to the south of the site which fronts on to the Glasgow Road."

The AAML valuation states (but the Raynell valuation does not):

> "We understand that informal discussions have taken place with the local planning authority regarding the potential for a supermarket consent being achieved for part of the site. We have not been provided with any evidence of such discussions; however, in accordance with your instructions we have assumed that such permission is in place."

The valuation figures are the same.

80 It is unclear which human being actually instructed the Black Partnership in 2012. Charles Gomez & Co. suggested to the FSC that it was Mr. Kane, but the existence of the 2011 valuations suggests that it was Mr. King. Regardless of this, there was an obvious conflict of interest between Raynell and Mr. King on the one hand as vendor and AAML and Advalorem on the other as purchaser. The valuations of Mr. McGartland wrongly state that there was no conflict.

81 As to the special assumptions, a point emphasized by Mr. Winter was that there is not necessarily any impropriety in a surveyor valuing land on the basis of special assumptions. He rightly mentions that Knight Frank, which was subsequently instructed by Advalorem, was happy to give a valuation based on the special assumptions used by the Black Partnership. Nonetheless, a valuer must, in my judgment, be aware of the danger of valuations based on special assumptions being misused. This is particularly so in a case such as this, where there is a conflict of interest and where the instructions as to special assumptions are so unrealistic.

82 In the current case, the three special assumptions are effectively fantasy assumptions. Already in 2011, the East Dunbartonshire Local Plan No. 2 had designated all but a small part of the land as green belt and as a flood risk area. Running through it was an "important wildlife corridor." The local plan policy DB13B stated that "development of an area which is known to be exposed to frequent or extensive flooding is likely to be unsustainable and should be avoided." It is clear that the valuations, insofar as they imply that there was any prospect of planning permission being obtained, are bogus. Mr. McGartland and Mr. Black must have been aware of this. Equally, they must have been aware of the purchase price paid to the Stewart Milne Group.

83 The only sensible conclusion from the statements made by Mr. Black at the meeting of April 11th, 2013 is that he was deliberately trying to mislead the FSC. Any British surveyor knows full well the difference between "green field" and "green belt." It is notoriously difficult to obtain planning permission in the green belt in the United Kingdom, but that fact may be less well known in Gibraltar. The file note of the meeting shows Mr. Black suggesting to the FSC that Kirkintilloch was a green field site. Further, given the green belt status and the flood risk, it is difficult to believe that Mr. Black had any honest belief that "the site was ripe for

development and [that he] did not think there would be any problems" or that "the value was probably about £12m."

84 My findings on these matters are obviously matters of concern and I shall direct that a copy of this judgment is sent to the President of the Royal Institution of Chartered Surveyors.

85 It does not, however, necessarily follow that Mrs. Compson was on notice of the misconduct I have found on the part of Mr. McGartland and Mr. Black. It is unclear what conclusion the Chief Executive reached in her decision letter regarding Mrs. Compson's knowledge of the above. When the Chief Executive says that the purchase of the Kirkintilloch land was "at a significant and contrived overvaluation," does she mean that Mrs. Compson knew that the true value of the land was in the hundreds of thousands rather than the tens of millions? The final report is silent on this issue.

86 In these circumstances, in my judgment, it is necessary to give Mrs. Compson the benefit of the doubt and to hold that the Chief Executive has decided solely that Mrs. Compson had knowledge of points (a)–(g) as set out in para. 73 above. Since Mrs. Compson had knowledge of those matters, it is irrelevant what reliance she placed on her husband and on Mr. Redford. She had a personal responsibility as a director to know the terms of the PPM and she knew Advalorem was breaching its terms. She knew the terms of the purchase from Thistle were unusual and must have known that they were disadvantageous to investors in Advalorem. These, and only these, matters are those on which the Chief Executive held that she failed to act with due skill, care and diligence and I agree with that finding.

87 Insofar as Mrs. Compson appeals against the findings of fact in para. 5.1(1), (2), (3) and (5) of the decision letter in respect of her, that appeal fails.

Sluidubh and Easterhill

88 The Black Partnership valuations in respect of Sluidubh and Easterhill are made on exactly the same special assumptions as those in respect of Kirkintilloch. There is, however, much less evidence about the extent to which the special assumptions are unrealistic.

89 There is an issue raised by the appellants as to whether Advalorem ever made a final decision to purchase, or whether the resolution of March 13th, 2013 was solely a decision in principle. It will be recalled that the minutes record that "it was agreed that valuation reports be accepted and the purchase of the land be approved." This is in contrast to the minutes of December 17th, 2012, which recorded the resolution that "the purchase of

the land be approved and that Advalorem . . . execute the purchase agreement to complete the purchase."

90 The reference in the decision letters to "Advalorem . . . agreed to purchase [Sluidubh and Easterhill]" is ambiguous. It could mean either an agreement in principle or approval of a concrete proposal. In my judgment, it is appropriate to give the appellants the benefit of the doubt on this issue. Unlike in the case of Kirkintilloch, there is no evidence of concrete draft purchase contracts being available to the board. It is unclear whether the price for each site had been finally agreed. There is also the point that Advalorem did not have the money available to pay the purchase price which was being negotiated. This point is of less weight, since Advalorem had signed the contract for the purchase of the Kirkintilloch land without having the moneys available to complete and was therefore not adverse to taking that risk, but it is a point against a final agreement to purchase being authorized.

91 Accordingly, in my judgment, the breaches which the FSC can identify in respect of these two sites are:

(a) The Black Partnership valuations do not assess the market value, as defined either in the PPM or in the Red Book.

(b) The valuations were based on three special assumptions.

(c) The valuations do not say in terms whether the special assumptions are realistic or reasonable, although they admittedly give some comfort that some development might be realistic.

(d) The valuations themselves say nothing about whether any application or enquiries had been made into obtaining planning permission for the site.

(e) There was no documentary or other evidence that the land was a distressed asset. Again, there was no discussion at the board meeting about whether the land was a distressed asset.

92 Again, the FSC was, in my judgment, entitled to find that Mrs. Compson and Mr. Weal both knew the above. Further, for the reasons set out in relation to the Kirkintilloch land, there was no possible basis for either appellant to believe either the Sluidubh or the Easterhill land was a distressed asset. As with the Kirkintilloch land, reliance on Mr. Compson and Mr. Redford is irrelevant. It follows that Mr. Weal's appeal in respect of the findings of fact at para. 6.1 of his decision letter, and Mrs. Compson's appeal in respect of the findings of fact in para. 5.1 of her decision letter, insofar as they relate to Sluidubh and Easterhill, both fail.

93 There is the same additional point, that the Black Partnership valuations are addressed to AAML, not to Advalorem as required by the

PPM. Again, however, this does not appear to be a point picked up by the FSC in its final report, so I ignore it.

The meeting of March 18th, 2013

94 Paragraph 5.2 of the decision letter in respect of Mrs. Compson says that she furnished false, misleading or inaccurate information to the FSC at a meeting with Mr. Killick, the former Chief Executive of the FSC, on March 18th, 2013. The misleading or inaccurate information is not stated in the letter, but the final report makes it clear that the allegation was that at "that meeting the FSC was repeatedly told that the Kirkintilloch land had been purchased at a price that it could be sold at and that when it was purchased it had been valued on the basis that it did not have planning permission."

95 There is no allegation in the decision letter or the final report that Mrs. Compson knowingly furnished the false information; however, that was a suggestion made by Sir Peter Caruana in argument, so I should deal with it. The allegation, as developed by Sir Peter, is effectively an allegation of dishonesty.

96 Now that meeting was attended by both Mrs. Compson and Mr. Redford and the report does not state which of them made the representation. That, however, is in my judgment irrelevant: if Mr. Redford made the representation, Mrs. Compson would have adopted it.

97 Charles Gomez & Co., on July 24th, 2013, suggested that Mrs. Compson had been taken by surprise at the meeting, so that the misrepresentation was an innocent mistake. Mr. Winter argued further that Advalorem sent copies of the valuations to the FSC directly after the meeting. This was consistent with the innocence of the misrepresentation, he said.

98 Sir Peter Caruana relied on two points. First, the meeting on March 18th, 2013 was only days after the board meeting on March 13th, 2013, which had the valuations of Sluidubh and Easterhill where the same special assumptions had been made. Thus, even if Mrs. Compson had forgotten the valuations before the board on December 17th, 2012 (which was unlikely in any event), she would have been reminded about the point only shortly before. Secondly, the force of the point that the valuations were sent shortly afterwards is much reduced because they were sent at the FSC's request.

99 I am dealing with a review of the decision of the Chief Executive. In my judgment, there was evidence on which she could properly come to the view that Mrs. Compson had furnished false, misleading and inaccurate information to the FSC. However, she makes no finding that Mrs. Compson deliberately lied to the FSC. Given the seriousness of such an

allegation, it was incumbent on the Chief Executive to make that allegation clear to Mrs. Compson and to make clear findings on it. Further, the terms of para. 5.3 of the decision letter, which relies solely on failures to exercise "due skill, care and diligence," are inconsistent with an allegation of dishonesty. Since the Chief Executive has not done so, it would not be right on appeal to make a finding of dishonesty.

100 Accordingly, Mrs. Compson's appeal against para. 5.2 fails, but I make it clear that the furnishing of false, misleading or inaccurate information was not done knowingly or deliberately. This makes the allegation in para. 5.2 of less weight in considering culpability.

Mr. Kane and the second valuation

101 Sir Peter Caruana, as part of his case against Mrs. Compson (and to a lesser extent against Mr. Weal), placed reliance on the involvement of Mr. Kane. He points out that Mr. Kane had no professional qualifications and that there was no formal contract of retainer between Advalorem and him. Indeed (although Sir Peter did not put it quite like this), there is a suspicion that Mr. Kane was acting as a shadow director (see the instructions being given to Linder Myers above).

102 In my judgment, whilst there are matters of concern with regard to Mr. Kane, these did not form part of the case found by the Chief Executive against Mrs. Compson. Accordingly, this is not a matter on which the FSC can rely.

Conclusion on the substantive appeal and on the appeal against sanctions

103 It follows that, save in respect of para. 5.1(4), Mrs. Compson's appeal against the facts found in paras. 5.1 and 5.2 of her decision letter and Mr. Weal's appeal against the facts found in para. 6.1 of his decision letter fail. The Chief Executive's conclusion in paras. 5.3 and 6.2 of their respective decision letters that the appellants "have not acted with due skill, care and diligence" is, in my judgment, unassailable on the basis of the facts found.

104 I turn then to consider the appellants' second ground of appeal, their respective appeals against the sanctions imposed.

105 I shall consider Mrs. Compson's case first. Mr. Winter spoke movingly of the impact of the sanction imposed on her, if it is upheld on appeal. It prevents her working in the financial services industry in Gibraltar in any senior capacity. The decision that she is not a fit or proper person is one which she must self-report to her professional bodies in South Africa and Switzerland. Those bodies may well bring disciplinary

proceedings against her. Mr. Compson is now in poor health and she is the sole bread-winner for her family.

106 I accept that the sanction imposed by the Chief Executive is severe. I also accept that Mrs. Compson's involvement in Advalorem has been a personal and professional disaster for her. However, the sanction imposed is, in my judgment, fully justified, even once the allegation in respect of the brochure is left out of account. The twice-repeated failures on the part of Mrs. Compson to ensure that valuations satisfying the requirements of the PPM were obtained were extremely serious. In relation to the Kirkintilloch land, it may result in the loss to investors of many millions of pounds. Further, she approved the unusual and disadvantageous terms of the contract for the purchase of that land. Unless such a sanction were imposed, it is likely that the good reputation of Gibraltar as a financial centre would be damaged. Moreover, the Chief Executive was fully entitled to decide that the sanction was necessary to protect consumers and to reduce financial crime. Deterrence of other directors from failing properly to monitor the activities of companies on whose boards they sit is a justifiable regulatory consideration.

107 The possible impact of the decision that Mrs. Compson is not a fit and proper person on her professional registration in South Africa and Switzerland is, in my judgment, of little weight. However, I do note that neither the Chief Executive nor I has made any finding that she was dishonest. Her and my findings are solely that she failed to act with due skill, care and diligence. That may affect the approach taken by her professional bodies.

108 As regards the sanction imposed on Mr. Weal, he too failed to ensure that proper valuations were obtained which complied with the PPM. That is a serious breach of his duties. However, his involvement in Advalorem was less than that of Mrs. Compson; the sole board meeting he attended did not (as I have found) give more than approval in principle to the purchase of Sluidubh and Easterhill; and no investor had lost money, even presumptively, from his actions.

109 The Chief Executive is better placed than I am to determine what sanctions are appropriate to further the regulatory objectives of the FSC as set out in s.7(2) of the Financial Services Commission Act 2007. Indeed, if she had imposed stiffer sanctions on Mr. Weal, I would have upheld that decision. This was a serious case of two directors ignoring their obligations as directors.

110 Accordingly, the appeals of Mrs. Compson and Mr. Weal against the sanctions imposed on them are dismissed. The time for Mr. Weal to

comply with the directions in his decision letter shall be varied to start running from the date of this judgment.

Orders accordingly.
