Neutral Citation Number: [2022] EWHC 2503 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No: CR-2020-002080**

BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY & COMPANIES LIST (ChD)

IN THE MATTER OF CFO LENDING LIMITED

AND

IN THE MATTER OF THE COMPANY DIRECTORS DISQUALIFICATION ACT 1986 ("CDDA")

Royal Courts of Justice
Rolls Building, Fetter Lane, London

Date: 07/10/2022

Before : **INSOLVENCY AND COMPANIES COURT JUDGE JONES**

BETWEEN:

THE SECRETARY OF STATE FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY

Claimant

and

MR JAMES TREVOR KEEBLE

Defendant

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- -

MR TIRAN NERSESSIAN (instructed by **HOWES PERCIVAL**) for the **Claimant**
MR RICHARD ASCROFT (instructed by **SIMON BURN SOLICITORS**) for the **Defendant**

Hearing dates: 5-8 July 2022

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Approved Judgment

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

.....CHJ 7/10/22.....

I.C.C. Judge Jones:

A) Introduction

1. There is a need for particular care to ensure that this claim under ***section 6 of the Company Directors Disqualification Act 1986*** ("***the CDDA***") is decided only upon the grounds relied upon to allege that Mr Keeble's conduct as a director of CFO Lending Limited ("CFO") makes him unfit to be a director of a company. That is because the claim for disqualification is supported by a vast array of evidence (including the contents of exhibits) which includes or is relevant to allegations, some potentially serious, that do not address those grounds for disqualification.

2. The grounds in summarised form are: misuse of customer banking information; excessive use of continuous payment authorities ("CPAs"); and inadequacy of records to accurately account for the amounts due from debtors ("the Three Grounds").

3. The following are just three of many potential examples to be found within the Secretary of State's evidence illustrating allegations asserted but not relied upon as the grounds for unfitness: (i) That the business failed because of irresponsible lending by failing properly to assess an applicant borrower's ability to repay loans as required by the ***Consumer Credit Act 1974***, as amended ("***the CCA***"). (ii) The contention of concern to be found within quotations taken from documentation of the Financial Conduct Authority ("the FCA"), the regulatory successor to the Office of Fair Trading ("the OFT"), that communications to customers and training and guidance materials relating to debt collection did not comply with their requirements and expectations as the regulatory body. (iii) The absence of records to enable customer complaints to be addressed by the new management in place following Mr Keeble's resignation.

4. There is also need for care because the Secretary of State has an obligation to ensure Mr Keeble knows or could identify from the evidence the essential facts to be relied on in support of the Three Grounds (see ***Re Finelist Ltd & Another*** [2003] EWHC 1780 (Ch), [2004] B.C.C. 877, Mr Justice Laddie). That need arises in particular in this claim because it is a feature of the Three Grounds and the essential facts that they assume Mr Keeble's unfitness because of incompetence from the conduct of CFO and his position as a director. They do not make specific reference to his role and responsibilities or to any specific acts or omissions by him. Whilst there is nothing necessarily wrong in an approach contending that the mere occurrence of the facts and matters giving rise to the grounds relied upon is sufficient to establish unfitness, it means the claim must be judged on that basis without adding particulars of acts and omissions which are not part of the claim.

5. Another introductory observation is that the conduct claimed to make Mr Keeble unfit to be a director is being judged in the context of a directorship of a company licensed under ***the CCA*** and subject to extensive regulation and guidance as a "payday loan" business. Whilst that feature is directly relevant, it is important to ensure that the decision applies the statutory tests of ***section 6 of the CDDA*** rather than address the issue from the perspective of suitability under the different statutory regime of ***the CCA***. I should emphasise, however, that Mr Nersessian as counsel on behalf of the Secretary of State made clear that he accepted this approach.

B) The Claim within the Evidence in Support

B1) The Grounds

6. The claim form issued on 1 April 2020 followed a ***s.16 CDDA*** notice sent on 27 September 2019. There are differences between the allegations made in that notice and in the evidence in support of the claim but I am satisfied nothing turns on that. The evidence in support from Mr North, a Deputy Head of Investigations in the Insolvent Investigations Directorate of the Insolvency Service, sets out Three Grounds relied upon individually and cumulatively by the Secretary of State for the claim that Mr Keeble's conduct whilst a director of CFO makes him unfit to be concerned in the management of a company. The following are the particulars for the Three Grounds (my underlining for emphasis):

> *"8.6.1 CFO had misused customer banking information to obtain payment in respect of outstanding debts due to CFO without the customers' knowledge, in breach of the Consumer Credit Act 1974, between at least 10 August 2011 and 05 February 2014.*
>
> *8.6.2 CFO had made excessive use of continuous payment authorities ("CPAs") in contravention of the OFT and later FCA guidelines, between at least 24 June 2011 and 13 June 2014.*
>
> *8.6.3 CFO's records were inadequate to accurately account for the amounts due from debtors, between at least June 2011 and October 2013. CFO submitted to the FCA four separate and different estimates of the numbers of customers affected by this and the amounts that they had overpaid, ranging from total overpayments by 98 customers of £8,823 to 1,667 customers overpaying a total of £183,579.*

7. Those particulars explain that these were "findings" of the FCA, then ***the CCA*** Regulator, set out in its letter dated 28 November 2014. The particulars also refer to a redress agreement between CFO and the FCA resulting from the inaccuracy in CFO's records (i.e. the third of the Three Grounds) and to the fact that this liability resulted in CFA's insolvency. It is not in dispute, however, that this is not presented as a "ground" for disqualification. It is identified as a consequence of the third of the Three Grounds relied upon and also explains the insolvency which satisfies one of the requirements of ***s.6 of the CDDA***. It is to be noted that there is also reference to payments received by Mr Keeble from CFO and to his membership of a retirement benefit scheme within the section identifying the grounds but these are also not grounds relied upon for the claim and they did not feature at trial.

B2) The "Unfair" Challenge

8. Mr Ascroft, counsel for Mr Keeble, in his closing submissions reiterated Mr Keeble's complaint in his evidence in answer that whilst the Three Grounds are based upon facts and matters relating to CFO, they are deficient because they do not address his responsibility for them as a director whether by action or omission. Mr Ascroft described the remainder of the evidence in support that followed identification of the grounds as a chronology of events followed by summaries in respect of only two of the Grounds and submitted that even those two summaries did not cure that deficiency. Thus:

a) The misuse of banking ground was simply summarised at paragraph 143 as follows: *"The above paragraphs demonstrate that FCA had concerns about CFO's use of customers banking details to obtain payment in respect of outstanding debts due to CFO without the customers' knowledge from at least August 2011 and February 2014"*. There is nothing there to identify why Mr Keeble is said to have been incompetent.

b) The summary of the excessive use of CPAs ground simply stated that *"the above paragraphs demonstrate that FCA had concerns about CFO's excessive use of continuous payment authorities in contravention of the OFT and later FCA guidelines, between at least 24 June 2011 and 13 June 2014"*. Again, no reference to Mr Keeble's specific acts or omissions.

c) There was no summary for the inaccurate records ground or any similar statement.

9. The consequential submission is that those failures bring the claim into the "unfairness arena" identified in ***Re Finelist Ltd & Another*** (above). As Mr Ascroft acknowledged, this submission needs to be addressed within the context of the evidence in answer and reply and the fact that this claim has progressed to a four day trial. His submission also appreciates that the "chronological" evidence sets out a considerable array of fact and matters relating to the day to day business and management of CFO. It is a submission he asks to be addressed in the context of the evidence as a whole. I agree with that approach and, as a result, it is necessary first to consider the defence (i.e. the evidence in opposition) and the Secretary of State's evidence in reply. To some extent this will overlap with the section setting out the evidence and findings of fact but that flows from the fact that the rules of the ***CDDA*** require evidence not statements of case. To the extent that I do not subsequently refer to matters raised as a defence within the evidence, or indeed to any parts of the Secretary of State's evidence, it will be because I have considered it unnecessary to do so not because it has not been borne in mind.

C) The Defence within the Evidence in Answer

10. Mr Keeble in his evidence in answer summarises his position as follows:

> *"Although my role related primarily to marketing when the OFT and latterly FCA investigation started I was the best placed person to deal with the regulator and "front" the investigation for CFO because of my knowledge of the financial services market hence the fact I took the lead on this side of things. It is not the case that I was responsible internally for many of the matters for which I am criticised in these proceedings."*

11. Mr Keeble acknowledges that the OFT and its successor, the FCA, found grounds of complaint in their regulatory capacities when investigating CFO's business. However, he in part defends his position with his witness statement from the basis that CFO under his guidance reacted to investigations properly by seeking advice, appointing independent advisors to assist it to respond to the OFT, submitting reports, cooperating with inquiries and liaising with the OFT and FCA. He draws attention, for example, to the fact that a "Skilled Person Report" by Hogan Lovells of 14 November 2014 (retained by CFO at the request of the FCA for the purposes of its

investigations) found little evidence of regulatory or statutory breaches and contains substantial evidence of Mr Keeble's determination to put matters right for any future lending.

12. Mr Keeble's also relies on delegation. For example, he says this:

> *"Richard Darlington the director of Deemar (UK) Limited was charged with dealing with compliance matters and ensuring that changes in the regulatory landscape were addressed by CFO. Whilst it is correct that I "signed everything off" I delegated a number of functions both in house and to Richard Darlington and to our other professional advisors."*

13. Mr Keeble asks for account to be taken of the changing regulatory landscape from April 2014 when the FCA took over responsibility from the OFT. Mr Keeble asks the court to take into consideration industry norms and/or the fact that the FCA's thematic review was designed to raise standards and involved improvements by agreement. He contends that the court should not necessarily apply the FCA's standards to the period whilst the OFT was the responsible regulator. He states that CFO's solicitors, Holman Fenwick Willan LLP, advised CFO that the FCA were attempting to retrospectively judge CFO on past conduct by applying the current or new rules to past events. Further, he says in his witness statement:

> *"It should also be borne in mind that as the interview was part of a thematic review it was inevitable that the review would identify areas where changes were needed. In fact it was this review which culminated in the 2015 Payday Loan Regulations."*

14. Considering further the regulatory environments in the specific context of the Three Grounds, Mr Keeble observes that "misuse of customer banking information" is not referred to in the OFT's "Irresponsible Lending Guidance". For example, it was not a matter alleged in the OFT's 26 March 2013 letter which followed a compliance visit on 12 June 2012. His opinion is that the rules the FCA were attempting to superimpose or judge activity against were not even in place until January 2015. The new rules meant the business would be unable to function as it had done and it had already been decided to cease making new loans and focus on collection of the outstanding loan book.

15. Mr Keeble in any event denies he caused or allowed misuse of card details in the circumstances objected to. Namely, when those details were provided to CFO within a subsequent web-application for a new loan. The web-sites used directly by CFO did not hide the fact that it was the lender. Whilst they used its trade name(s), this was explained at the bottom of the web page as required by company law. All users would have known (assuming they read the web page) that they gave information to the Company and the fact this information appeared at the end of the page was adequate notice. As to "Lead Generator" and "Lead Provider" web-sites, there would be no confusion because the applicant was directed to a CFO web-site before card details were required.

16. In his defence he states in his evidence that legal advice caused him and CFO to believe there was a contractual right under extant loan agreement(s) to use the credit card details provided with new applications, whether the application was accepted or not, for the payment of outstanding loans. In any event the policy and usual practice was to contact borrowers by telephone prior to using new debit card details to obtain payment. This would achieve their agreement potentially in the context of a review of

the repayment terms and consequentially agreed, revised repayment terms to suit the borrower in cases of financial difficulty. Forbearance to customers in financial difficulty was always provided. Mr Keeble says there is no evidence that he caused or allowed misuse of those details whether within the context of CPAs or otherwise.

17. As to excessive use of CPAs, this issue when raised by the OFT on 26 March 2013 was properly addressed through a submitted, independent, internal audit report from Deemar (UK) Limited. There was no response by the OFT or the FCA to that report indicating that its contents which proposed improvements were in issue. Individual case failings, which were small in number, should not be attributed to Mr Keeble who had no direct involvement or dealings with them as the head of the chain of command. It should also be appreciated that a number of automatic attempts to collect payment might occur overnight and/or around the same time because the system was waiting for the borrower's pay to be credited to their account.

18. Furthermore, he asks for it to be borne in mind that in practice the banks would not permit excessive use of CPAs:

> *"It was explained to [CFO] that if we did not comply with the rules that the OFT had put in place with the banks (in our case Barclays and FDMS) then the banks would have revoked our merchant services facilities ... As a matter of fact we did comply with the OFT recommendations and did not have our merchant services facility revoked."*

19. As to inadequacy of records to accurately account for the amounts due from debtors, there were IT complications or glitches making record keeping a problem. In particular this was caused by the migration of data from one system ("CFO1") to another ("Caseflow") introduced from 15 August 2012 to manage any loans in default by more than 33 consecutive days. That should not be attributed to his role or conduct. Mr Miller was the lead systems director but was dismissed in early 2014 because he could not keep up with the changes to the regulatory framework. He had been in charge of the construction and functionality of the customer relationship management system which recorded payments interlaced with the accounts system in order to show customer balances. In addition, there was Mr Rahman, a qualified chartered accountant who was a director for about 16 months and who would provide management with general numbers about performance. He was responsible for the reconciliation of issues concerning balances (as raised by the FCA) and participated in the management of CFO at a high level. The directors were entitled to rely upon him insofar as their functions were delegated to him.

20. Mr Keeble emphasises that his resignation as a director was not because of the investigations but was related to the wider interests of CFO's main investor and shareholder, Mr Smith. Those interests caused CFO to adopt a conciliatory approach in its solicitor's letter 12 December 2014 proposing a change to its management structure and to its future business. The approach was maintained by letters dated 19 and 23 December 2014 and in acceptance of the redress proposal. Whilst this is not a ground, the figures relied upon in respect of redress are in issue. For example, the shortfall of £34 million largely represented loan write offs for the benefit of customers. The conciliatory approach should not be taken as an admission of any liability by it or Mr Keeble.

21. Mr Keeble's witness statement also states that following his resignation he has been granted approval by the FCA to act as the Controlled Functions 1 (CF1) Director for another company and, therefore, satisfied their fit and proper person test in 2017. This includes tests of honesty, integrity and reputation, which were passed in the context of the FCA having full knowledge of Mr Keeble's previous position with CFO both generally and in the context of the three specific grounds which have been identified from the FCA's investigations.

D) Reply Evidence

22. The evidence in reply consists of a second affidavit from Mr North and one from Mr Slavin, an Associate in the Unauthorised Business Department within the FCA who had been part of the team carrying out the thematic review and in so doing, investigating CFO's approach to debt collection during 2014.

23. Mr North states that the purpose of his twenty four page reply affidavit was to demonstrate Mr Keeble's responsibility for the Three Grounds. Alternatively, and this was accepted to be a new case, that he allowed rather than caused them. It largely consists of argument based upon his analysis of the evidence. As such, it would normally be inadmissible as evidence but can be relied upon in this claim to the extent that it provides a statement of case and/or identification of the essential facts relied upon in accordance with the obligation prescribed by ***Re Finelist Ltd*** (above). However, it too must be addressed with care because of its continuation of allegations which do not form part of the Three Grounds.

24. The following appear to be the essential facts drawn attention to with the addition of my comments where necessary:

    a) Mr Keeble had a leading role in CFO's creation and his work outside of his core responsibilities of marketing and advertising included his contact with the OFT and FCA. There was an absence of others who would have been responsible for compliance instead of him. Reference is made to notes produced by the FCA of interviews of a wide range of CFO directors and employees. Mr North's argument is that their statements in interview confirm this analysis. It can be commented that it remains the position that the evidence does not address specific acts or omissions in this context.

    b) There was little change between the regime under the OFT and under the FCA as demonstrated by a variety of regulations referred to. Mr Keeble's responsibilities in his central role running CFO means he would have been aware of this. It can be commented that it is (at best) not entirely clear how this is linked to the Three Grounds.

    c) Mr Keeble's mismanagement caused CFO's insolvency. However, that would be a wholly new ground and (quite rightly) was not relied upon as a ground at trial.

    d) The case of inaccurate records is now identified with reference to the number of incorrect balances found within an August 2014 draft CFO investigation

report exhibited within the evidence in support which identified numbers for accounts undercharged, overcharged and overcharged and unpaid as follows:

i) Total customer accounts investigated: 98,561 of which 78,471 had incorrect balances;

ii) Accounts undercharged: 59,676 by a total of £17,785,802.70;

iii) Accounts overcharged: 18,795 by a total of £5,873,558.30; and

iv) Accounts overcharged and overpaid: 1,667 by a total of £183,578.51

The obvious comment is that Mr Keeble had had no reason or opportunity to address this within his evidence in answer.

d) Information provided by Mr Keeble's successors together with their opinions upon the quality of management evidence mismanagement establish his incompetence. This too is new evidence and there is no suggestion that the successors would provide evidence. They did not and, therefore, it is to be commented that Mr North is relying upon evidence not given under oath, untested and which Mr Keeble could not have addressed within his evidence in answer. That will be considered further below when addressing the witnesses.

e) A series of arguments and speculations are made to raise issue (as I understand it) with Mr Keeble's evidence that CFO relied on expert advice and/or had a team upon whom Mr Keeble could rely for the purpose of regulatory compliance. In part this relies upon picking out information provided by directors/employees during interview. It is principally a reply to Mr Keeble's evidence rather than identification of essential facts. I have read the interview notes and will refer to them when necessary. Overall, they do not take this claim further.

25. In the light of that summary and the comments made, it is unsurprising that the conclusions Mr North draws are based upon Mr Keeble's overall day to day responsibility as a director rather than upon specific acts or omissions. He says this:

a) "The evidence demonstrates he was ultimately responsible for the activity and processes enacted by the employees of the company. As director of CFO, Mr Keeble had an inescapable responsibility to act in the best interests of the company, including ensuring that it complied with relevant regulations and notwithstanding any delegation of tasks to other staff."

b) "Mr Keeble's responsibilities as director included ensuring that adequate records were maintained, and the OFT DCG (in both 2011 and 2012 versions) sets out at 3.1 that businesses must maintain accurate customer data and at 3.22 it states "The OFT considers that businesses should seek to ensure that they have accurate data, prior to pursuing debtors for outstanding debts, by taking appropriate steps to verify the data". Mr Keeble was in day-day control of CFO and should have taken steps to ensure that those tasked with maintenance of the records were doing so in a manner that ensured accurate information. The extent of the inaccuracies in CFO's records of customer balances demonstrates that Mr Keeble failed to ensure that the records were adequate, and/or that those who may have been delegated that task completed it to the necessary standard. It is also noted [but not to be relied upon at trial] that in

2013 Mr Keeble was offered professional assistance by Kingston Smith about ways to improve the loan software but he chose not to avail CFO of that."

26. Mr Slavin in a twenty three page witness affidavit *"deals with matters raised within Mr Keeble's affidavit to the extent that the [Secretary of State] considers input from FCA on those matters might assist the Court in determining this claim"*. There follows a summary of the regulatory context and the rejection of the evidence that the OFT and FCA did not take a *"uniform line"*. The steps taken by the FCA in its investigations are then addressed, he being able to give evidence as an Associate with the thematic review team led by Ms Margany and he having been company lead for CFO within the FCA team which visited its premises.

27. Points are made, such as that the "Skilled Person" was only retained when the FCA did not have confidence in the subject company's management and that their retainer was a minimum requirement if CFO was to continue to be regulated. Another being that CFO's offer of licence restrictions was to avoid obligatory ones. A speaking note for a meeting on 11 July 2014 is exhibited to show the key concerns the FCA was intending to raise based on the visit to CFO's premises. An inspection of 20 case file reviews ("the 20 Files") is addressed being those in which the FCA *"found material shortcomings in CFO's manner of dealing with customers which constituted breaches of legislation and guidance"* in place at the material times not just at the date of inspection.

28. Mr Slavin addresses each of the Three Grounds. As to misuse of customer bank details, he refers to an internal CFO report dated 20 August 2014 which found that *"6,187 payday customers who had supplied card details to CFO via affiliate websites then had their card details used for the purposes of making CPAs"*. Those are figures he describes as being borne out by the FCA's investigations. Mr Slavin also refers to Hogan Lovells's report mentioning that CFO had identified over 1000 customers who had complained about misuse of banking information but not lodged a formal complaint. He included reference to the "Iowya website" and to CFO's acceptance of a breach of ***the CCA*** in regard to its use. The "Iowya website" is not identified as a new or amended ground, however, and therefore is not to be treated differently.

29. That evidence leads Mr Slavin to refer to the FCA having written that *"at worst', there appeared to have been a 'deliberate policy to mislead and exploit ... customers"*, although this is certainly not presented as a new or amended ground. The approach to Mr Keeble's reliance upon contractual entitlement is that it is not sustained by Hogan Lovells or by the CFO management team which succeeded him.

30. As to the second ground, Mr Slavin strongly maintains the allegation of excessive use of CPAs and does not accept the OFT did not raise the issue. He relies upon the *"examples of hundreds of failed CPA attempts on individual customers"* found within the 20 Files and upon its emphasis by the FCA during the 13 November 2014 meeting. He refutes that the OFT approved their use by CFO, describing this by way of personal observation as a *"significant mis-statement"* and draws attention to CFO's acceptance within their solicitor's letter dated 28 November 2014 that their use was not in line with OFT Guidance between November 2012 and June 2014.

31. In regard to the third ground, customer account balances, Mr Slavin also refers to the Hogan Lovells report as mentioned above. This leads to him stating (as I read it) that

the FCA had the impression that the attributed cause of the change in systems hid the fact that *"the accounts process was being put together as [CFO] went along ... a cover for its failings"*. Again, however, there was no proposal to add this to or amend the Three Grounds. The only amendment is the general one of alleging "allowed" as well as "caused".

32. Mr Slavin then turns to professional advice. He draws attention to Mr Darlington's interview with reference to a variety of statements. He refers to legal advice in respect of the contents of the loan agreement, observing that the FCA had no complaint concerning its wording and that it was accepted that the explanation concerning how CPAs were used appeared reasonable. However, he says the FCA objected to CFO's practice, as opposed to policy, because of the evidence of numerous and repeated "hits", often several times a day. As to the explanation of salary payment timings, the FCA had a *"strong concern ... [that] CFO's management could [not] explain why CPAs were used in such a way"*.

33. Mr Slavin's statement of the FCA's conclusion is that *"CFO's operation [had been in the eyes of the FCA] at least incompetent to a marked degree ... [but CFO had not] sought deliberately to mistreat customers .... [although] the evidence did indicate serious harm being done to consumers"*. He finally addresses Mr Keeble's subsequent applications to the FCA for approved status but this did not feature at trial.

(E) Unfairness Submission Decision

34. The Court of Appeal in ***Re Rex Williams Leisure plc*** (above) rejected the fruitless argument that pleadings would be a more appropriate route than evidence in suitable cases. The essence of that decision being that the ***Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules*** required affidavit evidence and that is what had to be provided. This means a defendant has the potential disadvantage of not being able to identify a claim from a statement of case but in practice that possibility has usually been avoided by the evidence in support adopting template form by setting out at the beginning the grounds relied upon. This enables the Secretary of State normally to satisfy the requirements of ***Re Finelist Ltd*** (above) which arise in the context of evidence having to be used rather than statements of case.

35. In this claim the Three Grounds do not rely upon specific acts or omissions by Mr Keeble but rather upon the general proposition that they evidence his unfitness because as a director with day to day management duties, he was responsible for the conduct of CFO. That included its compliance with ***the CCA***, its regulations and the requirements and guidance of the regulators. The Three Grounds each involve material contraventions of ***the CCA*** and its extensive regulation and guidance for "payday loan" businesses. Therefore, it follows from his appointment as a director that those contraventions were his responsibility and demonstrate his unfitness through incompetence.

36. Bearing in mind that the evidence in support should identify the grounds and the essential facts relied upon, it is hardly surprising that Mr Keeble's evidence in answer largely responded to this "macro-approach" in a similar fashion. It was not for him to

identify his actions or omissions which might be relied upon as evidence against him. I do not suggest that he took a conscious decision to avoid doing so but observe that this was the inevitable result of the evidence in support unless he wanted to extend his answers into matters not alleged or not identified as essential facts. Furthermore the evidence in support by adopting the approach of referring to detailed and wide ranging OFT and FCA regulations, industry and CFO investigations often makes it difficult for the Court, and presumably Mr Keeble, to decide what facts and matters is being relied upon as evidence in support of the Three Grounds.

37. The approach adopted to the drafting of the evidence in support and reply also brings into play the question of the extent to which the findings, decisions and/or impressions of the OFT and/or the FCA to be found within that voluminous evidence are binding upon CFO, let alone Mr Keeble. In addition the question of where to draw the line between findings, decisions and/or impression made in the context of the payday loan business's statutory and regulatory governance and their application to the tests under ***s.6 of the CDDA***.

38. The evidence in reply is stated to be supplementary with the intention of demonstrating Mr Keeble's responsibility. However, it is unsatisfactory in many ways. In particular because it seeks substantially to present argument rather than evidence and the evidence there is on occasion irrelevant to the Three Grounds and/or introduces or relies upon facts and matters which do not fall within the scope of a reply.

39. In all those circumstances, I agree with the submission of Mr Ascroft that the Court must pay careful regard to ***Re Finelist Ltd & Another*** (above).

40. However, other than by including "allowed" in addition to "caused", it does not seem to me that the reply evidence alters the fundamental case, whether by express amendment or by identifying the key evidence relied upon. The Three Grounds continue to rely upon Mr Keeble's overall responsibility as a director for the conduct of CFO. In other words, they and the key pieces of evidence continue to present a claim without reliance upon his specific actions or omissions. It is based instead upon: establishing that CFO committed the acts relied upon within the Three Grounds; if so, upon Mr Keeble's overriding responsibility to ensure that each of the problems identified should not have occurred or were appropriately corrected if they did; and if that responsibility applies to the acts of CFO the conclusion that he must have failed to fulfil those responsibilities to the extent that his conduct was unconscionable.

41. My conclusion is that provided the claim is approached on that basis, the obligation prescribed in ***Re Finelist Ltd & Another*** (above) will be met and there should be no unfairness. That means the decision must be based upon general allegations of responsibility and conduct. Any temptation to address specific actions or omissions or to redefine the Grounds by reference to them must be resisted. That is not only because of the ***Re Finelist Ltd & Another*** (above) obligations but also because Mr Keeble was not given a fair opportunity to address specific actions or omissions in his evidence in answer.

42. I acknowledge that this still leaves the problem that the evidence in support and in reply needs a considerable amount of sifting. This includes the need to metaphorically remove to one side a variety of evidence that falls without the boundaries of the Three

Grounds. However, subject to the occasions when Mr Ascroft successfully observed that matters relied upon fell outside those boundaries, I am satisfied that the trial proceeded accordingly (noting that both counsel are to be applauded for their approach and ability to sift). This decision will also maintain those boundaries.

(F) Evidential Burden

43. It is obviously accepted by the parties that the burden of proof is upon the Secretary of State to the normal civil standard. As a result, the inherent probability or improbability of the event is a matter to be taken into account when relevant. So that the more serious the allegation the less likely it is to have occurred with the result that the stronger the evidence needs to be before the court can conclude it is established on the balance of probability. As Lord Hoffmann explained in ***Re H [Minors]*** [1996] AC 563, at 586E-G: *"a generous degree of flexibility in respect of the seriousness of the allegation is built into the preponderance of probability standard"*.

44. That burden will not shift but the evidential burden may. This was a matter for discussion during the course of the trial in circumstances where the Secretary of State's evidential case does not descend to particulars concerning specific acts or omissions of Mr Keeble but such matters are introduced as a defence. For example, when he relies upon CFO having received and acted on legal advice. In essence, although subject to specific context, this judgment will proceed from the basis that the evidential burden will shift when the Secretary of State's evidence has established a ground on the balance of probability but is being met by a positive evidential defence relying upon facts and matters which need to be proved by Mr Keeble for them to be accepted into evidence.

(G) Witnesses

45. An assessment of the witnesses should start with the feature that Mr North and Mr Slavin gave their evidence reasonably and fairly and it can be concluded that they both sought to assist the court. It was not submitted otherwise. One feature to note, and it is not a criticism of them, is the need to bear in mind that the hearsay evidence presented has not been tested by cross-examination. The extent to which that will affect its weight and reliability will depend upon the circumstances and upon the nature of the evidence in opposition but it should normally be a factor to consider.

46. Another feature results from an application of the overall requirement of fairness addressed above. The following general questions (amongst others) will need to be borne in mind: (i) to what extent does the evidence specifically address the Three Grounds? (ii) does it link to the responsibility and conduct (actions or omissions) of Mr Keeble? (iii) to what extent is the evidence concerned with CFO keeping its licence rather than with Mr Keeble's conduct? (iv) did Mr Keeble have a fair opportunity to respond bearing in mind that may not be the case if the facts and matters relied upon are "buried" within detailed interviews and reports? It would be inappropriate to keep referring to those questions and can be assumed they have been borne in mind throughout this judgment when it was appropriate.

47. As for Mr Keeble as a witness, I was impressed by him. Whilst of course the strength, accuracy and helpfulness of the evidence of a witness who spends a long time in the witness box, as Mr Keeble did, normally ebbs and flows, I mostly found that he addressed the questions and matters in issue seriously and carefully. Overall he came across as a reliable witness, subject to the usual need to check what was said against the contemporaneous evidence not least because of the problems caused for memory by lapse of time.

48. Mr Keeble came across as intelligent and as someone who understood his position, duties and responsibilities as a director. He did not appear to me someone who would intentionally allow CFO to take advantage of its customers. My impression from the manner in which he gave his evidence during cross-examination for over a day is that he could be expected to act reasonably and responsibly as a director. Caution must be applied, however, because this decision must address his conduct as a director in respect of the Three Grounds not his performance in the witness box in 2022. It must also be appreciated that the investigations of the OFT and FCA will have allowed those regulating bodies a far greater insight. Nevertheless he starts with a favourable, overall assessment from me.

49. Two potential witnesses who were not called by the Secretary of State are Mr Marshall and Mr Payne, part of the management team who superseded Mr Keeble following his resignation. The evidence in reply refers to their comments derived from their management experience of CFO and to their conclusions from investigations undertaken. Their overall opinions can properly be best summarised by the phrase "multiple systematic problems". I refer to this to state that I have not taken their evidence into account for four reasons. First to the extent that it covers matters outside of the Three Grounds it should obviously be disregarded. Second, although more a footnote, in parts it is opinion evidence not evidence of fact and in parts evidence after the event. Third, because it did not feature in the evidence in support, Mr Keeble did not have the opportunity to answer it. There was no obligation upon him to obtain permission for rejoinder evidence. Fourth, and as important, because as hearsay evidence it suffers from the fact that it has not been tested by cross-examination. Those facts and matters combined with requirements of fairness and justice mean it would be wrong to give it weight.

(H) The Evidence

50. CFO having been incorporated on 29 October 2008 began trading in April 2009 as a lender of "payday loans", which have the characteristics of high interest rates for short term lending pending receipt of the borrower's pay or salary. Its trade names have included: Payday First, Flexible First, Money Resolve, Paycfo, Payday Advance and Payday Credit.

51. Whilst permitting this form of lending potentially promotes the concept of usury, it has been generally accepted (recently) within this jurisdiction because it provides the opportunity for borrowing which will not normally otherwise be available to those constrained to accept the high interest rates charged. There is no suggestion here of excessive interest rates or immoral conduct and the claim is brought within the confines of an accepted and regulated lending industry. Plainly, however, legislative

and regulatory compliance and the adoption of industry guidance is important within the context of borrowers who will often be the weakest of society financially and may also be vulnerable in the broadest sense of that word. This was the background to CFO's payday lending business for which it obtained a CCA Licence on 17 December 2008.

52. At that stage and until April 2014 the OFT was ***the CCA*** regulator. It operated through published guidance including the *"Irresponsible Lending Guidance"* (published March 2010 and updated in February 2011) and the "Debt Collection Guidance" (published in July 2003 and updated in 2011 and in November 2012).

53. The "Irresponsible Lending Guidance" (2011) emphasised (amongst other matters) that the lending business should have regard to the spirit, as well as the letter, of the Guidance. The ***s.25 CCA*** fitness test was also highlighted. The purpose of the Guidance was identified as being to set out:

> *"the standards that the OFT expects of all businesses engaged in the recovery of consumer credit debts. To assist such businesses in meeting these standards, it identifies the types of behaviour the OFT considers falls within the category of unfair or improper business practices for the purposes of section 25(2A)(e) of the Act and which, if engaged in, would call into question fitness to retain or be given a standard consumer credit licence or to engage in regulated consumer credit, consumer hire or ancillary credit activity under cover of a group licence".*

54. It was accentuated that pursuant to overarching principles of consumer protection and fair business practice, which apply to all debt recovery activities, businesses should amongst other matters whilst bearing in mind most debtors *"may be regarded as 'vulnerable', to some degree, by virtue of their financial circumstances ... some ... [being] particularly vulnerable ... [being] significant constrained in terms of their ability to engage with those pursuing them for repayment of debts owed"*:

> *"• treat debtors fairly — debtors should not be subjected to aggressive practices, inappropriate coercion, or conduct which is deceitful, oppressive, unfair or improper, whether unlawful or not*
>
> *•be transparent in their dealings with debtors and others —information provided should be clear and should not be confusing or misleading*
>
> *• exercise forbearance and consideration, in particular towards debtors experiencing difficulty —... businesses [were expected] to work with debtors with a view to providing them with reasonable time and opportunity to repay debts and, where appropriate, to signpost them to sources of free independent debt advice*
>
> *• act proportionately when seeking to recover debts, taking into account debtors' circumstances ... [avoid] deceptive and/or unfair methods [including] misusing CPAs."*

55. The Guidance also emphasised the need to avoid deceit and/or unfairness giving examples including avoidance of the misuse of CPAs. Reference was made in their context to ***s.55 CCA*** and to the need to adequately and appropriately explain them pre-contract. Examples of misuse were provided and the need for their reasonable and proportionate use emphasised.

56. As to the operation and management of CFO, Companies House records identify the following CFO directors: James Trevor Keeble 29 October 2008 to 10 February 2015;

Faye Kara Smith 17 July 2011 to 19 September 2014; Brogan Garrit-Smith 17 July 2011 to 19 September 2014; Keara Garrit-Smith 17 July 2011 to 19 September 2014; Shauna Garrit-Smith 17 July 2011 to 19 September 2014; Enamur Rahman 08 September 2011 to 08 January 2013; Chris Payne 17 February 2015 and ongoing; Antony James Marshall 13 January 2015 and ongoing.

57. Mr Keeble accepts he was at all times the head of the chain of command and reporting structure but relies upon an entitlement to rely on those beneath to alert him to any operational or compliance issues. Mr Keeble's own specialist role of management concerned marketing and advertising. He draws attention to the fact that the other directors have given disqualification undertakings recognising, as he puts it, their flaws in that context of structural command. That said, he accepted at the trial that three of those directors could be treated as having had a nominal impact on management, namely Mrs Smith and her two daughters. They need not be referred to further.

58. Mr Keeble had had previous experience as a mortgage broker and before CFO had established an on-line, FCA authorised, insurance business. He makes the point that whilst he was not experienced in consumer credit (outside of mortgages) he was experienced in FCA regulated business. CFO was his idea and he was supported by its principal investor and major shareholder, Mr Henry Smith, his partner's uncle. Mr Smith invested in the region of £8 million into CFO over four years and held 60% of the issued share capital. Mr Keeble held the remainder.

59. Mr Keeble's evidence, which I accept, is that CFO obtained the advice of Haslers Accountants and the legal advice of Huggins Lewis Foskett for the purposes of establishing the business. The solicitors were responsible for drafting the loan documentation ranging, for example, from the loan agreements themselves to template debt collection letters. He said that advice was also taken subsequently with specific regard to the use of bank card details received from existing borrowers when applying via a web site for new loans for the repayment of existing debt. This produced a new clause for the standard terms which he understood to entitle such use. I have no cause to disbelieve him, although whether the provision worked and whether the practice operated by CFO complied with regulatory requirements is another matter to be considered further below.

60. During early 2012 Mr Keeble also became involved in a new, life insurance business with his father and Mr Smith known as SHK Finance Limited. Although this raises the possibility that he had less time for his duties on behalf of CFO and this might be a cause of any of the Three Grounds, that has not been alleged and is to be ignored. However, it is to be observed that CFO was no small scale business operating (in effect) as a one man company. This can be illustrated by reference to notes of interviews by the FCA during the summer of 2014 of the following CFO employees (amongst others):

    a) Mr Bishop, a floor manager who joined CFO in 2010, referred to CFO having around 40 customer service staff at "the peak" of its activities, about 7 staff in collections and to a customer complaints resolution section in which he had a role and to whom staff would refer issues. He also referred to staff induction training and supervision programmes and to his role in developing mainly

classroom PowerPoint presentation programmes for staff. He also provided details concerning borrower forbearance options and vulnerable customer treatment. He referred to customer communications. The main cause of complaints he identified were payments taken by CPAs after the customer had asked the bank to cancel the CPA but had not informed CFO.

b) David Foskett, who joined March 2013, was finance director and he referred to his role in (amongst other matters) dealing with collections strategy and to the regular discussions he had with heads of collections and his three team leaders concerning engagement with customers. Complaints would reach him and he would deal with them, although he explained this was not part of his specific responsibility.

c) Dorren Majeed, Administration Department Team Leader, explained her responsibility for ensuring customer accounts were accurately updated. The majority of her work was generated by external contact with borrowers by email and post including, for example, written requests for CPA cancellations. She worked within a team of six.

61. On 24 February 2012 the OFT started its "Irresponsible Lending Guidance Compliance Review" of the payday lending industry. The review, applying to the industry as a whole, resulted from an increasing number of complaints and would involve inquiries of individual payday loan businesses into compliance with legal requirements and the standards expected by OFT Guidelines. This was explained to CFO in a letter dated 22 May 2012 which gave notice that access to its premises was required pursuant to ***s36C CCA***.

62. The visit would assess CFO's compliance not only with the *"Irresponsible Lending Guidance"* but also with ***the CCA***, its applicable regulations and wider consumer protection legislation where relevant. The visit would observe the conduct of CFO's business and inspect documents ranging from board minutes and operational structure information to contractual terms and documents relevant to credit to policies and procedures and to compliance with the legislative requirements and guidance. Access to client files based on random selection would also be required.

63. Mr Keeble's evidence was that at this time "the payday lending industry was seen as being relatively 'light touch' in regulation terms. This was because the OFT operated a 'guidance based' approach rather than a 'rules based' approach to the regulatory environment". That is in dispute.

64. Nevertheless this review is of relevance both generally with regard to its application to the industry and specifically concerning CFO because it made clear the OFT's understanding of the law and its requirements. On the other side of the coin, it will also become apparent that Mr Keeble and CFO co-operated willingly with the review and investigation.

65. The visit took place on 12 June 2012 and led to a 14 September 2012 Notice to produce information pursuant to ***s36B of the CCA***. This was issued as part of the review and as part of the OFT's wider monitoring functions. Accompanying tables set out the information required. A response dated 5 October 2012 was provided by Mr Keeble.

66. A progress report in respect of the industry review was issued on 20 November 2012. An OFT press release identified concerns throughout the payday loan industry which included inadequacy of borrower checks, the proportion of loans not paid on time, the frequency of roll overs or refinancing, the lack of forbearance and unfair debt collection practices.

67. A "Debt Collection Guidance" was published the same day emphasising fairness of treatment, transparency, forbearance and consideration and proportionality. There was also reference to CPA guidance. To the need for a reasonable and proportionate use of CPAs and the need to have regard to the borrower's financial position. It set out minimum standards with examples of unfair/improper uses of CPAs including: their use without "informed consent" or in ways not agreed; taking payment when where was reason to believe an account held insufficient funds; and using them for an unreasonable period after a scheduled payment was due. It was expressly stated in a press release by the OFT that breach of the Guidance could lead to enforcement action. There could be no doubt to any of the payday lending industry businesses that the manner of use and reliance upon CPAs was an issue.

68. Mr Keeble's recollection is set out in his witness statement as follows:

> *"It was around this time that the OFT started to investigate the use of continuous payment authorities ("CPAs"). The OFT talked to banks that offer CPAs and asked them to tighten up their policies and procedures around who they would allow to use the CPA facility. The CPA facilities had worked previously in such a way that once a customer had provided their card details somebody with a merchant services account could use those details in the future without getting the details again from the customer.*
>
> *1t was explained to us that if we did not comply with the rules that the OFT had put in place with the banks (in our case Barclays and FDMS) then the banks would have revoked our merchant services facilities. This would have been a disaster and the business would effectively have been over in a month or our consumer credit license revoked because we used our merchant services facilities to draw down money to repay the loans. As a matter of fact we did comply with the OFT recommendations and did not have our merchant services facility revoked."*

69. This certainly presents Mr Keeble's recollection and understanding as being that it was from about 20 November 2012 that he and the industry appreciated the need to examine and potentially change their approach to CPAs. What is opaque from the evidence of the Secretary of State is the extent to which it is or could be said that CFO through Mr Keeble should have appreciated the problems identified within the Three Grounds relating to CPOs before that date.

70. CPAs were also a subject of an August 2012 "Ipsos MORI Report" commissioned for the OFT as part of their review. The failure to inform borrowers about the method(s) used to collect loan repayments being one of the matters to which attention was drawn.

71. The review's final report was issued on 06 March 2013. It painted a gloomy picture of the industry with a *"very poor compliance culture"* in a context of consumers with weak bargaining positions. Its significance for the purposes of the background to this claim is that all within the industry should have read it and should have appreciated the need to ensure, as a matter of urgency, that their respective businesses were placed in order to the extent that this criticism applied to them. It should have been noted that

it was expressly stated that borrowers who could not afford to repay their loan could instruct their bank or card provider to stop the payment being taken. This was expressed in the context of an appreciation that lending was often subject to a CPA (continuous payment authority). The emphasis was upon protection of the borrower.

72. The report also emphasised the importance of pre-contractual explanations (applying to each agreement and each modification), pre-lending assessments of affordability and to operating licences only being given to and retained by those fit to hold them having regard in particular to matters such as (amongst others): compliance with legislation; not engaging in practices the OFT considered *"deceitful or oppressive, or otherwise unfair or improper, whether unlawful or not"*; having personnel with the necessary skill knowledge and experience; and adopting appropriate practices and procedures. It drew attention to the guidance addressing how the OFT would determine fitness to hold a licence including the *"Irresponsible Lending Guidance"* (published March 2010 and updated in February 2011) and the "Debt Collection Guidance" (published July 2003 and updated in 2011 and November 2012).

73. It should have been apparent from the review and the guidance publications that a payday lending company was not purely concerned with its own interests of lending, repayment and debt recovery. It needed within the legislative, regulatory and guidance framework to apply its business and aim for profit within a business model that takes into consideration at all stages the particular circumstances of each potential and existing borrower. Its directors and managers needed to ensure that the company operated within that framework and that its model meets those requirements. The fact of the OFT Review and its reports emphasises the need to review whether this was occurring in the context of an industry where it appeared many businesses were failing to comply with this ethos as required.

74. It is reasonable to conclude that the industry was expected to change from one which was lax in its dealings to one which appreciated that its customers were likely to be financially vulnerable and that those who were should be protected not taken advantage of. Mr Keeble accepted in evidence that he would have read the report.

75. The position set out in the final report and in the guidelines as referred to above was effectively reiterated, specifically for CFO in a letter of warning from the OFT, addressed to Mr Keeble, dated 26 March 2013. Its Annex "A" set out specific concerns that had arisen during the visit to CFO and as a result of other investigations relevant to CFO's fitness to hold a licence. The OFT's view being that those matters indicated that CFO may not be complying fully with their guidance for creditors and other relevant law and guidance. It was stated that action was needed by CFO to address any matters highlighted within the Final Report with specific reference to the Annex "A" matters and within twelve weeks an audit report should be submitted to demonstrate the implementation of necessary changes to ensure compliance. Failure to comply would be a matter relevant to the fitness of CFO to continue holding a licence. The fact that a practice was not mentioned in the Annex did not mean it had been approved.

76. Annex "A" addressed amongst other matters:

    a) Implementation of the requirement of fair practice to ensure the documentation and the adequate explanation of a CPA included reference to: what it is and how it

works, how it will be applied and can be cancelled, the consequences of insufficient funds, the frequency of further attempts to collect payment and whether part payment would be sought. It was asserted that CFO's *"Adequate explanation of our credit offering"* and its F&Qs on the website failed to contain an explanation of the CPA or of its use (which could be in CFA's case up to 5-6 times a day) or of its potential adverse consequences for the debtor. In addition there was a failure to give any explanation about how to cancel the CPA.

b) Forbearance and debt collection with clear, effective and appropriate policies was required together with avoidance of the unfair business practice of misusing the CPA outside the terms of the credit agreement or without the informed consent of the debtor/relevant third party and/or by using the CPA unreasonably or disproportionately or excessively. In particular by failing to have proper regard to the fact that a debtor was in financial difficulty and the consequent need for forbearance. It was asserted that: complaints evidenced misuse by CFO. For example, by debiting bank accounts up to five or six times a day and leaving consumers with insufficient funds to pay priority bills. This was described as contrary to the stated policy of not making more than three attempts to collect payment. It was also noted that there were inconsistencies between policy and practice by not following the policy. An absence of pre-contractual explanations in breach of the requirements of ***s.55 CCA*** was referred to (amongst other matters).

77. Plainly this letter placed Mr Keeble on notice of the problems identified and it is fair to conclude that they effectively covered only one of the Three Grounds' problems. Namely, the use of CPAs including the frequency of attempts to obtain payment. As to that Ground, excessive use of CPAs, receipt of Annexe "A" meant that he as a director was responsible for ensuring an appropriate reaction. Insofar as the problems were accepted, to take steps to resolve them. Insofar as they were in issue, to raise that issue with the OFT. What is less clear from the evidence of the Secretary of State is the nature of the claim before this letter except in the broadest state that any problems which existed must be due to his actions or omissions as a director. There is no allegation concerning his responsibility or reference to any action or omission demonstrating non-compliance with his duties and obligations.

78. Mr Keeble explained that these requirements were discussed with Quick Decision Marketing Ltd ("QDM") as experts and that CFO retained Deemar (UK) Limited to produce an independent expert's audit dated 17-18 June 2013. The audit results were required by the OFT by 29 June 2013. The audit's "Solution & Notes" to the matters specifically identified above are (in summary):

a) As to the pre-contract information/adequate explanations and the CPA: An explanation, information concerning cancellation and as to how the CPA is used *"is covered on Adequate Explanations"* and the F&S's section of the website: Cfolending.com and paydayfirst.co.uk as of 12 June 2013.

b) As to the misuse of the CPA: An explanation or policy and practice including the right of cancellation as copied into the report appears on the website as of 12 June 2013 within the "*Adequate Explanation"* and as of 12 June 2013 within the F&Qs. In summary: payment will be collected on the due date in accordance with the

> credit agreement; if collection is unsuccessful attempt will be made to contact and to exercise forbearance by considering alternative repayment plans will be considered; the CPA will be used if there is no contact for up to four attempts up to the end of the working day after the repayment date; non-payment will lead to a 2 working days collection suspension with continued attempts to contact; followed by the discretion to continue to use the CPA until payment is received, alternative repayment agreed or 65 days have elapsed since the original repayment date.

79. Mr Keeble in his witness statement observes that *"the report demonstrates that I took compliance with both the spirit and the letter of the law seriously and utilised appropriate professional services to ensure that we were being compliant"*. He also says that CFO :

> *"started to outsource all aspects of our compliance to them. This included work on maintaining the necessary books and records, controlling new updates from the OFT and so forth. A formal engagement was made with Deemar (UK) before the first OFT review although I cannot recall with certainty when I believe it was some 6 to 12 months before the first OFT review. The nature of our arrangement with them is that we would pay for a certain number of hours every week and as the requirement for more assistance grew we increased the number of hours paid for."*

80. By email sent to Mr Keeble on 29 August 2013, the OFT stated that it was not enough to assert that changes had been made to meet the 26 March 2013 letter's concerns. In a letter 4 September 2013 the OFT asked for evidence in of compliance by the sending of screen shots of the application process and of a credit agreement with a new loan and rollover.

81. These were provided in a response to the letter received by the OFT on 4 September 2013 and it was explained or emphasised that Deemar (UK) Limited provided an independent report. A further email from the OFT for some more information was sent on 1 October 2013. No response has been identified but presumably that is because nothing is said to turn on it.

82. By letter dated 19 March 2014, addressed to Mr Keeble, CFO was informed by the OFT that the information gathered in respect of it would be transferred to the FCA, who would supersede it as regulator. However, it is to be observed that the OFT appears to have had nothing further to say to CFO following the supply of further information. On the face of it there was nothing to suggest to CFO that the Deemar (UK) Limited independent report together with the further information supplied had not satisfied the OFT's concerns. Indeed, Mr Keeble's recollection in his witness statement is that a "local OFT officer" had visited CFO and confirmed that the changes required had been implemented.

83. On 1 April 2014 the FCA took over the OFT's regulatory role for the "£200 billion" consumer credit industry with research apparently showing that nine million people were in serious debt and 1.8 million "in denial" (as quoted from a 1 April 2014 press release). The FCA prior to assuming their new responsibilities decided to carry out an *"in-depth thematic review"* of payday and high cost short term lenders concerning their debt collection, management of borrowers and forbearance. This was announced on 12 March 2014 and its aim, as stated in the press release, would be to tackle poor practice. Colloquially it was added that there would be no place in an *"FCA-regulated consumer credit market for payday lenders that only care about making a fast buck"*.

Whilst this may be viewed as an emotive, press statement, it continues the underlying theme that companies operating in this business needed to consider the particular circumstances of each potential and existing borrower. It also supports Mr Keeble's assessment that the FCA were adopting a tougher stance than the OFT had previously.

84. The FCA produced a "Handbook and Guidance" to assist regulated firms follow the "detailed" consumer credit rules it had published, as notified to Mr Keeble by the OFT in the same letter dated 19 March. The letter informed CFO that it was expected to *"review its policies and to ensure compliance with these rules as appropriate"*.

85. An issue which arose during the trial was whether Mr Keeble was correct to state that the FCA was taking a new and far more stringent approach to the pay day loan sector than had been experienced under the auspices of the OFT. The Secretary of State's position was that there was no significant change between the approach of the two bodies. Mr Keeble observes in his witness statement:

> *"It should also be borne in mind that as the interview was part of a thematic review it was inevitable that the review would identify areas where changes were needed. In fact it was this review which culminated in the 2015 Payday Loan Regulations."*

86. No firm conclusion can be reached simply because the issue could not be subject to sufficient scrutiny in the time available. However, the press release, the existence of new rules and the need to review are all facts which support Mr Keeble's evidence of his impression and understanding at the time. This is endorsed by the following within the press release and overall it seems to me there is a clear impression of a more rigorous approach by the FCA seeking to reform the consumer credit industry in the context of national debt problems which have arisen in the context of a proliferation of borrowing options:

> *"Consumer credit providers will need to ensure that they give customers the right information to make informed choices, that their services meet consumer needs, and that people in difficulty are treated fairly. The biggest changes come for payday lenders and debt management companies, including: limiting the number of loan roll-overs to two; restricting (to two) the number of times a firm can seek repayment using a continuous payment authority (CPA); a requirement to provide information to customers on how to get free debt advice; requiring debt management firms to pass on more money to creditors from day one of a debt management plan, and to protect client money"*.

87. Reference was made to the Handbook and Guidance during the trial but time precluded any in depth consideration. Attention was drawn to the requirements of *"suitability"* for licence holders within a *"fit and proper person"* test. These included compliance with FCA requirements and requests for information and that those who manage the licence holder/applicant had *"adequate skills and experience and [to] act with probity"*.

88. Mr Keeble was interviewed by the FCA on 17 June 2014 as part of the thematic review. It is to be noted that this occurred in the context of CFO having stopped providing pay day loans from 19 May 2014. This was attributed to them no longer being profitable due to costs and to difficulties finding "good" customers.

89. The interview notes do not suggest that the interview was for the purpose of collecting information that might be used in future proceedings. It was a fact finding exercise for the purposes of the review. Nothing specific turns on this and it has not featured in

submissions. However, it is to be borne in mind that Mr Keeble would not have been on notice that he needed to present information to justify his management of CFO.

90. Mr Keeble explained he was responsible for day to day running of the business strategy. He said he *"signs off everything"* and compliance functions and collections strategy were his responsibility. The team he relied upon to assist his performance of his duties included: Mr David Foskett, who oversaw financial areas as the finance director; Mr Ryan Derrick, who was responsible for dealing with operational aspects of the business, "KPI" generation and associated "MI"; Ms Emma Martin, who had a compliance role; Mr Peter Saunders, who was relied upon for his debt collection experience within the industry; Mr Richard Darlington, who was also concerned with compliance and ensured changes in the regulatory landscape. Most of the interview concerned the collections strategy but Mr Keeble was recorded in the notes as having stated (amongst other matters – my underlining for emphasis):

> *a) "His challenge, as CEO, was to balance compliance (and its associated cost) with risk and reward. Indeed, the challenge for small businesses generally is to ensure that the CEO obtains sufficient information to allow him/her to understand how the business is run and whether they are happy with it."*
> *b) "Where new regulations were introduced it drove action by himself, as CEO, to instruct his management team ('foot-soldiers') who would in turn instruct the front-line staff. He confirmed that CFO had not responded to the FCA consultation regarding the new rules but that they did work with their trade body (CCTA). He would obtain updates regarding regulatory changes from the FCA website (alerts), the trade body, David Foskett (CFO) and Richard Darlington."*
> *c) Richard Darlington was in the business for two days per week. He undertook file checking for Equifinance, spot checking of existing QA results and also advised as to compliance changes needed and their implementation … [His] day to day compliance work … was not 'squeezed-out' by the bigger issues, such as the FCA visit."*
> *d) "Strategic reviews were not undertaken by the firm as issues and problems were spotted on a weekly basis. An example - after prompting - was the potential action arising from seeing systemic DPA issues. [He] confirmed that while QA of the agents was undertaken by the team leaders this was not checked by Emma Martin, i.e. while she would check that the QA check had been completed she would not check the results."*
> *e) " … borrowers were contacted through a number of channels (phone, voicemail, letters, emails and SMS)."*
> *f) "The senior management team in place were very good and [he] cited the appointment of David Foskett that followed a rigorous interview process. He cited the experience of Ryan Derrick who had been with the firm from the beginning. He confirmed that the senior team were all monitored and reported on that that there were no significant gaps in expertise.*
> *g) Complaints were a key driver for the lender when identifying changes required. CPA had been a key complaints driver (no longer used) but not the long term collections area.*
> *h) Staffing levels were reviewed regularly in light of performance measures …."*

91. Mr Keeble also addressed the future intentions for CFO's business and the *"significant changes to [its] business model"*. The ending of payday lending had meant:

> *"the dissolution of the CF01 department and its bespoke software solution (incl. customer services, loan enquiries, new lending and early arrears) and the subsequent reduction in IT support and the shift of all outstanding loans into CF02 (long term arrears).*
>
> *His aim and personal objective [was] to develop a Financial Services firm with multiple products. There had been a need to reconsider delivery of this in light of increased regulation*

> *but the aim remained the same. He stated a preference for on-line business models and confirmed that the sale of the business was an option but not part of the short to medium term strategy. He stated that he liked the idea of expanding into brokerage when the market picks up….*
>
> *A future in consumer credit was sought - through the guarantor [loan] product - so a key consideration for [CFO and its investors] was that poor treatment of borrowers in payday may adversely impact their guarantor loan customer base in the future …. also stated that a negative (or harder) approach to borrowers in collections led to worse longer term collection results, i.e. he recognised the balance between greater customer numbers paying less over a longer payment term compared with fewer borrowers paying more over a shorter term. He indicated that CFO was collecting out the payday book slowly with a view to rehabilitating those customers as potential guarantor loan borrowers - this, and collecting against bad debts were the twin drivers of the current approach …*
>
> *While he did not have a good personal understanding of the customer profile the lending undertaken by the business had provided it with an understanding of its customer's circumstances and the consequent need for a longer term debt collection solution. Payment arrangements vary between 12 and 40 months in duration. He confirmed that the Head of Collections (Pete Saunders) would be able to provide further information on their approach to income and expenditure and agent mandates, and that the firm would spot any agents acting outside of these. He confirmed that collections agents would go through an induction programme.*
>
> *CFO had never litigated as this was too expensive and that the freelance team (within CF02) were an elite group of collectors ('on a pedestal') that showed how things could be done. They were involved in training new staff. There was no less management oversight or control for this team and no additional incentivisation compared to the other collectors within CFO2 and CF01.*
>
> *… the Ioweya.com website and stated that this had briefly been used as a marketing/lead generation website by the lender. The site would generate leads that would be fed into the CFO Lending payday product subject to the usual checks. He stated that the site did not offer loans directly, and that customers fed through to the CFO platform were subject to a phone call as part of the underwriting process. There was not an automatic process of submitting these customers for CFO loan applications - in order to manage down the costs of credit scoring, all new apps (through any website) would be manually reviewed to screen out obvious declines before the credit scoring phase.*
>
> *He noted the increased focus on collections given this was the single remaining area. He confirmed that Pete Saunders had been brought in due to his collections expertise and that tracing was being used. Tracing was undertaken through Callcredit and Experian and was on a pay by results basis, i.e. the lender would make a decision regarding whether to purchase leads on the basis of successful matches. The tracing strategy was being reviewed and evaluated as it was in a very early stage - the first batch of tracing results was on 2012 loans."*

92. Mr Keeble's reliance upon senior management came under considerable scrutiny during cross-examination. However, in regard to compliance his position throughout was to accept his responsibility. For example saying (as my note records): *"I accept as director it was my obligation to ensure CFO complied with its licence"* and that this *"need[ed] oversight and monitoring, taking advice was not sufficient"*.

93. Mr Keeble explained that until 2013 he relied heavily on the advice of Mr Cook, a director of QDM, who had a wealth of consumer lending experience. I accept Mr Keeble's evidence that there will have been regular meetings, that Mr Cook will have had an important influence upon him and that it was prudent or Mr Keeble to ensure

he had such advice available. Mr Keeble's affidavit also explains that CFO obtained guidance from QDM (i.e. Mr Cook) to ensure from incorporation up until the end of 2013 that the Company's systems, documents and processed were compliant with the relevant regulatory requirements. I accept that evidence, although recognising its generality.

94. Mr Keeble said in the witness box that Mr Darlington became involved for the purposes of the independent audit. Mr Keeble accepted that Mr Darlington had no monitoring role but said that he put policies into place and procedures to be delegated down to employees to implement. Whilst there was some confusion concerning his role during cross-examination, I accept Mr Keeble's evidence that he provided assistance with regulatory requirements some two days a week.

95. In reaching that decision I have borne in mind the notes of Mr Darlington's interview with the FCA in which it is recorded that he described his role as *"minimal"* with an inclination *"not to get involved"*. On the other hand he also stated that he reported to Mr Keeble, Mr Foskett and also occasionally works with Ms Marin and Mr Derrick. That does not suggest "minimal" and nor does the quantum of his invoices, although neither side took me to their content.

96. It is also to be borne in mind that whilst Mr Keeble's evidence was under oath and tested by rigorous cross-examination, the Secretary of State chose not to call Mr Darlington. That is not a criticism but it leads to the point that what he said in interview in different surroundings and context was not tested. That is significant in itself but that significance increases when it is to be remembered that Mr Darlington will inevitably (i.e. also not a criticism) have been cautious when addressing the FCA to ensure that he was not thought to be "mixed up" with any deficiencies of CFO to the detriment of his own business[es].

97. That is also relevant when addressing his statements to the effect that: (i) whilst CFO had made changes in the light of the OFT's investigations and in preparation for the FCA's visit, including improving the capture of data more accurately within CFO1 and putting *"call monitoring in place"*, and the number of complaints had reduced, more robust systems were required to ensure the different departments were more unified; (ii) he believed there was inadequate communication between managers and that compliance was not carried out; and (iii) that although he had provided policy templates and he thought some vulnerability training had been provided, CFO's systems, controls and policies could be much more robust; (iv) although employees were aware of forbearance, there were no established policies or adequate training; (v) although CFO1 provided "tangible monitoring systems" which was *"adequate"*, it was *"quite basic"* and more could be implemented.

98. Mr Darlington's absence as a witness meant none of this could be tested, the detail could not be addressed and Mr Keeble did not have the opportunity, for example, to obtain more favourable evidence by challenging these statements through Mr Ascroft. In addition, it is to be noted that those statements do not address such matters from the perspective of Mr Keeble's responsibilities and do not refer to any matters which he personally omitted to implement or implemented but should not have failed.

99. Mr Keeble's evidence also refers to Ms Emma Martin having a compliance role. Whilst she had worked for CFO for a number of years, she was a recent appointee in

the area of compliance at the time of the interview and had little experience. This in itself does not matter, of course. People have to start somewhere but it meant his reliance upon her would have to be carefully managed. Nevertheless nothing actually turns upon this because there is no suggestion that the defence includes specific reliance upon her advice or actions.

100. Mr Keeble also relies upon the appointment of Mr Rahman as a director between 08 September 2011 to 08 January 2013. He does not suggest Mr Rahman was directly concerned with compliance subject to his overall management responsibilities. Mr Rahman was a chartered accountant and his delegated function was as the financial director. Whilst there is a lack of detail, based upon his qualifications and position I accept that he would have been concerned (subject to appropriate delegation) with ensuring that CFO's financial records complied with the requirements of ***the Companies Act 2006*** and that, as part of such role, he would have addressed reconciliations of individual customer's accounts. Mr Keeble's evidence to that effect also included acceptance of the fact that he did not know how such reconciliations were conducted. That is understandable bearing in mind delegation. It is also to be noted that Mr Keeble was not on the bank mandate and did not have access to the bank accounts. This indicates the extent of delegation of day to day financial affairs.

101. Mr Miller was described by Mr Keeble as the person responsible for setting up the bespoke CFO1. He was engaged with a share package because he had a significant amount of knowledge about the system's requirements and concerning its future expansion having previously worked on the system for Payday UK. Mr Keeble's witness statement explains: *"Mr Miller was in charge of the construction and functionality of the customer relationship management system ("CRM") which recorded payments interlaced with the accounts system in order to show customer balances. The system was also integrated with the payment service provider which was used to collect money from customers. As matters transpired Mr Miller's work was not successful and the system failed which led to his termination."*

102. During cross-examination Mr Keeble also referred to the long standing involvement and assistance of Mr Ryan Derrick. However, he did not have any responsibility for compliance.

103. Mr Smith was described by Mr Keeble as having provided the investment and managed the investment on a day to day basis. It became clear during cross-examination that this concerned the funds required for lending and, as such, did not affect the day to day running of the business in the context of this claim. He was, however, the main shareholder and it is plain that he will have kept a close eye on the business and have been looked to by the younger Mr Keeble when required. Nevertheless, his role also did not feature within the context of the claim.

104. Returning to the chronology, between June and August 2014 there were FCA visits and correspondence, a request for information dated 18 July and a letter dated 23 July from the FCA expressing the concern that "*the management at CFO does not appear to understand the issues that we have outlined, which we consider to be very serious and potential breaches of our rules"*. The letter, which requested further information in answer to specific questions and also documents to be produced by 28 July 2014, drew attention to the:

> *"concern that customers' bank details appear to have been automatically used for CPA purposes when a customer applied for a new loan or new credit via CFO's affiliated websites (by this we mean loweya.com, Capital Finance One and those others listed in response to our question 5) without full disclosure and without seeking the informed consent of the customer. It is of further significant concern that there is no acknowledgement or recognition by the firm that there may be breaches. We have instead been told there was a contractual right to take payments in this way but no evidence of such a contractual right has been provided and there is no apparent understanding that in any event any such contract may be in breach of regulatory obligations. In addition, despite our questions, we are still not clear whether the practices have been stopped (although we have been told that the Caseflow system functionality to update bank details automatically is no longer available)".*

105. That evidence needs to be treated with some care to the extent that it includes untested opinion evidence in the early stages of the FCA's investigation. For example, the contractual terms were provided and, therefore, a new opinion would have to be formed. However, it presents (for the first time) the first of the Three Grounds. I will refer to Mr Keeble's evidence later having referred to other contemporaneous sources which addressed the problem.

106. On 1 August 2014 the FCA informed CFO that a "Skilled Person" would be appointed under s166 of FSMA (as amended by the 2012 Act). The circumstances in which this occurred are quoted by Mr North from a "Requirement Notice" as follows:

> *"Until 19 May 2014, the firm provided online payday loans to customers. Loans ranged from £75 - £600 with an interest rate of 36% per month, which is equivalent to 432% per year. Although the firm has ceased offering payday loans, it continues to collect the outstanding debts on loans it has previously issued. The firm currently estimates that it has 80,366 accounts with balances outstanding. The value of these accounts is estimated at approximately £37 million. Information obtained by the FCA about CFO prior to and during a visit conducted between 17 and 19 June 2014, and subsequent visits on 26 June 2014 and 3 July 2014, has given rise to serious concerns in relation to CFO's debt collection practices...."*

107. CFO was informed on 1 August 2014 that a report from the Skilled Person was required because of the concerns resulting from visits on 26 June and 3 July 2014 and:

> *"in relation to CFO's debt collection practices. In particular, a system error has occurred at CFO which has resulted in some customers' outstanding balances on their loans being incorrectly inflated. Hence, CFO cannot be certain that the outstanding amounts it has previously and is currently seeking to recover from its payday loan customers are actually correct. A preliminary investigation by the firm indicates that out of 91,053 accounts which have potentially been subject to overcharging, 4,764 accounts were actually overcharged (although only 98 of these customers have actually overpaid on their outstanding balances). These overpayments by customers are estimated by the firm to be in total approximately £8,800 (excluding any additional compensatory payments which CFO may need/wish to make).*
>
> *In addition, the FCA has concerns about CFO's debt collection practices and procedures and whether the firm is treating its customers fairly. For example, CFO's training and guidance materials relating to debt collection prioritise collection of monies owed over fair treatment of its customers, particularly those who are or may be vulnerable. CFO has also used communications to customers asking for repayment of outstanding debts which could be perceived as threatening or pressurising in order to encourage customers to make payments regardless of their current financial circumstances. CFO's training and guidance materials direct staff to encourage customers to further extend their indebtedness elsewhere in order to make a payment against outstanding balances with the firm. Additionally, the FCA has*

> *concerns about CFO's staff incentive schemes, including that they may incentivise staff to prioritise repayment of debts over treating the firm's customers fairly."*

108. It is to be noted first that the basis for the report concerning debt collection practices is described as a "system error", which presents the question: if that is so, why Mr Keeble should bear responsibility in the context of a disqualification claim? Second, that the concerns in the second paragraph are not relied upon for this claim.

109. The report to be produced would cover: Workstream 1 – a review of the firm's collections policies and procedures, management controls and governance procedures; Workstream 2 — a system error redress exercise; Workstream 3 — to concern ongoing inbound call monitoring; and Workstream 4 – to address collection, retention and use of customers' banking information.

110. In a "Voluntary Application for Imposition Requirement" document signed 12 August 2014, CFO asked the FCA to impose requirements on its licence permission including the appointment of the skilled person, the suspension of all outbound debt collection activities and the introduction of a consumer redress scheme based upon the following facts and matters from which two of the Three Grounds derive (amongst others referred to):

> "1.2 … *the FCA is concerned that CFO has potentially misused banking information provided by customers, including via affiliated websites, to repay outstanding debts of existing CFO customers who are in arrears.*
>
> *1.3 There have also been systems errors relating to the automatic calculation of customers' balances, where the inputs to these calculations (such as fees, balance adjustments or the period of time used to calculate Interest) have not been consistently applied - this has resulted In some customers' outstanding balances on their loans being Incorrect.*
>
> *1.4 In addition, the FCA has concerns that CFO's communications to customers, as well as its training and guidance materials relating to debt collection and its staff incentive schemes, are not compliant with the FCA's requirements and expectations, in that they prioritise collection of monies owed over fair treatment of its customers, particularly those who are or may be vulnerable."*

111. A visit to CFO's premises on 14 August 2014 by the FCA included a review of 20 customer files ("the 20 Files") and resulted in the conclusion that CPAs had been excessively used in 40% of the cases. Mr North's witness statement sets out a table of findings including, for example: (i) that between 24 June 2011 to 30 May 2012 there were 191 CPAs attempted for one borrower in respect of a loan of £863.48 including interest/charges; and (ii) that 999 CPA attempts were made between 29 June 2012 to 13 June 2014 for one borrower's loan of £201.55 including interest/charges. The concern being that this evidenced a failure to comply with the Irresponsible Lending Guidance with regard to forbearance and was an improper practice.

112. There is an issue whether the 20 Files were an entirely random selection or selected only from files known to contain complaints. Mr Keeble was clear it was the latter and his evidence made sense. I accept it and note that Mr Slavin appeared to accept (or at least not to dispute) it too during his cross-examination. It is also to be noted

that Mr Slavin accepted that the sample was too small to be statistically reliable. These facts and matters lead to the conclusion that the results should not be treated as representative of CFO's dealings outside the context of the 20 Files.

113. CFO carried out an internal review concerning the allegation of misused banking information. A document ("the CFO August Report") dated 20 August 2014 was produced, entitled "CFO Internal Investigation: Use of Customer Card Details in Payday Loans INTERNAL WORKING DRAFT" (the copy in the bundle being marked "Private & Confidential – Draft Not for Circulation" but no issue arose from at trial). The CFO August Report records that it was produced to provide CFO's response to questions asked by the FCA in an Information Request dated 23 July 2014. It appears to have been the work of Mr Ryan overseen by Mr Keeble. It was intended to be finalised before the Hogan Lovells "Skilled Person" review was carried out or completed.

114. The following explanation within Section B is to be noted (my underlining for emphasis):

> *"1.1 In July/August 2014, the management of CFO following meetings with the FCA as part of its high-cost, short-term credit thematic review and the review by CFO of its systems and data (including complaints data) in response to the S165 Information Requests, identified that there was a lack of clarity around CFO's use of Customer Card Details and its use of CPAs.*
>
> *1.2 In August 2014, CFO indicated to the FCA that it wished to investigate the abovementioned matters to identify whether there had been any breaches of contractual and/or regulatory obligations applicable at the relevant time and, in addition, whether there had been any adverse impact on CFO Payday Customers as a result. CFO proposed that the results of the investigation be reviewed by the Skilled Person...".*

115. It appears from that quotation that the existence of problems identified by the description "lack of clarity" had not been appreciated by management before July/August 2014. The Report addresses the various web sites used by CFO and explains how card details provided upon a new loan application would automatically be updated to a customer's file on the CFO1 system (until 13 June 2014) but not the Caeflow system that had run alongside it since 15 August 2011 if the applicant was already an existing borrower. It explains they would be stored as new card details but may be identical to the card details already held. It is stated that *"the CF01 System would then attempt recovery of that customer's outstanding balance by exercising CPAs using the Updated Customer Card Details"*.

116. The report sets out CFO's position that this was a contractual entitlement and that (my underling for emphasis):

> *5.2. It was usual practice (although not documented in CFO's written procedures nor recorded in its systems other than occasionally in account notes) to contact CFO Payday Customers by telephone prior to the exercise of CPA using Updated Customer Card Details. These communications would have been undertaken by CFOI System's customer service department which would have confirmed to the CFO Payday Customer that, due to the outstanding balance with CFO, their new Payday Loan Application had been declined and*

> *that the Updated Customer Card Details would be used in respect of the collection of the outstanding balance.*
>
> *5.3. In the event that contact was not successful with the customer, the Updated Customer Card Details would still have been used in respect of the exercise of the CPA.*
>
> *Conclusion*
>
> *The CPAs [stored in the CFO1 system as a result of the new application] were exercised whether prior contact had been made with the relevant CFO Payday Customer or not. It was CFO's policy that attempts to contact the customer should have been made. There are no comprehensive records of the attempts to make contact with those customers or whether the attempts were successful or not.*

117. Section H of the CFO August Report records the following preliminary results:

> *"2.1 Based on the analysis undertaken (as described above), CFO has identified that 6,187 CFO Payday Customers supplied Customer Card Details as part of Applications to Affiliate Websites (as described in Section A) or following Lead Provider Application described in Section B, which were then subject to the successful use of CPAs by CFO for the purpose of recovering outstanding balances on that customer's existing loan ("Affected Customers').*
>
> *2.2 There are 6,395 card tokens which have been used in respect of the Affected Customers."*

118. Emma Martin, who joined CFO at the beginning of 2012, referred to CPAs during her interview in June 2014 with the FCA. She explained that issues with a borrower's debit would lead to it being stopped and appears to identify cancellation issues as the main problem. However, she also (as the note reads, my underlining for emphasis):

> *"acknowledged that there had been circumstances of mis-use of card details for example a third party offering to pay off the debt and their card details then being used to pay off subsequent loans ... these incidents had been down to an agent problem where the agent did not deal with the third party details properly and had failed to make sufficient notes of the customer's situation on the system. The third party card details should have been deleted after use as the system will attempt payment from the last known card".*

119. Mr Pete Saunders, Head of Collections (who reported to Mr Foskett, who reported to Mr Keeble) during his June interview with the FCA also (although it is less easy to follow) appeared to confirm the policy and usual practice of the Caseflow system only operating CPAs after the borrower had been contacted and asked how they wanted to "pay an arrangement" and if they "wanted to pay using CPA, they could". He described the most common complaints as concerning interest and charges.

120. On 31 October 2014 CFO also produced a working draft of its "CFO Internal Investigation: Accuracy of customer balances outstanding loans on Caseflow" report. It recorded that it was produced as a result of the customer account balance errors that came to light in April 2014 whilst the CFO1 system was being decommissioned. This is consistent with the information provided by Mr Pete Saunders during his June interview. He mentioned (amongst other matters) the fact that the balance systems error had only been spotted a couple of months before the interview "due to there being nothing to spot". Obviously, as with all interviewees, account must be taken of

the fact that this was an unapproved record, the information was given in different circumstances to evidence adduced at trial and it was not tested by cross-examination.

121. Mr Keeble oversaw the resulting investigation by Mr Derrick. It provided an in depth assessment of the problems and consequences based upon systems defaults including configuration issues. It explained within an investigation covering 96,927 customers who had Caseflow accounts with defaulted loans outstanding or settled during 15 August 2012 – 13 June 2014:

> *"The issue first identified was that late charges were not being applied in line with CFO Lending's charging structure (Charging Structure}. On further investigation it also became apparent that an Interest Accrual (name of "due type" used in Caseflow) added by Caseflow was based on a calculation that could have led to customers being undercharged or overcharged contrary to the terms of their Credit Agreements and the Charging Structure".*

122. Based on recalculations the diagnosis can be summarised as system errors concerning (amongst other matters): (i) an incorrect automatic interest charge; (ii) incorrect starting balances for a sub-section of the accounts; (iii) migration issues when information was transferred from the old to the new systems. Their causes were detailed within section 6 ("Root Cause Analysis") of CFO's report and may fairly be described as "technical". The report ended with a number of detailed steps proposed to address the identified issues. It is very difficult to understand in the light of its findings how the system errors can be suggested to be attributable to Mr Keeble's acts or omissions as a director. No such acts or omissions have been identified within the claim to assist.

123. The recorded results of the investigation were:

4.2.1 Total Accounts Investigated: 98,561

4.2.2 Total number of customer accounts in Caseflow: 96,927

4.2.3 Total number of customer accounts with an outstanding balance: 81,477

4.2.4 Total outstanding balances on all customer accounts with an outstanding balance: £58,430,296.91

4.2.5 Total number of customer accounts undercharged: 59,676 (c) Total amount by which the customers were undercharged: £17,785,802.70

Average amount undercharged per customer account: £298.04

Range of amounts undercharged: Lowest: £0.01 Highest: £5,397.83

4.2.6 Total number of customer accounts charged correctly: 20,090

4.2.7 Total number of customer accounts overcharged (including overpaid): 18,795

(a) Total amount by which the customers were overcharged: £5,873,558.30

(b) Average amount overcharged per customer account: £312.50

(c) Range of amounts overcharged: Lowest: £0.01, Highest: £2,703.72

4.2.8 Total number of customer accounts overcharged and overpaid: 1,667

a) Total amount by which the customers were overcharged and overpaid: £183,578.51

b) Average amount overcharged and overpaid per customer account: £110.12

(c) Range: Lowest: £0.01, Highest: £1,861.06.

124. Those results would be (in part) referenced in the "Skilled Persons Workstream Reports" . The reports do not assert incompetence by Mr Keeble and there is no suggestion that Mr Keeble should have ensured practices or procedures which would have resulted in an earlier discovery of the problems or that he did not act properly and reasonably when they were discovered.

125. Hogan Lovells produced their "Skilled Persons Workstream Reports" in November 2014. The copy in the bundle is entitled "Draft". No explanation for this was provided but no point was taken by either side. It is lengthy and accordingly it is fair to observe that it was not addressed in great detail at the trial. This also followed from the fact that the authors were not witnesses and, therefore, their findings and conclusions were not tested. They were not asked to address the question whether their findings led to their opinion that Mr Keeble bore any responsibility by act or omission for the Three Grounds either within the reports or in evidence for the purposes of the claim.

126. The following appears in the "Summary" and needs to be drawn attention to for the benefit of Mr Keeble: (i) there was *"little evidence of regulatory or statutory breaches in CFO's policies, procedures and template correspondence"*, although changes are recommended; (ii) debt collection practices have presented *"a number of high-level recurring issues"*. In addition Mr Keeble drew attention to its conclusion that *"CFO's handling of inbound communications seems largely conc-compliant with CFO agents appearing sympathetic and exercising forbearance where appropriate. We did not hear any examples of agents acting unreasonably or threatening or harassing customers. Almost all offers of repayment were accepted"*.

127. The following are to also be noted from the main body of the report for Work Stream 1 largely) to CFO's credit and to Mr Keeble's benefit: (i) CFO has recently demonstrated an increased commitment to treating customers fairly ("TCF") and (although capable of improvement) has implemented a new policy for which all staff are trained and CFO is ensuring that TFC will be reflected in future collections, the training documents and policy evidencing a firm commitment; (ii) the collections policy is high level but recognises that balances are fixed because all accounts are currently in arrears; (iii) CFO has made *"genuine attempts"* to improve its CPA procedures to comply with the "CPAs: CONC Requirements" ("CONC") but the procedures need to be improved *"to reflect more clearly the particular circumstances of CFO and the fact that all debt collected is subject to forbearance"*; (iv) CFO has simplified its customer communications which are satisfactory; (v) customers appear to be contacted by telephone rather than by visits, there is a training document and no evidence of malpractice was identified; (vi) there is detailed data protection training and there are no regulatory issues; (vii) CFO's disputed debt policies and procedures are satisfactory except in the context of alleged fraud which requires improvement; (viii) there is no evidence of regulatory breaches when dealing with debt management companies but a written policy and training is required; (ix) the requirements of CONC are being met in respect of forbearance with *"CFO ... developing a general collections ethos with a strong focus on forbearance and TCF, demonstrated partially*

through written policies but largely through staff training materials and template correspondence"; (x) as part of forbearance, CFO regularly makes offers to repay as appears from its policies and training and in general the approach taken complies with the CONC regulations; (xi) CFO's new policy for CPAs *"appears to demonstrate that CFO will have adequate procedures in place to ensure it offers forbearance and due consideration, as required by CONC 7.3.4G "*; (xii) CFO needs written policies or procedures detailing how debt is enforced; (xiii) there is no clear evidence of any significant regulatory breaches in relation to how CFO intends to deal with customers it identifies as vulnerable but its Vulnerable Customer Policy and CPA Policy lack detail; (xiv) changes to the policy document for complaints handling are required but *"will simply reflect processes already in place at CFO"*; (xv) CFO's training regime has been *"radically overhauled"* and whilst there is still room for improvement there are no regulatory breaches competence; (xvi) CFO has sufficient mechanisms in place to identify regulatory breaches; and (xii) CFO has clear and effective record-keeping systems and appropriate management information is delivered to management enabling complaints and breaches once identified to be addressed.

128. The summary above is to be noted for the positive angles Hogan Lovells present indicating that management has attempted to comply with the various regulations by ensuring there are procedures drafted, training in place and application of the regulations. Plainly there is room for improvement but this is a proactive background to bear in mind when addressing Mr Keeble's conduct.

129. "Workstream 2" reviewed "systems errors" which resulted in incorrect reporting of customer balances. It referred to the findings of the CFO internal investigation and did not dispute the fact that the problems identified were attributable to systems error in particular when CFO changed over from the bespoke "CFO System" to an off the shelf "Caseflow" system introduced from 15 August 2012 to manage any loans in default by more than 33 consecutive days. They largely repeated the figures produced by the internal investigation: (i) 98,561 accounts were investigated; (ii) 81,477 accounts have outstanding balances; (iii) 59,676 accounts are classed by CFO as being 'undercharged'; (iv) 20,090 accounts were charged correctly; (v) 18,795 accounts are classed by CFO as being 'overcharged'; and (vi) 1,667 accounts were overcharged and overpaid.

130. The root causes for the errors recorded in the report as having been identified by CFO were: (i) interest accrual because it was not appreciated that late interest charges were not applied leading to undercharges and overcharging in certain roll over contexts; (ii) errors caused by manual adjustments resulting in late interest being charged for 91 not 90 days; (iii) the application of unintended compounding within accounts for which interest and charges had been removed for repayment purposes; and (iv) miscellaneous migration issues.

131. There was no suggestion that CFO ignored the problems once they became aware of them. Indeed, the impression given by the report is that the opposite is true with CFO having identified and sought to find solutions for the errors and their causes. For example, the reference to the use of recalculation spreadsheets for which the report's conclusion was one of confidence that the calculations were correct providing there was input of the correct figure. There was also a general but not complete confidence expressed within the report that the root causes had been identified.

132. Concern was expressed over the opportunity for mistakes when calculating the customers' balances because a calculation by reference to interest is used to produce the principal instead of taking the principal loan amount from the Caseflow System (known as "Reverse Engineering of Principal"). In addition concerns of undercharging arose because agreed repayment plans were not reflected in the spreadsheets CFO used to recalculate. Although, it appears CFO had reacted to this and corrected or sought to correct the position, Hogan Lovells addressed the steps to be taken when debt collection resumed including CFO's "Proposed Redress Paper". They made a number of additional recommendations. At no stage, however, did the report suggest that the problems resulted from the acts or omissions of Mr Keeble or that he was at fault with regard to the existence of the problems or for failing to ensure CFO took proper and reasonable steps once the problems were identified.

133. The third workstream was a review of inbound collections activities. A random selection of accounts was chosen and Hogan Lovells attended CFO's offices. They were given access to the Caseflow system and relevant telephone recordings, emails and income/expenditure details were provided for each account. They were held on USB drives and were not on the Caseflow system itself. Whilst there were information gaps, CFO provided further documentation and what remained missing was insignificant for review purposes. This section of the report need not be dwelt on because of the conclusion in favour of CFO that "CFO's handling of inbound communications seems largely CONC-compliant", although there were criticisms and recommendations were made. However, the existence of USB records ("the USB Records") is to be noted with regard to telephone conversation records for future reference.

134. Work Stream 4 reviewed CFO's collection, retention and use of customers' banking information. It considered complaints by customers who asserted they had not authorised use of their card details for the payment of extant loans when applying for a new loan. The report raised concern over the need for disclosure upon the relevant website that the application was being made to CFO when it used a trading name or when the application was received via an ancillary site. Hogan Lovells were of the view that the provision of the required information in a footer was insufficient to alert customers to the fact the application was to CFO. That the majority would have been unaware and, as a result, would not have appreciated access could be obtained to the card details submitted for a new application to pay the debt outstanding on an old loan.

135. As to the contractual right to retain the card data asserted by CFO, Hogan Lovells described the clause relied upon as *"highly vulnerable to fairness challenges"* and opined that it should not have been used to collect customer bank account details without their knowledge. It was also observed by Hogan Lovells that other forms of agreement did not contain that wording but simply stated:

> *"You grant us permission to debit the Total Amount Payable to the Account on the Payment Date."*

136. The report referred to the CFO August Report referring to *a "usual practice' of contacting customers before exercising the CPA using 'updated' card details"*. However, it was observed there was no written procedure of record of

communications. It appears, therefore, although not stated, that the USB records did not assist. The report observed:

> *"it is unclear whether CFO contacted customers to ask for consent to use the card details, or simply to inform them that the new details would be used. It also appears that updated card details were used where customers could not be contacted to ask for consent"*.

137. Hogan Lovells also stated (at "Workstream 4. Complaints Data") they had *"seen numerous complaints from customers suggesting that they did not consent"*.

138. Mr Keeble's evidence accepted that CFO would use card details obtained from new, web-site applications for payday loans to pay or try to obtain payment for existing debt. Those web-site may be CFO's using trade names or start with third party web-sites which (in summary) sent an applicant to a CFO web-site. The distinction does not matter for these purposes because the issues concern the CFO web-sites.

139. There was one web-site exception in that Mr Keeble also accepted that CFO's "Iowya" website operated for a short time without its name being specified in CFO's licence in breach of ***s.39(2) CCA***. This, he explained, was pure error and the site closed as soon as it was appreciated. However, whilst this fact is referred to in the Secretary of State's evidence it is not a specific ground of unfitness.

140. Mr Keeble when giving evidence did not accept that the web sites used failed to draw sufficient attention to the fact that the lender was CFO. Whilst the web-site banner would use a trade name, it was CFO's trade name and its ownership by CFO was clearly stated at the end of the page in accordance with company law. That was factually correct and the page complied with the requirements of ***the Companies Act 2006***. It is to be concluded as a fact that anyone who had properly read the application form would have understood that to be the case. In addition that this would occur in circumstances where a reasonable person could be expected to ask "who is [trade name]?" and, therefore, look for the answer on the web page. I do not consider that such an approach should be limited to those with sophisticated business knowledge. I also note Mr Keeble's evidence, which appears probable, that it is likely that returning applicants would have known CFO by its trade name in any event.

141. In reaching that finding I appreciate that this may appear to be at odds with the opinion of Hogan Lovells. Whilst not being able to test them with this as witnesses, I do not think it is. Their concern was whether those who were likely to be borrowers in need of payday loans, stressing "in need", would subjectively realise the lender was CFO. The issue being whether CFO should have appreciated in the context of their responsibilities as a payday lender applying the guidance of the OFT and/or requirements of the FCA that the footer was insufficient to alert customers. Whether it is fair for that issue to be raised within this claim and, if so, what conclusion should result is a matter to be considered when deciding unfitness. What cannot be asserted, however, is that objectively the web-sites did not identify CFO as the lender.

142. Mr Keeble also refuted the suggestion during cross-examination that the use of trade name web-sites was a ruse, purely to obtain the details since all applicants with outstanding, unpaid CFO loans would be refused their applications for a new loan. This is not part of the grounds for the claim but in any event I accept his denial. I found his explanation for the use of trade names in the witness box entirely plausible.

Namely that this occurred for advertising reasons because the name "CFO Lending" did not draw sufficient attention to its pay day lending in contrast with the trade names, such as "Payday First". In addition he drew attention to the fact that there had been a passing off issue raised by another substantial financial body and lender.

143. Mr Keeble's evidence was that the use of new card details received during the course of new loan applications was permitted by the contractual terms borrowers had agreed for the original loans. His evidence at trial was that the ability to use new loan application card details to pay existing liabilities had been discussed with CFO's lawyers and they had revised the standard terms for the loan agreement to incorporate the following terms which he was advised was effective:

> *"1.2 You grant us permission to debit [the total amount payable] from any Account that you have provided to us either before or after application... You authorise us to collect any monies owed under the Agreement from any debit card account of which you have supplied details to us."*

144. Bearing in mind the importance of this allegation as a ground for the claim of unfitness, it is appropriate to copy the following passage from Mr Keeble's witness statement concerning this issue for two reasons. First because it addresses his recollection and second because it reasonably identifies his understanding of the claim as one in general terms rather than specifically referring to what he did or did not and should. He does not address, for example, adequacy of procedural reviews or record keeping because these were not identified topics concerning his duties and responsibilities within the evidence in support (my underlining for emphasis):

> *"The simple fact of the matter was that <u>we had received advice from our compliance advisors and the solicitors who drafted the agreement</u>. The drafting of those agreements and these events all predated the FCA taking over as our regulator. The FCA clearly knew what changes they were looking to impose, hence on 2 January 2015 the new regulations came into force. However it felt as though our practices in 2011 to 2014 were being measured against the new regulations.*
>
> *The rules which the FCA were attempting to superimpose or judge activity against from 2011 to 2014 was simply not in place until January 2015. in the period 2011 to 2014 the OFT were responsible for regulating the sector and as is apparent from our interactions with the OFT above we were not breaking any of the regulatory rules during that time.*
>
> *It is correct that the loan agreement was written in simple terms and if we were unable to collect funds on an agreed repayment date the collections system which we operated would attempt payment for a set time period until the payment was successful. The OFT had not imposed any regulatory prohibition on this and the banks were happy to facilitate this. Furthermore it was clearly documented and explained in the clients loan agreement and at this time the clients were happy to proceed on that basis ….*
>
> *<u>The OFT had no problem with us using banking information in this way</u> to collect payments but the FCA wanted the rule to be changed once they took over. The FCA supplied new rules to the payday lending industry.*
>
> *<u>We took legal advice on this point and were told by HFW that we were perfectly within our rights to use card details as it was properly explained in the loan agreement that we would do so.</u> Our solicitors said there was no reason why the OFT guidance prohibited this. The FCA however asked us to look retrospectively back at the past and try and comply retrospectively with their new rules….*

> *It should be noted that the 6,187 customers that supplied banking information was discussed with the FCA in great detail. These customers were always contacted prior to a collection attempt on a new card. CFO did not simply "try" to attempt payment we had a call centre with over 100 people at one point working there whose job was to make calls to customers and notify them when payments were to be taken.*
>
> *There were a number of instances where the system mistakenly took funds from an account where it should not have taken them and this was a system issue which was tackled."*

145. During cross-examination Mr Keeble was taken to another form of agreement which did not contain such a term and which appeared to be in existence during 2013. Mr Keeble could not explain this but nor was there any specific evidence that debit card details had been obtained on new applications under this form of agreement and used for existing debt. Evidentially the position was at best opaque from the perspective of Mr Keeble's perspective but it could not be concluded that this specific distinction formed part of the Secretary of State's case or that Mr Keeble's own evidence established this as a case of actual misuse.

146. Mr Keeble's evidence in any event relied upon the CFO's policy and to his belief practice of ensuring that new cards (noting his evidence that usually the same debit card details would be used because payday loan borrowers would be unlikely to have more than one account) would not be used without prior contact and agreement by telephone. He explained that agreement would normally be reached in the context of a new repayment plan or other form of forbearance. His belief was that all such communications would have been recorded on the CFO1 system. This was in accordance with the requirements of communication and fairness, as well as forbearance. Whilst he acknowledged that customers complained that payment was taken without their knowledge, it had to be borne in mind that when this occurred within a redress context it was easy for that to be said to receive compensation. I will consider this further in the context of the evidence as a whole when reaching my decision upon unfitness.

147. A meeting was held on 13 November 2014 to address the FCA's concerns. Mr Keeble and Mr Derrick attended for CFO with its retained lawyers. The concerns addressed senior management failures: (i) resulting in unfair treatment over a significant period with an apparent failure to grasp the requirement for fairness; (ii) to respond properly to the problems and to take them seriously; (iii) to have appropriate systems and controls in place; and (iv) to ensure the business model took sufficient account of borrowers' needs and risks. It is to be noted that none of those concerns to be discussed feature as grounds relied upon in the claim to establish unfitness except to the extent that the Three Grounds assert unfairness and/or inaccurate records to establish balances.

148. The FCA raised those concerns in the stated context of CFO having the highest number of complaints upheld by the Ombudsman of any payday lender over 12 months, 77%. In addition of the 20 Files reviewed by the FCA, 19 contained evidence of unfair or inappropriate treatment of clients broken down as: 8 unauthorised use of banking information, 8 excessive use of CPAs, 8 balance anomalies and 11 unfair dealings for which there was detailed summary. The previous note effectively applies here too.

149. There were detailed responses and discussions during the meeting but the recorded conclusion of the FCA at the meeting was that it did *"not have confidence whether CFO's senior management have adequate skills and experience to implement the new policies and procedures [and had] concerns whether CFO's management team can ensure that its affairs will be conducted in a compliant and prudent manner"*. Again, not the form of the allegations within the Three Grounds.

150. This resulted in a letter from the FCA dated 28 November 2014. The starting point was that the FCA welcomed the progress made in developing new, compliant, debt collection policies and procedures, and recognised the work of CFO to support and engage with the Skilled Person's review However, residual concerns meant it could not agree to CFO recommencing collections of outstanding payday loan book. In particular, CFO did not meet the suitability threshold as a fit and proper person. This is also not an allegation within the Three Grounds.

151. It was explained (in part) by the following which was based upon the evidence detailed in Annex A to the letter:

> "*Current senior management of CFO have presided over significant unfair treatment of your payday customers over a period of five years, in breach of the relevant applicable standards at the time. While some of the evidence set out in this letter relates to past (though recent) practice, we believe that the accumulation of so many breaches, some of them even after the OFT had warned you about the practices in question, give rise to doubt as to the suitability of the current management team to run a compliant business.*
>
> *Senior managers of CFO have not identified and/or not responded to these issues in the manner we would expect of a firm which took seriously its obligations to treat customers fairly and run a compliant business.*
>
> *Systems and controls in place at your business fall far short of what we expect of authorised firms, as does senior management oversight of them. These failings relate not just to IT systems, but also, among other things, to: the quality and competence of CFO's compliance function; your approach to documentation and record keeping; your approach to the management of risk; and your corporate governance structure."*

152. It needs to be emphasised that this is not the case relied upon to establish unfitness as set out within the Three Grounds or the identifiable essential facts. The assertions and evidence in Annex A relevant to the grounds for disqualification included:

a) CFO's record on treating customers fairly is poor: This effectively repeated the information identified during the meeting adding that 43 complaints had been registered in the past year which was the fourth highest for payday lenders despite no new loans having been issued for the past six months and the worse three being much larger lenders.

b) Misuse of banking information: This was described as *"very serious"* and with the observation that the *"FCA believes … the response of CFO's management … has not been commensurate with the gravity …"*. More particularly, the FCA considered: (i) the proposed contractual defence to be of "questionable

merit"; (ii) the reference to CFO in footers on the website topped by one of its trading names was viewed as insufficient notice or information to alert customers that CFO would be the lender and consequentially that customer inputting card details would not appreciate CFO would gain access and use them to pay debts owed to it; (iii) that the same applied to lead provider web-sites even though directed to the "CFOLending.com" web page; (iv) it was not directly disclosed that card details may be used to pay existing debts; (v) the Skilled Person's report reached the same or similar conclusions; (vi) the fact that management were unaware of this "unlawful" practice was no defence; (vii) a reasonable observer would conclude it to be unfair and misleading practice; (ix) the obtaining and use of the card details in this manner was "at best … gross unfair treatment, and at worst, … a deliberate policy to mislead and exploit"; (ix) redress was required especially in the light of the evidence of excessive use of CPAs and the absence of evidence of consideration of customers' individual positions; and (x) although 6,187 customers had been identified as affected, the true scale and nature of the impact had not been established due to inadequacy of record keeping and a failure to progress further lines of enquiry highlighted in CFO's 20 August 2014 report.

c) Excessive use of CPAs was in contravention of the OFT's Debt Collection Guidance. The grounds relied in effect repeat what has been summarised above within the context of the interview.

d) Inadequate record keeping: It was described as *"deeply concerning"* that the principal amount recorded in the current Caseflow system may be incorrect and a reliable figure did not exist in the CF01 system. The systems were over-reliant on manual processes and allowed too much room for error. Four separate and significantly different qualifications and explanations of systems error had been provided by CFO. The admitted consequences were:

i) In an untitled and undated document provided in hard copy during the FCA's visit on 3 July 2014, CFO estimated that 98 customers had overpaid a total of £8,823.33;

ii) In a document entitled 'CFO Internal Investigation: Accuracy of Balances on Outstanding Loans in Caseflow, Working Draft' dated 13 August 2014, CFO estimated that 678 customers had overpaid £38,814.24;

iii) In the document entitled 'Internal Investigation 7 October 2014,' appended to the Interim Report of the Skilled Person on Workstream 2, CFO estimated that 982 customers had overpaid £122,232.44; and

iv) In the document entitled 'Internal Investigation: Accuracy of Balances on Outstanding Loans in Caseflow, Working Draft,' dated 31 October 2014, appended to the Final Report of the Skilled Person on Workstream 2, CFO estimated that 1,667 customers had overpaid £183,578.51.

153. Some of those matters/assertions relate directly to the Three Grounds, some indirectly and some not at all. It is to be noted that the evidence in support of the claim could have been drafted in the same form if that had been the basis for the Secretary of State's ***section 7 CDDA*** decision that a disqualification should be made against Mr

Keeble. It was not and the contrast between the specific allegations within Annexe A addressed at management and the absence of such allegations addressing Mr Keeble's conduct is marked not only in the context of evidence of responsibility but in the context of identifying why it is that his conduct is alleged to be incompetent.

154. The FCA's letter resulted in a response from solicitors instructed by CFO dated 12 December 2014 setting out proposals in relation to management and governance of CFO in the light of the concerns raised concerning the suitability of the current management team and in circumstances of CFO having ceased payday lending except for recovery of its loan book debts. This included CFO sharing a board of directors with "Loanote" (a separate entity with dormant status but with an interim consumer credit licence) to which would be transferred the guarantor loans business. Mr Keeble would resign as a CFO director and not be part of the new structure.

155. By letter dated 19 December 2014 solicitors set out CFOs proposals with regard to future management and governance in the context of the FCA's concerns that CFO did not meet the threshold conditions for authorised firms. . The following content is to be noted: (i) the statement that the solicitors *"consider that CFO's affairs are now conducted in an appropriate and compliant manner, having proper regard for the interests of consumers and the integrity of the UK financial system"* as a result of the steps taken in response to the thematic review; (ii) although current management has been strongly criticised including with regard to its response, *"CFO has produced and implemented revised policies and procedures addressing the FCA's concerns, as well as conducting its own lengthy investigations in advance of the Skilled Petro 's review. CFO has since worked with the Skilled Person in preparation of its reports on each of the Workstreams which has produced positive results which are reflected in the Skilled Person's reports and [the solicitors] consider that CFO's current management has taken and continues to take the FCA's concerns extremely seriously and that its actions to date reflect this"*; (iii) and the IT failings, the criticised compliance function and approach to documentation, record keeping, management of risk and corporate governance have been addressed by the changes implemented since May 2014.

156. Mr Keeble sought to distance himself during cross-examination from the contents of the two letters, in particular insofar as they were relied upon as admissions by CFO of the FCA's criticisms in contrast with Mr Keeble's factual defences. The basis for this being that those letters were drafted on the instructions or in the interests of Mr Smith and in the context of Mr Keeble being removed from management. He explained that the aim of those steps and the contents of the correspondence were conciliatory to ensure ***the CCA*** licence was retained and that there was no adverse fall out for his other business interests. Concerning his departure from management, Mr Keeble says this in his witness statement:

> *My departure from the business was not prompted by particular concerns raised by the FCA concerning my actions as opposed to those of the other, remaining, directors. In effect my resignation was "offered up" because of concerns that Mr Smith had concerning his other financial interests in the financial services arena. We were advised that the FCA would feel comforted if a senior resignation was offered. Mr Smith owned a business called Equifinance Limited and he was concerned that the FCA were going to spread their investigation to that company. The directors who were brought in to replace me were the directors of Equifinance Limited and remained the directors.*

157. My assessment of the correspondence is that it is in form as drafted by lawyers typical of the tactical approach of ensuring that the regulators are appeased. That is not to suggest that the proposals are not presented with good intentions or that they are not valuable. It is to explain my conclusion that the letters must be understood to be intentionally devoid of any attempt to raise disputes and instead to be designed to ensure that the complaints were closed.

158. There was further correspondence including with the new management and a redress programme was put in place but these facts and matters need not be referred to specifically here.

(I) Submissions

159. Whilst the Secretary of State's case is wrapped within a mass of evidence that gave rise to and enabled Mr Ascroft's challenge to its fairness, the case was presented at trial and within the submissions made by Mr Nersessian in an exemplary manner by cutting through the evidence, providing clear and precise analysis and seeking to cure the potential deficiencies which Mr Ascroft relied upon. The following summary of his submissions (for which even Mr Ascroft courteously expressed admiration) will not do justice to them and for logistical reasons will have to exclude many of the details relied upon. However its aim is to identify the progress made for the Secretary of State's case by the close of the trial both by crystallising the claim and by ensuring that the case to be addressed was not extended beyond what is fair.

160. Mr Nersessian made clear that the claim is based and should be decided on the basis that Mr Keeble is unfit to be a director of a company because of his incompetence to a very high degree as a director operating in a regulatory area requiring fairness which incompetence resulted in each of the three grounds relied upon for the conclusion of unfitness. Mr Nersessian accepted there is a heavy burden upon the Secretary of State to establish this unfitness when no dishonesty is alleged.

161. The main submission with reference to each of the Three Grounds was that Mr Keeble's role and the limited roles of others in the area of regulatory compliance meant that the failings of CFO relied upon in the claim must be attributed to his incompetence and were sufficient to render him unfit to be concerned in the management of a company. He could not rely upon delegation as a defence because the evidence shows that he assumed responsibility. There was no relevant or sufficient structure of delegation to competent people and no real, adequate reliance upon professional advice.

162. It was submitted that although Mr Keeble disputed a variety of the factual allegations, the facts and matters relied upon by the Secretary of State are to be found within the various reports and communications resulting from regulatory investigations of CFO. The two letters from CFO of December 2014 recognise that and were written with his authority as the sole director. As to that, whilst I accept his responsibility for the letters, the manner of their drafting to achieve the purpose of conciliation and final resolution still applies.

163. It was also submitted that CFO's system of using trade name web sites was a "ruse" to obtain credit card details of those who would be then automatically be declined because they had an outstanding loan. I understand that this submission can be derived from the approach of the FCA taken in their letter dated 28 November 2014 but the evidence in support of the claim which needs to set out the grounds for the unfit allegation and also the essential facts relied upon is not framed in that way. In any event the findings of fact above rejecting that allegation defeat the submission.

164. Mr Keeble was criticised on a variety of occasions for having failed to exhibit documentation. I will not list the occasions or deal with this in any detail because I have not found it affects my decision. It appears that he could have inspected the 42 boxes of records apparently held in storage by CFO's administrators before their destruction but there was no obligation to do so. His defence is to be viewed in the context of the evidence he has adduced. Insofar as that is deficient, he may find it adversely affects the strength of his defence but the same can be said of the Secretary of State's case.

165. Mr Ascroft very helpfully provided a "speaking note" for his eloquent, closing submissions. Underpinning them was the feature of unfairness and the need to focus on the allegations as framed with reference to Mr Keeble's responsibility as a director. In addition, he submitted that it was essential to bear in mind that the evidence of the OFT and FCA investigations was focussed on CFO's compliance with the regulatory regimes not on Mr Keeble's conduct as a director of CFO. He submitted that it remained unclear how it is said that Mr Keeble caused or allowed any misuse of customer banking information, any excessive use of CPAs or any failure to keep accurate client account records. That the factors relied upon in the reply evidence, such as his leading role, ultimate responsibility and as sole director for CFO's first three years lacked specific detail and were often no more than statements of general legal principle.

166. Mr Ascroft emphasised the fact that Mr Keeble sought expert advice and assistance on behalf of CFO on numerous occasions and in a variety of circumstances. He submitted that the evidence did not establish a company which left staff unguided but established one with policies, procedures and training. In addition that CFO acted responsibly and properly when addressing the investigations including by seeking independent advice and legal assistance. It is also to be borne in mind, he submitted as Mr Keeble contended, that the regulatory environment changed significantly with the appointment of the FCA, whose regime was based upon the rules of its handbook as opposed to the guidance of the OFT. CFO was having to and did react to change and in the context of having had no challenge to the adequacy of CFO's response to the OFT's concerns in the 9 months which elapsed between receipt of Deemar (UK) Limited's audit report and the FCA's assumption of regulatory functions on 1 April 2014.

167. As to the misuse of banking information, CFO believed it was entitled under contractual terms to use the credit card details and Mr Keeble's evidence that this belief was founded on legal advice was credible. Neither this nor the use of trade names and affiliate websites establish incompetence. In addition, the policy was, and Mr Keeble understood the practice to be that card details would be used only after communication with the customer and often having renegotiated payment terms.

168. The case for excessive use of CPAs starts on the weak foundations of a review of 20 files which did not constitute a representative sample and could not be the basis for extrapolation. Mr Keeble's evidence was that any instances of attempted usage of CPAs in excess of the number of attempts referred to in policy documents reflected manual attempts by agents with the express authorisation of the relevant customers. This should be accepted together with the fact that adoption by CFO of an automated process of a number of attempts on one day simply reflected the fact that different people would be paid at different times of the day. Nor should system failures, for example the 999 failed attempts in one isolated incident, be grounds for alleging unfitness when there is no evidence to suggest any involvement, fault or omission by Mr Keeble when performing his duties.

169. The customer account balance deficiencies were also attributable to systems' failures. It is not suggested that Mr Keeble was or ought to have been aware of any account balance issues before April/May 2014 or that the selection and reliance on Mr Miller to build the original Caseflow system was somehow unreasonable. Once the problems were identified, steps were taken to resolve them. It is also to be noted that Mr Rahman remained in office as a director throughout the period of adoption of Caseflow, only leaving in January 2013. There is no evidence that he experienced any difficulties in the reconciliation exercise he was performing, still less that he notified any difficulties to Mr Keeble.

(J) The Law

170. In a nutshell, ***section 6 of the CDDA*** requires the court to be satisfied that Mr Keeble was a director of a company which has at any time become insolvent and that his conduct as a director makes him unfit to be concerned in the management of a company. If so, there is a duty to disqualify. As stated by Dillon LJ in ***Re Sevenoaks Stationers Ltd*** [1991] Ch. 164 at [176B-C]:

> "It is beyond dispute that the purpose of section 6 is to protect the public, and in particular potential creditors of companies, from losing money through companies becoming insolvent when the directors of those companies are people unfit to be concerned in the management of a company. The test laid down in section 6 - apart from the requirement that the person concerned is or has been a director of a company which has become insolvent - is whether the person's conduct as a director of the company or companies in question 'makes him unfit to be concerned in the management of a company.' These are ordinary words of the English language and they should be simple to apply in most cases. It is important to hold to those words in each case."

171. When deciding unfitness, the court will view the conduct complained of *"cumulatively and taking into account any extenuating circumstances"* and in doing so consider whether the defendant *has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies"* (see ***Re Grayan*** [1995] Ch 241, 253C-F). This is to be evaluated in the context of the conduct in question not by taking into consideration other extenuating circumstances.

172. The following words of Jonathan Parker J., as he then was, in ***Re Barings plc (No 5)*** [1999] BCLC 433, a decision upheld by the Court of Appeal with specific approval of his legal analysis (see ***Baker v Secretary of State for Trade and Industry*** [2001] BCC

273), are also to be noted in the context of Mr Keeble being judged as a director within a regulated industry:

> *"While the requisite standard of competence did not vary according to the nature of the company's business or to the respondent's role in the management of that business, and in that sense it might be said that there was a 'universal' standard, that standard had to be applied to the facts of each particular case. To say that the Act envisaged a 'universal' standard of competence applicable in all circumstances took the matter little further since it said nothing about whether the requisite standard had been met in any particular case. The court, whilst taking full account of the demands made upon a respondent by his management role, would determine incompetence in whatever circumstances and at whatever level of management it occurred, from the chairman of the board down to the most junior director. In that sense there was an element of 'universality' in the court's approach."*

173. In reaching a decision, the court must take into account ***paragraphs 1-4 of Schedule 1 to the CDDA*** and the additional matters at ***paragraphs 5-7***. ***Paragraphs 1, 3 and 4*** require account to be taken of the *"extent to which the person was responsible for the causes of any material contravention by a company ... of any applicable legislative or other requirement"*, the frequency of such conduct and the nature and extent of the loss and harm. If the court is satisfied it is required to make a disqualification order of not less than 2 or more than 15 years.

174. It is also relevant to bear in mind in the specific context of responsibility and generally that 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 (see ***Re Barings Plc (No5)*** [1999] 1 B.C.L.C. 433, Jonathan Parker J.).

175. In the context of a claim relying upon incompetence in a very marked or high degree, it is relevant that ***s174(2) of the Companies Act 2006*** provides that a director must exercise *"the care, skill and diligence that would be exercised by a reasonably diligent person with (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and (b) the general knowledge, skill and experience that the director has"*. In so doing a director is entitled to trust people in positions of responsibility until facts indicate otherwise, although delegation does not permit unquestioning reliance and a director still has to supervise the discharge of the delegated functions. However, a director will not normally be negligent if they acted on appropriate legal advice. Whilst a disqualification claim is not to be equated with a professional negligence claim, the approach to knowledge is plainly pertinent (see generally with regard to delegation (see ***Re Barings Plc (No5)*** above).

176. It is nevertheless to be emphasised that ***section 6 of the CDDA*** refers to unfitness not breach of duty. Whether there was unfitness shown by the defendant's conduct is a question of fact and law applying the standard of conduct laid down by the courts for appropriate conduct to the facts of the claim. For claims based on incompetence *"the burden is on the Secretary of State to satisfy the court that the conduct complained of demonstrates 'incompetence of a high degree'. The burden is a heavy one, as explained by the serious nature of a disqualification order"* (see ***Re Barings Plc (No5)*** above at [483j-484b], as approved by the Court of Appeal, and the principles summarised from that decision in ***Re Keeping Kids Co*** by Faolk J. at [144], the most relevant of which are set out below). The existence of a statutory right to apply for

leave to act as a director whilst disqualified means the degree of incompetence required should not be exaggerated and a finding of unfitness does not require a breach of duty to be proved (see ***Baker v Secretary of State for Trade and Industry*** (above), Morritt LJ at [35]).

177. The assessment of competence will need to address the defendant's role (assigned or assumed), duties and responsibilities taking into consideration the part the defendant was expected to play in management and the organisation of the company and its business (see ***Bishopsgate Investment Management Ltd (in liq) v Maxwell (No 2)*** [1993] BCLC 1282 at 1285 per Hoffmann LJ).

178. In reaching a decision consideration should also be given to the following guidance of Hoffmann LJ, as he then was, in ***Re Grayan Ltd*** (above) at [23h-254A] concerning statutory purpose:

> *"The purpose of making disqualification mandatory was to ensure that everyone whose conduct had fallen below the appropriate standard was disqualified for at least two years, whether in the individual case the court thought that this was necessary in the public interest or not. Parliament has decided that it is occasionally necessary to disqualify a company director to encourage the others. Or as Sir Donald Nicholls V.-C. said in In re Swift 736 Ltd. [1993] B.C.L.C. 896, 899: 'Those who make use of limited liability must do so with a proper sense of responsibility. The directors' disqualification procedure is an important sanction introduced by Parliament to raise standards in this regard."*

179. Reference should also be made to and I will bear in mind the words of Henry LJ in the same case emphasising the importance of standards and the need to comply with regulatory rules and disciplines, which in this context will not be limited to creditors but will extend to borrowers:

> *"The concept of limited liability and the sophistication of our corporate law offers great privileges and great opportunities for those who wish to trade under that regime. But the corporate environment carries with it the discipline that those who avail themselves of those privileges must accept the standards laid down and abide by the regulatory rules and disciplines in place to protect creditors and shareholders. And, while some significant corporate failures will occur despite the directors exercising best managerial practice, in many, too many, cases there have been serious breaches of those rules and disciplines, in situations where the observance of them would or at least might have prevented or reduced the scale of the failure and consequent loss to creditors and investors."*

K) Decision

Ki) Discussion

180. The requirement that Mr Keeble has been a director of a company which became insolvent, applying the ***section 6*** **CDDA** definition, is met. The starting point when assessing whether his conduct as a director of CFO makes him unfit to be concerned in the management of a company is that investigations carried out by and for the FCA pursuant to its statutory duties identified three specific problems (amongst others), concerning the operation of CFO's payday lending business. Those problems, now formulated within this claim as the Three Grounds, were part of the cause for CFO's licence becoming subject to voluntary impositions from 12 August 2014. They,

together with the other matters identified notified by letter dated 28 November 2014, were sufficient to cause the FCA to doubt whether CFO met the suitability threshold for a ***CCA*** licence. The FCA would not agree to CFO recommencing collections of its outstanding payday loan book. Plainly these were serious matters and consequences for CFO.

181. The Three Grounds certainly lay the foundations for a claim asserting that the competence of CFO's management should be questioned: The first ground, "misuse of customer banking information", essentially resulted from management policy. Namely, to rely upon contractual terms to use debit card information provided with new loan applications to repay existing debt. The second, "excessive use of continuous payment authorities", resulted from CFO's business practice when using CPAs to recover debt (whether intended or resulting from systems' failures). The third, "inaccurate customer balances", principally resulted from IT failures which might raise issue with management supervision and control.

182. However, it is clear that even if competency of management should be questioned, that is only a starting point for the purposes of this ***section 6 CDDA*** claim. It is necessary to analyse the causes of the problems, decide if management competence was a potentially relevant factor and then identify the responsibility, if any, of Mr Keeble. That task must be carried out in the circumstance of the FCA's investigations, and before them the OFT's investigations, not having been intended and not having sought to identify who was responsible for the problems identified concerning CFO's business or for any resulting regulatory breaches.

183. That analysis must also be carried out within the context of the requirements of ***Re Finelist Ltd & Another*** (above). In other words within the reasonable constraints (not strait jacket) of the Three Grounds for unfitness and the essential facts relied upon within the evidence to support them. Those essential facts must be identifiable as such within the evidence.

184. In this case those constraints are moulded in part by the fact that the evidence does not specifically address why it is alleged Mr Keeble was responsible for any of the Three Grounds in the performance of his role as a director of CFO other than the fact of his office. There is a distinct contrast, for example, between this case and the manner in which the case was presented in ***Barings Plc (No5)*** (above). This claim's evidence does not identify specific actions or omissions by him as causes for any of those problems or as failures by him to fulfil his responsibilities as a director by allowing them to occur and/or continue. It does not consider whether those problems fell within the sphere of his specific duties and responsibilities or address the Three Grounds in the context of knowledge, skill and experience whether subjectively or objectively.

185. That does not mean it is necessary to do so for the claim to succeed. It may be the evidence as a whole can satisfy the court on the balance of probability that the problems identified within the Three Grounds (or any of them) must be attributable to Mr Keeble's high degree of incompetence. However, it does mean the decision must be based upon this non-specific form of allegation and must consider whether the existence of the Three Grounds (or any of them) in itself establishes on the balance of probability his responsibility and his high degree of incompetence.

186. The burden of proof and the shifting of the evidential burden has previously been addressed. However, it is to be borne in mind that a failure within the affidavit evidence in support to draw attention to essential evidence may mean that Mr Keeble did not have a fair opportunity to present the evidence he might otherwise have done in his evidence in answer. In addition, that the introduction of new evidence within the evidence in reply potentially placed him at the unfair disadvantage of being unable to respond to that evidence. Finally there is the umbrella point, that caution must be exercised to ensure fairness when the evidence in support and in reply has presented an amorphous body of facts and opinions which is not always easy to filter to ascertain what needs to be addressed in answer/defence either in the evidence filed or at trial.

187. Bearing those matters in mind, I will address each of the Three Grounds in turn. To the extent appropriate, I will address them cumulatively when reaching the final decision. For reasons which will become apparent, I will start with the third of the Three Grounds and work backwards.

Kii) The Third of the Three Grounds

188. Applying the approach discussed above, it is plain the third of the Three Grounds ("inaccurate customer balances") does not establish Mr Keeble's unfitness.

189. There is no dispute that the incorrect balances resulted from IT systems' failures. There is no suggestion that Mr Keeble had any specific IT knowledge, skill or experience. He is to be judged in the context of incompetence from the perspective of the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions he undertook as a director. It can be taken when addressing this problem and generally that he is to be viewed as the chief executive officer. However, that does not mean he was responsible for the systems' failures. No act or omission relevant to causing the problems and/or to the effect that he failed to prevent the problems occurring or continuing has been identified or established.

190. For example, there is no case that he fell below the appropriate standards of a director because he failed in his duties (whether in terms of active involvement or supervision or otherwise) by having a bespoke software package set up for CFO. No case that his choice of Mr Miller as the designer and installer was incompetent. There is no case that he fell below the appropriate standard by causing CFO to purchase the "Caseflow" package or in the context of its installation and replacement of CF01. There is no allegation that he bore any responsibility in any form for the fact that the transfer of data to Caseflow from CF01 resulted in errors. There is no allegation or evidence to support a case that, as a director acting in accordance with the appropriate standard, he should have identified the incorrect balance problem earlier and/or that he failed to react quickly enough or to respond adequately or properly to the errors when they were disclosed.

191. The third ground is a very serious one. That is particularly apparent from the redress to customers consisting of £31.9 million to be written-off customers' outstanding balances and £2.9 million payments. It is easy to understand why this would potentially lead to disqualification and to why it might cause a ***CCA*** licence to be

immediately suspended (entirely or in respect of debt collection) or subsequently terminated. However, that in itself or the fact in itself that the problem existed does not establish that Mr Keeble was responsible for the problem in his capacity as a director or, indeed, otherwise. It does not establish that he was incompetent in carrying out his responsibilities and duties.

192. The importance of "responsibility" when determining a disqualification claim should be self-evident, not least because the ***section 6 CDDA*** test of unfitness is applied to the conduct of the individual director defendant. However, it is also apparent from ***paragraphs 1-4 of Schedule 1 to the CDDA*** which specifically address "responsibility". This claim does not.

193. This claim insofar as it relies upon the third of the Three Grounds does not establish Mr Keeble's incompetence. It addresses a problem for CFO where the root causes referred to in the Hogan Lovells report are technical and not directly or indirectly linked to any specific act, omission or responsibility of Mr Keeble. Hogan Lovells' report itself does not attribute fault to Mr Keeble (see paragraphs 131-132 above). The claim does not establish that his conduct makes him unfit to be a director.

Kiii) The Second of the Three Grounds

194. Continuing with the Three Grounds in their reverse order, the second ("excessive use of continuous payment authorities") also covers the period between 24 June 2011 and 13 June 2014 within the context of complaints having been received covering the period 10 August 2011 to 5 February 2014 (although without any break down). No distinction is apparently drawn between the period before and after the OFT's "Irresponsible Lending Guidance Compliance Review" began, on 24 February 2012, and involved specific investigation of CFO starting with the 12 June 2012 visit pursuant to the OFT's 22 May 2012 letter. Nor is any distinction drawn within this Ground for the period from 1 April 2014 when the FCA took over the regulatory role. That may be attributable to the short time that remained within the period of claim.

195. The reason attention is drawn to this is that the period after 24 February 2012 presents a different scenario to the period before because it is plain the matter of excessive use became an issue drawn to the attention of and responded to by CFO. In my judgment, for reasons that will become apparent, it is appropriate to draw that distinction and to start with the later period.

196. Dealing first, therefore, with the post 24 February 2012 period: Mr Keeble acting as a reasonable director ultimately responsible for compliance, as he accepts, should have concluded from the commencement of the "Irresponsible Guidance Compliance Review" that there was a need for all payday lending businesses to review their policies and practices to ensure compliance with ***the CCA*** and the OFT's existing guidance, including its "Debt Collection Guidance" issued on 20 November 2012**.** This conclusion would or should have been reinforced by the notification by letter dated 22 May 2012 that CFO was to be visited and inspected. Also when the review's final report issued in 6 March 2013 (see paragraphs 71-74 above). It is a conclusion which should have applied to (amongst other areas of the business) CFO's policy and practice for the use of CPAs. Indeed, Mr Keeble's evidence recognises this (see

paragraphs 68-69 above), although it does not appear as a particular of this second of the Three Grounds.

197. Nor is there a specific allegation within this ground or the evidence identified as essential fact to the effect that he failed to take appropriate action. In fact, as observed within paragraph 69 (above), it is unclear when and upon what factual basis it is asserted that Mr Keeble should have identified the problem of excessive use of CPAs in the light of the matters set out in paragraph 196 above (or any of them). Whilst misuse of CPAs, including by excessive use, is a serious matter, so too is disqualification and it is necessary to address the actions and omissions of the individual concerned. Mr North in his evidence in support identified two examples but neither were used to address Mr Keeble's conduct. His responsibility cannot be taken for granted.

198. The position certainly becomes clearer from about 26 March 2013 when CFO received "Annex A" to the letter of that date. It expressly referred to the fact that complaints evidenced misuse of CPAs by reason of excessive use. However, there is no express link from this to the period before 26 March 2013 in terms of alleging Mr Keeble's responsibility. Nor is there an allegation that he failed to act appropriately or incompetently having received that notice (see paragraph 77 above). Indeed, the evidence indicates he did. He discussed the matter with experts, QDM, and instructed an independent report/audit from Deemar (UK) Limited.

199. It is not entirely apparent whether the expert proposals in the "Solutions and Notes" of Deemar (UK) Limited's report were intended to reflect past policy and procedure but in any event the policy set out appears to have met the OFT's requirements and fulfilled CFO's obligations. There was nothing from the OFT to suggest the contrary. Nor was there any apparent, subsequent adverse response from the FCA. There is no evidence to suggest that the FCA raised issue with any of the contents of the report (see paragraph 82 above). The statement from Mr Keeble quoted at paragraph 79 above, contending that the report demonstrates he took compliance seriously, is not undermined by the evidence and nor is the additional statement within that paragraph addressing what was done. Insofar as the evidential burden shifted requiring him to demonstrate that he reacted to the Annex, and it is certainly arguable that it has, his evidence satisfies that burden. The claim of incompetence based upon the period of the FCA being the regulatory body simply does not identify failings on his part whether by action or omission which constitute incompetence.

200. The FCA's position was that evidence of excessive use had been found when they visited CFO's premises on 14 August 2014 and inspected the 20 Files. No-one has relied upon the specific dates of those complaints. For example, whether they were derived from before or after the FCA's investigations. However, the contents of those files are a key evidential component of the claim against Mr Keeble.

201. A problem with that for the claim is that the files have not been the subject of examination or scrutiny at this trial. In addition, it means reliance upon only 8 cases within the 20 Files and it is to be accepted (or I find in any event based on the evidence referred to above) that the 20 Files were not randomly selected because they were all files containing complaints. Add to that the acceptance that they are far too small a number to rely upon as a representative sample and cannot be the basis for

extrapolation, then the limitations and deficiencies of the evidence are all too apparent.

202. Furthermore, there is no allegation specified as to whether Mr Keeble was or ought to have been aware of the problems identifiable from any of the 8 cases. This claim is based on the proposition that the problems occurred and, therefore, Mr Keeble erred and was incompetent. It is plain that this proposition is unsustainable without raising issues of responsibility and without addressing his knowledge, actions and omissions.

203. There is no evidence to specifically link Mr Keeble to those 8 cases and no express allegation that he ought to have identified the defaults which occurred in any of those 8 cases in the performance of his duties. Nor that he failed to take reasonable or adequate steps to address the problems they establish if/once he did identify them. It is right to observe that some of them show very numerous misuse. For example one case of 999 failed CPA attempts but that in itself indicates some form of systems' failure which needed investigation and which, therefore, would lead to questions concerning Mr Keeble's responsibility and/or actions or omissions in that context. Questions which have not been asked or addressed because the evidence in support does not include factual assertions which give rise to those questions.

204. Bearing in mind the period currently being addressed (i.e. the FCA period), it is also to be noted that there is no consideration within the claim of the effect of Mr Keeble having initiated Deemar (UK) Limited's independent audit and no allegation identifying any specific act or omission of his concerning that report whether in the context of the 8 cases or otherwise. This is simply consistent with the failure to refer to any act or omission concerning any of the 8 cases.

205. I cannot conclude that 8 files out of a selection of 20, which appear to have been random but only through selection from a collection of complaints' files, provide evidence from which to decide that Mr Keeble was responsible for the excessive use of CPAs whether by action or omission. Nor is there evidence of any act or omission establishing incompetence on the balance of probability when addressing the whole period from the start of the OFT's "Irresponsible Lending Guidance Compliance Review" whether with reference to the 20 Files or not unless it can be asserted that the fact that excessive user occurred is sufficient in itself from which to conclude he is responsible and incompetent.

206. That is to considered further within the context of the period before 24 February 2012 to which I now turn. In support of the claim's general assertion that there was excessive use and Mr Keeble was incompetent, it is to be concluded from the evidence that it was the consistent policy of the OFT that it would be unfair and improper to use numerous consecutive attempts to seek to recover a single payment. This follows from the requirements to consider individual needs, to appreciate that payday loan borrowers may find themselves in the position of being unable to pay for essential needs if the payment is obtained and because of the underlying requirement of fair treatment.

207. For those reasons it was required that CPAs be used reasonably and proportionately (see paragraphs 51-55 above) and, as previously mentioned, Mr Keeble with responsibility for compliance would or should have been aware of this (see paragraph 196 above). He also had a responsibility to have sufficient knowledge and

understanding of CFO's business to enable him to discharge his functions, responsibilities and duties (see paragraph 174 above).

208. The content of the 26 March 2013 letter's "Annex A" provides evidence of previous misuse of CPAs by reason of excessive use. Its source, borrowers' complaints, has not been disputed. However, the position remains that the allegation of incompetence is based upon that fact alone. There is no case or evidence that Mr Keeble had direct knowledge of the matters giving rise to the complaints, that they resulted from his actions or omissions or that he failed to act reasonably when addressing (if he did) them and/or the need for CFO to change its policies and/or procedures. As stated, the claim assumes the excessive use resulted from his incompetence because he had overall responsibility for compliance.

209. There is no doubt that this could be the basis for a claim. For example, it could be asserted that: the following complaints [identified with specific detail, at least to a limited degree] resulted from or establish the fact that CFO was failing to comply with ***the CCA*** and/or OFT guidance in the following manner [identified with specific detail, at least to a limited degree] and that this resulted from the fact that the director with overall responsibility for compliance had acted incompetently. It could or might then be alleged, for example, that this occurred as a result of Mr Keeble: introducing a policy that allowed excessive use; failing to ensure adequate training to implement a policy which would prevent excessive use; failing to make certain that systems were in place to monitor compliance with acceptable policy; failing to react sufficiently to prevent valid complaints from reoccurring; or by ignoring the problem.

210. In which case, the Court would be able to consider the complaints, their causes and the actions or omissions of Mr Keeble both before and after the complaint was made or established. However, this claim does not proceed on that basis.

211. There is reliance by Mr North upon CFO's 19 December 2014 letter acknowledging that customer case files show significant evidence of use of CPAs which was not in line with OFT Guidance in the context of excessive use. However, this appears to refer to the 20 Files and even if it does not, it is plainly a conciliatory letter seeking finality and should not be read as an admission by Mr Keeble of any failure when fulfilling his functions, duties or responsibilities or of incompetence. Furthermore none of the matters referred to in paragraph 209 above were identified or addressed in the evidence and, it follows, at trial.

212. The same observations can be made in respect of Ombudsmans' decisions. Understandably these were not specifically relied upon at trial being opinions and opinions relating to CFO not to Mr Keeble. They would not address Mr Keeble's role or responsibility for the complaint in issue. Nor was there any evidence relied upon by the Secretary of State in respect of any such decisions addressing that role or responsibility.

213. In all those circumstances I have to conclude that the claim does not establish Mr Keeble's unfitness as a director. It has not been established that he was responsible for a policy which resulted in excessive use. It has not been established that he was aware of a practice of excessive use. There is no evidence to indicate that he ignored or otherwise dealt incompetently with particular complaints. There is no evidence that the problem of excessive user was caused by or became endemic because of his

incompetent actions or omissions or that the problem required action from him which he ignored or incompetently did not provide.

214. In my judgment this second of the Three Grounds does not prove unfitness. I have been slow to reach that conclusion because of the importance of the issue and the need to recognise that excessive use should not occur. However, this claim must be proved on the balance of probability. That has not been done and the absence of evidence addressing the role, duties and responsibilities of Mr Keeble has also limited the extent to which he needed to present evidence explaining what he did or did not do. As a result it has not been necessary to address in that context the various pieces of evidence he relied upon to indicate that he was not incompetent. They will be addressed when considering the first of the Three Grounds.

Kiv) The First of the Three Grounds

a) Approach to the Secretary of State's Case

215. The first of the Three Grounds presents a different scenario to the other two because there is no dispute that Mr Keeble in his role as a director was responsible for CFO adopting the policy which has led to the allegation of "misuse of customer banking information". To use new card details obtained from new loan applications to pay existing debt. There is also no doubt that this too is an area for serious concern.

216. Looking at the operation of CPAs generally: CFO needed permission from the borrower to set up this type of recurring payment authority. Otherwise the CPA would be unauthorised and both CFO and the card provider (under ***the Payments Services Regulations*** in force at the relevant time) would be liable to repay the money received. Subject to express terms, permission will normally enable payment to be taken from the bank card identified by the payee in the CPA whenever it is due. However, the CPA will not automatically switch if the customer changes or adds to their bank cards without further consent applying the or a new CPA to those cards. There has been no suggestion before me that the CPA cannot provide that it will apply to new cards without the need for a further agreement if its terms and conditions permit. It has not been argued and I have not been asked to decide otherwise.

217. The FCA decided pursuant to its statutory duties that CFO's use of new card details obtained from new applications made on web sites using CFO trade names was *"unlawful practice"* and *"at best ... gross unfair treatment, and at worst, ... a deliberate policy to mislead and exploit"*. In reaching that decision the FCA doubted (but did not decide) there was a contractual right to use the card details as CFO asserted.

218. In any event it was concluded by the FCA that applicants for new loans would not have appreciated that CFO would be the lender and, therefore, that any such contractual right would be activated. That was because the FCA was satisfied that the relevant websites contained a lack of sufficient, apparent information identifying CFO. In particular because of the use of trade names as the web-site banner with reference to CFO being in the footnote of the end web page. The FCA also concluded

that it was not disclosed that the card details would be used in this manner with or without a contractual right.

219. This claim is not based on dishonesty or upon a challenge to Mr Keeble's integrity but alleges incompetence. It is therefore to be noted that the FCA's reference to deliberate and misleading exploitation is not pursued (see paragraphs 152(b) and 217 above). Subject to that, however, the Secretary of State relies upon the key facts identified by the FCA and upon the fact that the FCA reached the conclusions and decisions it did. Whilst the conclusions and decisions of the FCA are hearsay and opinion, that is a matter of evidential weight which is and should be strong because of the FCA's regulatory role.

220. In those circumstances Mr Keeble faces a claim that he, as the director with specific responsibility for this policy and practice and with overall responsibility for regulatory compliance, has been incompetent to a high degree. That claim is identifiable from the summarised key facts in accordance with the requirements of ***Re Finelist Limited*** (above). The case is that those key facts establish on the balance of probability that his conduct fell below the standards *of probity and competence appropriate for persons fit to be directors of companies*.

221. Subject to considering Mr Keeble's defence, in my judgment:

a) Applying standards of probity and competence, it should normally be expected that a director will not cause or permit a company (whether as a general business practice or in specific circumstances) to use bank payment details for any purpose outside the one(s) for which they have been provided without the agreement of the customer unless otherwise permitted by the law.

b) That expectation is all the more appropriate within the payday lending business bearing in mind the March 2010 and February 2011 versions of the "Irresponsible Lending Guidance of the OFT" and the original July 2003 Debt Collection Guidance (see generally paragraphs 51-55 above). The "Irresponsible Lending Guidance Compliance Review" and subsequent guidance endorse that conclusion.

c) As a director of a payday lending company, Mr Keeble should have taken reasonable skill and care to ensure he and, therefore, CFO were abreast of and complied with current consumer credit requirements relevant to the pay day industry. This would include having in mind the contemporaneous concerns expressed by the OFT in respect of the use of CPAs from the date of its review, and later by the FCA both in the context of the industry generally and during the course of their investigations of CFO (although hindsight should not be applied).

b) Applying Mr Keeble's Defence

222. Mr Keeble does not challenge the case that the requirement of responsibility is met. This is entirely consistent with his clear acceptance in the witness box that he was the director responsible for compliance. Instead, Mr Keeble challenges essential facts

relating to the claim of incompetence and asserts that it was not incompetent to allow CFO to retain and use the information in the circumstances that in fact existed.

223. In doing so he (through Mr Ascroft) observes that the weight of the Secretary of State's evidence must be diminished to the extent that it is based on hearsay and when there has been no opportunity to test its primary sources. In addition, that this should be contrasted with his evidence which has been thoroughly cross-examined. Mr Keeble does not accept in the context of a claim for his disqualification that, for example, the Court should assume that those asserting a lack of knowledge that the new loan application had been made to CFO (in particular within the context of them seeking the benefits of a redress scheme) should be believed without their evidence being presented to the court as sworn testimony subject to testing by cross-examination. In addition that it should not be assumed that borrowers would not have read to the end of the web-site page and, as a result identified CFO as the lender. Nor should it be assumed that when they made their new application, they knew CFO by its name of incorporation, as opposed to its trade name(s), as a result of previous borrowing. He also points to his lack of CFO records to enable him to refute the claim. I consider it right to bear those points in mind and will do so without necessarily repeating them.

224. The facts Mr Keeble relies upon have been addressed above but the following summarise the principal bases for his defence: he acted on legal advice and relied upon a lawyer's drafting to achieve the result that there would be a contractual entitlement to use the card details obtained from applications for new loans even if those loans were refused, as they would be if there was outstanding debt. The applications were not derived from misleading web-sites which failed to disclose CFO was the lender. There was full disclosure. In any event, CFO's policy and practice was that the new card details should only be used for the CPAs after communication and agreement with the borrower. Agreement would normally be reached in the context of a new repayment plan or other form of forbearance.

225. I have already found that he acted on legal advice and relied upon a clause drafted by those lawyers (see paragraph 59 above). I find as a result that he genuinely held the belief, as expressed within the witness box, that CFO was entitled to obtain and use the new card details as described. Not only was there no cause to doubt his evidence, as stated, but the fact that the clause existed is consistent with his recollection that he obtained advice and the drafted provision. In addition the evidence establishes that his normal practice was to obtain and act upon expert advice when needed. For example, he relied upon accountants and lawyers when the business started, he sought advice from Mr Cooke of QDM and his response to the investigations of the OFT and FCA was to obtain expert advice and reports. This is supportive evidence of consistency of approach.

226. Hogan Lovells were extremely dubious that the clause would be effective in the face of "fairness challenges" (see paragraph 135 above). I am doubtful it would work on construction grounds. However, the issue as presented and argued in this claim to the Court (should Mr Keeble's evidence be accepted) is not whether either proposition is correct but whether Mr Keeble acted incompetently by accepting the advice received. No basis for the conclusion that he did act incompetently has been submitted and rightly so. There is no evidence or ground justifying that conclusion.

227. I have also found, applying an objective test, that the web-sites were not misleading (see paragraphs 140-141 above). The OFT, FCA and Hogan Lovells reached a different conclusion when applying their subjective borrower test (see paragraphs 141 and 152(b) above). The issue this presents therefore turns upon the approach to be adopted and conclusion to be drawn based upon the assumed understanding of borrowers as judged within the context of the underlying principles and guidance concerning ***the CCA***. That issue has not been advanced by the Secretary of State or otherwise tested before me and I could not reach a conclusion without better, more specific evidence and a far greater investigation into those principles and guidance than this trial has permitted.

228. However, even assuming that the Secretary of State had satisfied the burden of proof on this issue, I do not see how it can in itself lead to a conclusion of incompetence. Once "ruse" is removed from the submissions (see paragraph 142 above), I cannot conclude that Mr Keeble was incompetent by allowing CFO to adopt its policy when he relied upon legal advice and drafting, when the web-site on its face provided the information required and when there was no (identified) express statutory provision or regulation or even policy stating that such a web-site was impermissible.

229. This means that the claim is reduced in scope to an allegation of incompetence based upon the fact that the new card details were used without the knowledge of customers. That is, of course, a specific basis for this Ground (see paragraph 8.6.1 of Mr North's affidavit in support) and is subject to the defence that CFO had and followed, Mr Keeble believed, a policy ("the Communication Policy") of ensuring that the debit card details would only be used after CFO had communicated by telephone with the debtor in default and agreed it could be used whether in the context of a new repayment agreement or not.

c) The Approach To The Narrower Claim

230. The starting point for this narrower claim will be to determine whether Mr Keeble can establish his defence that there was a Communication Policy. The answer will identify an important part of the scenario from which to decide knowledge (actual or deemed) and incompetence. That decision will also need to take into consideration the extent and circumstances of the breach, although the degree to which those factors will be necessary and important may depend upon whether there was a Communication Policy. It may be easier, for example, to establish deemed knowledge and consequential incompetence if Mr Keeble had not introduced a Communication Policy.

231. As a preface to the decision, it is to be observed that it is not an easy task to decide whether Mr Keeble's evidence of belief is true. First, because of lapse of time. Mr Keeble has had to present his recollection of facts that occurred over eight years ago and this in itself and combined with the known potential problems of false memory is inevitably a concern for reliability. Second, there is a lack of contemporaneous documentation outside of the investigations. Third, because this issue of fact only arose at the defence stage; there having been no apparent, previous investigation conducted by either side or the OFT or FCA into the existence of a Communication

Policy and/or its breach and/or Mr Keeble's knowledge. Fourth, because there are a number of potentially conflicting pieces of evidence, as will be seen.

232. Those factors have left the contemporaneous scenario more opaque than transparent through no fault of Mr Keeble. It may appear harsh, therefore, for Mr Keeble to have to defend a claim for an order which will restrict his right to work in that context. I make no decision on that. It is what it is but in his favour is the fact that I have found him to be someone who has sought to be a reliable witness (see paragraphs 47-48 above).

233. The Secretary of State has criticised Mr Keeble for having failed (as admitted within an answer to a Part 18 Information Request) to ask for access to some 42 boxes of documents held by CFO's administrators before their destruction, I believe, during February this year. That criticism may be justified but I have no reason to conclude that this was not done for the benefit of his defence. In any event that criticism does not appear to extend to the electronic records, including the CFO1 system and Caseflow, which neither side appear to have presented whether in substance or by report. These appear to be the relevant records subject to the possibility that they were transferred onto another form of data holder. The potential for that being evidenced by the existence of the USB Records.

234. Against that background, I will start with evidence that is potentially informative but which cannot lead to a conclusion as to the existence of a Communication Policy, one way or another.

235. First, the favourable witness assessment should be applied as a consideration but noting its important caveats (see paragraphs 47-48 above). Second, consideration should be given to the many conclusions reached during the investigations favourable to CFO and, therefore in this context, to Mr Keeble as the person with overall responsibility for compliance. They do not mean that his evidence should be accepted but they provide background for the purpose of assessing probability.

236. I refer in particular to: (i) the fact that when non-compliance was identified, he ensured CFO took reasonable steps to address and correct the problem, for example by the appointment of QDM for general advice and Deemar (UK) Limited as an expert to produce a report which would provide solutions (see paragraphs 78-79 noting that I agree with his observation); and (ii) the favourable comments within the Skilled Persons Workstream Reports (see paragraphs 126-128 and 131 above in particular) which overall provide a conclusion that Mr Keeble as a matter of normal business practice sought to ensure compliance by CFO with all statutory and regulatory requirements.

237. Moving next to Mr North's evidence in support: It principally relies upon (insofar as it is specific as opposed to consisting of general reference to comments and observations of the OFT and FCA):

    a) The fact that 6,395 card tokens were used but this does not identify misuse.

    b) The 26 March 2013 letter from the OFT requiring (in summary) CFO to take immediate action to rectify the findings in Annex A. However, this does not refer to the misuse of bank card details by reason of a lack of consent.

c) The letter dated 23 July 2014 from the FCA setting out their concerns over the automatic use of bank details when a borrower applied for a new loan but the concerns are couched in terms of "appear" and in any event the letter does not address circumstances or other detail.

d) The document CFO signed on 12 August 2014 constituting a voluntary imposition requirement application which refers to FCA concerns but in terms of "potential" misuse.

e) The FCA's findings during their visits, which appear to relate to the 20 Files and the conclusion that 40% identify misuse of information complaints with two examples being provided. However, this, only relates to 8 files from a selection the randomness of which was limited to files containing complaints. It therefore gives rise to the equivalent problems as those identified when addressing the second of the Three Grounds.

f) The Skilled Persons Reports which contains a reference to Hogan Lovells stating they had seen *"numerous complaints from customers suggesting that they did not consent"* with one example being provided as a data misuse complaint. There is also reference to them mentioning that CFO had found over a thousand customers who complained. However, that is unspecific and it is not apparent from the CFO August Report that there were such a number of complaints concerning misuse of data.

g) The CFO August Report in particular as referred to by Hogan Lovells to be considered further below.

238. Mr North's evidence in reply does not take matters further, as previously explained. Mr Slavin when addressing misuse of customer banking information adds the observation that the number of borrowers concerned may have far exceeded 6,187 customers but this did not address the Communication Policy or its application to those customers. It was concerned with the wider allegation not the narrower one.

d) The Hogan Lovells' and the CFO August Reports

239. It is not without significance that the Hogan Lovells' Skilled Persons Reports (as summarised at paragraphs 134-137 above) refer back to the CFO August Report overseen by Mr Keeble (noting that I have not found the contents of "Annex A" to the FCA's letter dated 28 November 2014 add further to it for the purposes of this claim – see the analysis at paragraph 152(b) above).

240. The reasons for that are: First, because its source makes its weight in a case against him particularly strong. Second because it does not appear to be established that Hogan Lovells reviewed the underlying factual information or made any further investigations themselves. Their comments and opinion appear to be based upon their

interpretation of the CFO August Report. It has not been possible to check this or indeed to question those comments and opinions in any event because no-one from Hogan Lovells was called as a witness for the Secretary of State. This must be borne in mind when addressing the key points identifiable by reference to both reports.

241. Those key points are: (i) The CFO August Report records there was a usual practice to contact customers before the card details obtained from the new application were used but such communications were only occasionally recorded in a borrower's account notes. This supports Mr Keeble's evidence of a Communication Policy but raises questions concerning its implementation. (ii) Hogan Lovells do not appear to dispute the existence of the Communication Policy but make clear they could not report upon what might have been said and, therefore, whether the communication was limited to informing borrowers of intended use rather than seeking consent. (iii) The CFO August Report also records that the details were used nevertheless if the attempt to contact was unsuccessful. The Report records that this was contrary to policy. This in effect repeats support for the existence of the Communication Policy but accepts breach in an identified circumstance. (iv) The Hogan Lovells' report suggests that the breaches are significant in number whether limited to the circumstances admitted in the CFO August report or not. (v) The Hogan Lovells' report makes no reference to Mr Keeble whether in the context of his responsibilities, actions or omissions concerning the Communication Policy or otherwise.

e) Decision - Was There A Communication Policy?

242. That evidence leads to the first issue to be decided (applying paragraph 230 above), namely whether there was a Communication Policy. It is to be noted in this regard that whilst Mr North in his first witness statement refers to passages within the CFO August Report which state or imply that there was one (see, for example, paragraph 120 above and following), he does not go on to dispute its existence or to adduce evidence to establish there was none. For example, there is no case made within the evidence that the Communication Policy could not exist or be implemented because the computer system used would result in the automatic use of the new card details when payment was due or not made.

243. Nevertheless it is not in dispute that borrowers' new card details were used to repay existing debt and the evidence also establishes that this occurred (at least) on occasions without consent. That is identified with the Hogan Lovells' reports and accepted within the CFO August Report, which refers to it as a breach of policy occurring when borrowers could not be contacted. This in my judgment is sufficient to shift the evidential burden of proof upon Mr Keeble to prove the existence of the Communication Policy. It is his defence.

244. Although the burden has shifted, the weight of the Secretary of State's evidence is set off to a degree by the fact that it is not suggested within that evidence that there were not also cases of a significant number when new card details were used after consent had been sought and given. That is a background feature but the main feature is the evidence of Mr Keeble in the witness box. He very positively asserted the fact that the Communication Policy existed and did so within the context of stating his belief that it was applied.

245. The evidence of Mr Keeble is supported by the contents of the CFO August Report which describes the existence of the Communication Policy. No issue was raised by Hogan Lovells with that. Their concern was with what might have been said but they could reach no evidential conclusion and this potential issue is not included within the Three Grounds. The evidence of Ms Martin's statement in interview is also to be noted. Her reference to misuse and to the fault of an agent is inherently consistent with the existence of the Communication Policy (see paragraph 118 above).

246. It is appreciated that care must be taken and caution adopted when considering the evidence in support of the defence for the reasons set out in paragraph 231 above. Mr Keeble's evidence could be based on faulty memory or be self-serving. The CFO August Report may itself be self-serving and Ms Martin was not a witness with the result that she has neither given evidence under oath or had her recollection tested by cross-examination. On the other hand, the points in favour of his evidence and conduct are to be borne in mind (see paragraphs 232, 235-236 above). The fact that the CFO August Report disclosed rather than hid an important admission of breach of the Communication Policy supports a conclusion of reliability when it asserts there was such a policy. In addition, it records that in August 2014 CFO wanted to investigate whether there had been any breaches of contractual and/or regulatory obligations. That (at least) indicates as supporting evidence that Mr Keeble did not then positively know there had been any. In addition, no one has raised concerning that information given by Ms Martin in interview.

247. Weighing all those matters against the evidence of the Secretary of State, it is clear to me that Mr Keeble has satisfied the evidential burden that shifted to him and I have found no further evidence from the Secretary of State (whether in support or reply) to undermine the conclusion that there was a Communication Policy. That being so, the other part of the scenario to consider before deciding issues of knowledge and incompetence is the extent and context of the breaches of the Communication Policy.

f) Decision – The Extent and Context of Breach

248. Plainly there were complaints over the misuse of new card details but their true extent is not addressed by Mr North other than by reference to the 6,395 card tokens used (which does not address misuse) and the vague assertions of over a thousand complaints from Hogan Lovells combined with their reference to the numerous complaints seen "suggesting that they did not consent" (my underlining).

249. The only substantive reference to context is to be found within the admission of the CFO August Report. There are a couple of examples of misuse referred to within the Secretary of State's evidence but these are inadequate to establish general context. It is puzzling why there is not some form of analysis of the complaints to provide substance and detail within the evidence but there is not. The 20 files do not really assist as explained. There is also the FCA's comment that there may be many more but that too suffers from vagueness.

g) Decision – Knowledge and Incompetence

250. The claim is also made without express reference to Mr Keeble's knowledge within the Secretary of State's evidence. It is also relevant to repeat the observation that this was not addressed by Hogan Lovells. The evidence in support leaves it to be implied that he must have known of the problem because it existed. The evidence in reply does not take the matter significantly further. It emphasises Mr Keeble's responsibility without linking it to express knowledge of bank card information misuse. Mr Slavin's affidavit does not provide further assistance.

251. The absence of detail of extent and context and of direct evidence of knowledge does not mean there is not a case to be met. There is evidence to establish that data had been misused because permission was not first obtained from borrowers during the period in issue. The fact that Mr Keeble had overall responsibility places him in line to potentially have known about this. First, because of the fact that complaints were made and second because his responsibility should have caused him to monitor the position from time to time. This is particularly the position when as a director of a payday lending company, Mr Keeble should have taken reasonable skill and care to ensure he and, therefore, CFO were abreast of current consumer credit requirements relevant to the pay day industry. This would include having in mind the contemporaneous concerns with regard to CPAs expressed by the OFT from the date of its review and later by the FCA in the context of the industry generally as well as for CFO specifically during the course of investigations (although hindsight should not be applied).

252. Therefore, it can still be claimed from the fact of the breaches of the Communication Policy that Mr Keeble's responsibility for compliance meant he must have known or ought to have known before the CFO August Report of the breaches from the complaints made. That this knowledge must exist despite his denials because of the potentially "numerous" complaints, perhaps over a thousand, combined with the admission of breaches of the Communication Policy in the CFO August Report. However, the absence of detail means it is still necessary to consider whether the obligations identified in ***Re Finelist Ltd*** (above) have been met.

253. In my judgment, the beginning for the decision must be that Mr Keeble introduced and knew of the Communication Policy. There is no evidence of him having reached a decision to adopt or permit or otherwise having given instructions to effect an additional or alternative policy allowing CFO to permit exceptions to the Communication Policy. To the contrary, the underlying evidence is that those exceptions were in breach of the Communication Policy which he introduced. I accept Mr Keeble's evidence at trial on this point. The Secretary of State has not established on the balance of probability that Mr Keeble by active steps caused the breaches of the Communications Policy. To the contrary, he, as the director responsible for compliance, caused CFO to adopt a policy which would prevent that occurring if followed.

254. The case against him is, therefore, and on the evidence presented must be that he allowed the breaches. That too requires knowledge to be established, actual or deemed. It also requires it to be proved on the balance of probability that he failed to take steps which he ought to have done and, as a result, that he was not purely negligent but incompetent. In other words, to prove he fell below the standard of competence appropriate for persons fit to be directors.

255. There is no doubt that as a director responsible for CFO's compliance he should have ensured there were not just policies in place but procedures to ensure compliance whether, for example, with reference to training and/or check lists and/or monitoring. He ought to have ensured there were reporting procedures of complaints and in any event that compliance with policy was monitored. He ought to have appreciated that a complaint or selection of complaints which suggested a breach of the Communication Policy required investigation. It is not difficult to envisage that evidence establishing non-compliance with those responsibilities in the context of the importance of the requirement of prior consent would readily lead to a conclusion of unfitness. The words of Lord Justices Hoffmann and Henry in ***Re Grayan*** (above) being potentially highly applicable to such a scenario.

256. However this claim does not address any of those features of responsibility or any aspect of responsibility except for strict liability resulting from the fact of the breaches. This case has not addressed specific examples in the context of Mr Keeble's knowledge. It has not presented evidence (as opposed to assertion) to the effect that the breach(es) would or ought to have been known by him, that he should have acted upon it/them and that he failed to do so thereby allowing further breaches. These are requirements needed for this claim to be proved.

257. To do that it was necessary for the evidence to address specific examples or categories of complaint and within that context to either specifically raise knowledge and/or failure take competent steps. The essential facts need to be identified because this is not just a case concerned with the fact that data was misused by CFO. It is concerned with the allegation that it was misused despite the Communication Policy and that this misuse in breach of the policy introduced by Mr Keeble was attributable to his incompetence.

258. In addition to that evidence being required to prove the claim, Mr Keeble was entitled to have the opportunity to address such evidence in his evidence in answer and to know what will be asserted at trial. This is not a claim where the general fact of CFO's breach(es) can be attributed to the incompetence of the director and for it to be submitted that any reference to the underlying detail is not required because it is not for the Secretary of State to have to show how the director should have behaved. This is a claim where the evidence required to prove knowledge and incompetence is missing.

259. It is not as though this is a one-man or very small company. There is issue as to whether a proper structure of command was in place and whether delegation took place as Mr Keeble asserted (although not a basis of allegation within the Three Grounds) but it is clear from the FCA's interview notes that there were layers of staff and numbers sufficient to make it certainly possible that breaches were attributable to individual faults by others and that they were not drawn to the attention of Mr Keeble.

260. This is in fact demonstrated by the information provided by Ms Martin during her interview with the FCA (see paragraph 118 above). It may well be that she was referring to one of the two examples provided in the Hogan Lovells' report because she referred to the use of the borrower's mother's card. In any event, she informed the FCA that this was the fault of an agent who did not deal with the third party details properly and failed to make sufficient notes of the borrower's situation on the system.

If that example had been investigated for the purposes of this claim and specific facts relevant to Mr Keeble's knowledge and responsibilities had been identified, those facts could and should have been put to him within the evidence in chief.

261. He would then have been able to deal specifically with them in his evidence in answer. He would have had the opportunity, for example, to raise (whether addressing it as a specific example or as part of a category of examples) a defence of "no responsibility" or "not incompetent" based potentially on the fact(s) that he did not know and/or that it cannot be asserted he ought to have known of this occasion of individual fault and/or that any actions or omissions were not incompetent. Whether he would have been able to or not is not known but that is because it was not raised within the claim. This illustration demonstrates why the requirements for evidence of knowledge and incompetence is required whether this particular case would have been relied upon or not.

262. The court might be able to "jump" to its own conclusions by "filling in the gaps" in certain disqualification claims but the evidence is insufficient for that to be done in this claim. That is in particular because of the existence of the Communications Policy which, once established, means that the Secretary of State's case needed to address Mr Keeble's knowledge and incompetence by reference to its breaches.

263. To "jump" to a conclusion of incompetence would also ignore the important fact that Mr Keeble did not have the opportunity to answer that type of evidence. He did not have the opportunity, for example, to challenge specific, illustrative cases (whether individual or by category) by demonstrating that the complaint relied upon in fact concerned debit card details which were the same as those provided when the loan had been made and, therefore, to rely upon the contractual entitlement addressed above.

264. There was no opportunity, as another example, to explain why a particular complaint should not be viewed as a one off. There was not even an opportunity to explain what was or might have been done to address the complaint. Whilst the Secretary of State's evidence refers to a few examples, it is not suggested in respect of any of them that Mr Keeble was in fact made aware of the complaint(s) or that he ought to have been aware of the specific facts or that he did or did not do something as a result which establishes incompetence.

265. In this regard it is also to be noted that the issue is not whether Mr Keeble breached any of his duties but whether the conduct complained of demonstrates 'incompetence of a high degree'. It might be easier to assume, for example, negligence but the issue here for the purposes of assumption carries a heavy burden. On the one hand that emphasises the need to satisfy the Court that the matters concerned were caused or allowed by Mr Keeble's actions or omissions and on the other hand it emphasises his entitlement to be able to answer specific evidence in order to challenge the case that the heavy burden has been successfully carried even if his conduct might have involved breaches of duty (see generally at paragraphs 176-177 above).

266. Mr Nersessian sought to find the answer to these problems with reference to the "admissions" made by CFO in the December 2014 correspondence for which Mr Keeble was responsible as the sole director. However, I have already concluded that this correspondence is to be construed in the context of intended conciliation (see

paragraphs 20 and 162 above). Its purpose was to ensure the continuation of the business and this is evident from the fact that Mr Keeble's resignation was intended. That not only limited his real connection with the correspondence but it demonstrated that a commercial approach was being taken to the problem. Nor does his resignation provide evidence to establish incompetence. In any event the content of the correspondence does not bridge the gap created by the matters set out in paragraph 256 above.

267. The potentially, strongest cause for a "jump" is to be found in Mr Nersessian's submission (as also put in cross-examination) that the computer systems used by CFO would automatically produce the result that new card details would be used because of default. Mr Keeble disputed that and the submission does not accord, for example, with the evidence of Ms Martin (see paragraph 118 above). However, the fundamental problem for this submission is that this is not how the evidence in support or even in reply presents the claim. That also means that Mr Keeble did not have a proper opportunity to address it within his evidence in answer (see paragraph 242 above).

268. The underlying cause for the absence of the required evidence from the Secretary of State appears to be that the claim was based upon the wider assertions of the FCA concerning an arguable absence of contractual right and misleading web-sites and the absence of consideration of the existence of the Communication Policy. As a result (or in any event) it did not drill down sufficiently into the issues of borrower consent, knowledge or incompetence through action or omission.

269. However whatever the cause, the result is that not only has the burden of proof not been met but it would be wrong to base this decision on matters which fall outside the general allegations that the claim relies upon. Any temptation to address specific actions or omissions or to redefine the third of the Three Grounds by reference to Mr Keeble's knowledge of the computer system, his responsibility for it and his failure to take appropriate actions must be resisted (see paragraph 41 above).

L) Conclusion

270. Of course I do not suggest that it was necessary to address each and every complaint. Even a small sample would potentially have been sufficient to establish his knowledge and/or a disregard for the breaches of the Communication Policy. It can be observed that such an approach is not uncommon in public interest petitions and in disqualification cases. The evidence will often refer to illustrative complaints both by detailing them within the main body of the statement and by exhibiting relevant documentation including correspondence from the "victim". The point here is that not even a small, acceptable sample has been presented to identify Mr Keeble's role, his responsibility, knowledge, actions or omissions in respect of the complaint(s) in the context of proving incompetence. Such evidence is needed in particular when Mr Keeble caused CFO to adopt the Communication Policy and there is no evidence that he caused the breaches. It is for the Secretary of State to satisfy the burden of proof and that has not been achieved.

271. As previously explained, it would also be wrong to reach any other decision because it would mean that incompetence had been assessed without Mr Keeble having had the opportunity to address specific evidence concerning his knowledge and actions or omissions in relation to the breaches of the Communication Policy. Even assuming he had the information available to descend into the detail for which the Secretary of State did not provide evidence, there was no obligation for him to do so. He did not have to prove he was not incompetent. He was entitled to have evidence of essential facts presented and identified within the Secretary of State's evidence. The obligation explained in ***Re Finelist Ltd & Another*** was not fulfilled.

272. Incompetence on the part of Mr Keeble has not been established for any of the Three Grounds and a cumulative assessment will obviously not alter that conclusion. I do not find him to be unfit to be a director based upon his conduct as a director of CFO. The claim is dismissed.

Order Accordingly