CHP 2019/0066

IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN

CIVIL DIVISION

CHANCERY PROCEDURE

Proceedings under the Companies Act 1974, the High Court Act 1991 and the Financial Services Act 2008 relating to Montpelier (Trust and Corporate) Services Limited

BETWEEN:

ISLE OF MAN FINANCIAL SERVICES AUTHORITY Claimant

and

MONTPELIER (TRUST AND CORPORATE) SERVICES LIMITED Defendant

JUDGMENT OF HIS HONOUR DEEMSTER MOHAMMED KHAMISA QC
DELIVERED ON 2nd OCTOBER 2019

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1. **Introduction**

This is an application by the Authority ("**the Authority"**) for the following appointments in respect of Montpelier (Trust and Corporate) Services Limited (**"the Defendant"):**

(a) a manager, pursuant to section 22 of the Financial Services Act 2008 (**"FSA 2008"**);

(b) a receiver, pursuant to section 21 of the FSA 2008 and section 42 of the High Court Act 1991 ("**HCA 1991"**); and

(c) an inspector, pursuant to section 5 of the Companies Act 1974 ("**CA 1974**")

2. The application is opposed by the Defendant.

Representation

3. An application was previously made for a Temporary Advocates' Licence by the Defendant, pursuant to section 17(2)(b)(iii) Advocates Act 1995, for James Collins Q.C. of Essex Court Chambers , London, to represent the Defendant but on the material before Deemster Corlett, was refused. [**see: Decision of Deemster Corlett 9th July 2019**]. That application had preceded the various applications I deal with under the section, Procedural History, below. Therefore the Defendant was represented by Mr Edward Watkin Gittins ("**EWG"**) during this hearing; although for the purposes of drafting of the applications and written submissions, he had assistance throughout from Mr Collins QC who had drafted the detailed 67 page skeleton argument lodged with the court for this hearing. That document

dealt in considerable detail, with the law and the factual matrix. During the hearing, **EWG** was assisted by Mr Jones, a member of the English Bar but without rights of audience. At the outset of this hearing, I made enquiries about representation and was told by **EWG** that he had been unable to secure representation from the IOM due partly to conflict issues and one he did secure, could not accommodate the court timetable. I advised **EWG** that I would assist him within the bounds permitted of a Judge. In addition, I would grant him time and adjournments to consult with Mr Jones should he need it. Mr Jones sat behind **EWG** and frequently assisted him with points including advising him to raise objections during the Authority's reply. I permitted **EWG** to read almost the entirety of the Skeleton argument. I assisted him by raising a number of queries he had raised about the Authority's claim, pleadings, submissions of law, factual inaccuracies and proportionality concerns. **EWG** was permitted breaks as and when he requested them. He struck me as an articulate, able man, well versed in the factual aspects but importantly, with a good understanding of the law relating to the Claim and fiduciary duties. In a way, he had the best possible opportunity to read out the vast detail of the skeleton argument, an indulgence, I would have been reluctant to grant to counsel. Those passages which were not read out were referred to and have been read by me, several times. I am satisfied that I have ensured that **EWG** was able to have a fair hearing and given all the assistance that was necessary for the purpose of defending the claim.

4. Mr Walter H Wannenburgh (Solicitor General) represented the Authority.

5. I am grateful to both parties for the assistance they have provided me with during the course of the hearing and in their detailed written submissions.

Defendant's Licence

6. The Defendant is licensed by the Authority under section 7 of the FSA 2008 to carry out particular regulated activities. By Licence issued on 3 October 2017, the Defendant's licensed regulated activities are restricted to Class 4 (corporate services) and Class 5 (trust services) activities.

Statutory Functions

7. The statutory functions of the Authority are set out in paragraph 2 of Schedule 1 to the FSA 2008 and include:

   (a) the regulation and supervision of persons undertaking registered activities;

   (b) the maintenance and development of the regulatory regime for regulated activities;

   (c) the oversight of directors and persons responsible for the management, administration or affairs of commercial entities.

8. Under paragraph 3(f) of Schedule 1 to the FSA 2008 in discharging its functions the Authority *must* have regard to, inter alia, the need to safeguard the reputation of the island.

9. By section 2 of the FSA 2008, "The functions of the Authority shall, so far as is reasonably practicable, be exercised:

   "a) in a way that is compatible with the regulatory objectives set out in subsection (2); and

(b) in a way that the Authority considers most appropriate for the purpose of meeting those objectives.

(2) The regulatory objectives are —

(a) securing an appropriate degree of protection for policyholders, members of retirement benefits schemes and the customers of persons carrying on a regulated activity;

(b) the reduction of financial crime; and

(c) the maintenance of confidence in the Island's financial services, insurance and pensions industries through effective regulation, thereby supporting the Island's economy and its development as an international financial centre."

10. It is important to keep the Authority's role and functions in mind throughout the assessment of the evidence and arriving at my decision. I have kept in mind my task here is carry out an assessment of all the evidence in the case-the Authority's and the Defendant's - in order to decide whether the statutory criteria has been met for the making of the various orders that the Authority seeks in its applications. I have to carry out a balancing exercise once I have read all the evidence and decide, whether the evidence supports the making of the orders sought by the Authority or not. In doing so, I have applied the civil standard of proof reminding myself that the burden of proof is on the Authority to satisfy me to that standard. In the Defendant's skeleton argument, it is submitted that I should adopt a different standard of proof. I am not persuaded by that argument principally because my task for the purposes of these applications is to make an assessment of the evidence to ascertain whether the Authority has discharged its burden. I am also satisfied that the statutory framework does not require different standards to be applied. Further, my task, for the purpose of determining these applications is not to decide whether there has been any wrong doing here or dishonesty or misappropriation. That is a task which may or may not be required in the future. What I am required to do is to assess the evidence against the statutory criteria. The parties were not able to agree on a Joint List of Issues (**LOI**) therefore each has submitted separate documents [**see Appendix 1 (Authority's LOI) and 2, (Defendant's LOI)**]. However, the statutory framework which I refer to below provides the best approach to the issues which a court has to resolve in these type of applications. It is not complicated nor should it be, given the regulatory objectives identified above. I deal with my approach in detail below.

11. Following a pre-planned on-site supervisory inspection of the Defendant between 24th to 26th July 2018, the Authority undertook a targeted investigation into the conduct of the Defendant and during that investigation discovered what is described in the Claim Form as the "***Bayridge Arrangement***". There was then protracted correspondence between the parties which culminated in the Claim being issued on 23rd June 2019, which is referred to as "***Bayridge Correspondence*"** [**JPM/1/487; claim form at para 26**].

12. **Procedural History**

(a) Pre-issue procedural history [see Timeline attached at Appendix 3]

It seems to me that the pre-claim history is of some importance as one of the complaints that the Defendant makes is, why, given the apparent urgency, about these applications, the Authority did not make these applications sooner? The answer the Authority gives is that it took a proportionate approach by seeking information from the Defendant about

key features that needed answering, namely, the Loan arrangement, the Beneficial Ownership, the significant payments made to the Mr Gittins' family and details of compliance and due diligence into borrowers as well as the investment criteria. This led to the "***Bayridge correspondence"*** referred above, which the Authority asserts shows at the least an unhelpful approach and lack of co-operation with the regulator and at worst, attempts to mislead it. The Defendant submitted that it did co-operate but was constrained in some respects by confidentiality requirements contained in Trust Deeds and a lack of information in its possession. I shall deal with the confidentiality point in more detail below. In my Judgment, the pre-claim procedural history does tend to support the Authority's case that it was attempting to obtain important information from the Defendant and notwithstanding the confidentiality constraints, there was a great deal of material which I would have expected a licence holder to be able to access and provide without the need for delay. I do not think that there is any merit in this criticism of the Authority on this point and it could have, if it had wanted to, made an application on an ex parte basis but instead appears to me to have chosen a proportionate approach in trying to engage the Defendant.

(b) Post issue-procedural history

Following the issuing of the Claim on 21st June 2019, there have four relevant applications made to me (three before this hearing and one at the commencement of this hearing) and one Deemster Corlett, to which I have already referred to above. The four applications I have dealt with are:

(i) application to transfer from Chancery Procedure to Ordinary procedure 2nd July 2019 and response 8th July, 2019. The Application was heard by me on 26th July 2019 [see my decision of ,refusing the application];

(ii) application to cross-examine on 2nd August 2019 and response of the same date [see my Judgment 15th August, 2019, refusing the application]

(iii) application for discovery on 2nd August 2019 and response of the same date [see my Judgment of 15th August, 2019 refusing the application]

(iv) application for disclosure of third party material which was made to me on the first day of the hearing of these applications. I deal with this in my Judgment [see 13(iv) of this Judgment].

13. **Pleadings**

(i) The Claim

The Authority has filed a detailed Amended Claim form dated 21st June 2019 supported by three statements of John Paul Mylchreest (**"JPM"**) along with large body of exhibits [see **JPM/1** dated 17th June 2019, pp 1-608 and copies of bank statements spreadsheets provided in an electronic form].

(ii) The Defence

Whilst there is not a procedure to enable the filing of a Defence under the Chancery Procedure, the Authority agreed that the Defendant could file a defence. That has been accompanied by a detailed statement from EWG [see Defence dated 19th July 2019 and Watkins Gittins' statement of the same date].

(iii) Other documents

In addition, pursuant to directions given by me, detailed skeleton arguments, separate lists of issues, a defence bundle and a core bundle (served by the Authority) have been lodged with the court. The material is voluminous and I have read all the material. The parties submitted further documents during the hearing which were not voluminous but which I have taken into account in this Judgment. A concern expressed by the Defendant during the hearing was that the Authority, in its oral submissions, was seeking to go beyond the pleaded case and I have been urged to constrain the Authority to the pleaded case. The Defendant provided me with aide memoire itemising areas of the pleadings where the Authority had strayed beyond the pleadings. In its reply, the Authority took me to passages in the Claim form and its pleaded case, which it was said provided the foundation for its oral submissions. I accept that I must approach this application on the basis of the pleaded case and if it appears that a submission, by either side is straying beyond the pleadings then I should ignore that to avoid unfairness.

(iv) Application for third party disclosure

On the day of the hearing, the Defendant made an application for disclosure of the accounts of BIOM to be placed before the court and if granted, that references to the accounts should only be made in a private hearing due to commercial sensitivity. The application was opposed by the Authority on the grounds of delay in making the application and relevance of the accounts to the issues I have to determine. The Authority submitted that if I allowed the application then following the well know principles of "open justice"(which I do not need to recite here), the hearing should be held in open court. I ruled against the Defendant on the grounds that current financial status (liquidity/solvency) of BIOM was not being challenged by the Authority; although the Authority had sought disclosure of these accounts for some time. Further, the Defendant's only real reason for adducing this evidence (which it had previously said it could not because of constraints of confidentiality), was to remove any "suspicion" that BIOM was an entity which did not have very substantial assets of in excess of £100m. The Authority was not challenging that aspect and it seems to me that whether it had assets to that value or not, was not going to assist me with determining the applications here. I was not persuaded that delay should defeat the application but my reason for refusing the application is on a lack of relevance. There was a procedural issue raised by the Authority, namely, that the application had not been served on BIOM and that it was not represented for the purpose of the application. I do not have to deal with that aspect as I have ruled against the Defendant. I have not rehearsed the arguments set out the respective skeleton arguments for this purpose because it seems to me that the issue was a simple one-relevance.

Entities involved

14. I think it would be helpful to set out the various entities that feature in this hearing and the abbreviations used:

Angela Southern	Full name Angela Jean Southern, Isle of Man resident and employee of the Defendant.
Bayridge (Isle of Man) Limited ("**BIOM**")	An Isle of Man company, incorporated on 18 June 2007, registered office at Fernleigh House, Palace Road, Douglas, Isle of Man IM2 4LB, beneficially owned by Watkin Gittins. The company is still live. Directors are Watkin Gittins and Maura Gittins.

Bayridge Investments Limited ("**BIL**")	A name used by the Defendant in internal and external documents, The Defendant advised that there was no such company and that references should be to Bayridge (Isle of Man) Limited.
Bayridge Investments LLC ("**LLC**")	A Delaware company believed to be beneficially owned by Watkin Gittins which ceased to exist on 1 June 2014
Ellis Gittins	Son of Watkin Gittins
Goldwyns Limited	A client of the Defendant.
Helen Gittins	Gittins family member (possibly daughter of Watkin Gittins)
John Cuddy	Former director of the Defendant
John O'Connor	Full name John Francis Noel O'Connor, Former director of the Defendant.
Maura Gittins	Wife of Watkin Gittins, director of BIOM.
Mark Gittins	Son of Watkin Gittins.
Mogeely Stud Limited	A company incorporated in the Ireland, registered office at 29 Lower Patrick Street, Kilkenny and owned by Mark Gittins
Montpelier Insurance Company Inc ("**MICI**")	A Barbados company beneficially owned by Watkin Gittins which, according to the Defendant, ceased to trade in 2011 and which held an insurance licence issued by the Barbados FSC from 2003 to 2011 but not since.
Montpelier (Trust and Corporate) Services Limited (the "**Defendant**")	An Isle of Man company, incorporated on 6 May 1998, registered office at Fernleigh House, Palace Road, Douglas, Isle of Man IM2 4LB, beneficially owned by Watkin Gittins, licensed by the Isle of Man Financial Services Authority to conduct Corporate Services and Trust Services. Current Directors are Watkin Gittins and Paul Garrett.
Monza Contracting Limited ("**Monza**")	A client of the Defendant.
Nigel Kneale	Full name Nigel Graeme Kneale, former

	director of the Defendant.
Paul Garrett	Full name Paul William Garrett, Isle of Man resident and director and Secretary of the Defendant.
Watkin Gittins(**EWG**)	Full name Edward Watkin Gittins, Isle of Man resident, managing director and sole beneficial owner of the Defendant. Husband of Maura Gittins, father to Mark and Ellis Gittins
Wyken Tools Limited 2010 No2 BBT ("**Wyken**")	A client trust of the Defendant

15. **Statutory Framework**

(i) Section 21 of FSA 2008 -Appointment of Receiver

(1) The Authority may present a petition to the High Court for the appointment of a receiver under section 42 of the High Court Act 1991 in respect of the affairs, business and property of a permitted person.

(2) If the High Court is satisfied that —

(a) the appointment is in the *public interest*;

(b) the appointment is *necessary* to protect the interests of customers, creditors or others who have or have had dealings with the permitted person; or

(c) the appointment is necessary for the orderly winding up of the regulated activity undertaken by the permitted person; or

(d) the appointment is necessary so that the affairs, business and property relating to the former regulated activity undertaken by a person may be settled or disposed of in an orderly manner, it may appoint a suitable person as receiver.

(3) On the presentation or hearing of a petition the Court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make an interim order or any other order that it thinks fit.

(4) Without prejudice to the generality of subsection (3), an interim order under that subsection may be made ex parte and may restrict (whether by reference to the consent of the Court or otherwise) the exercise of any powers of —

(a) the permitted person; or

(b) if the permitted person is a body corporate, its directors, in respect of the affairs, business and property of the regulated activity of the permitted person.

(5) This section is without prejudice to the generality of the jurisdiction of the High Court under section 42 of the High Court Act 1991, or under any other enactment or at common law.

(ii) Section 42 of the HCA 1991 Appointment of Receiver

(1) The High Court *may* by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.

(3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

(4) The power of the High Court to appoint a receiver by way of equitable execution shall operate in relation to all legal estates and interests in land; and that power shall be in addition to, and not in derogation of, any power of any court to appoint a receiver in proceedings for enforcing a charge.

(iii) Section 22 of the FCA 2008- Appointment of business manager

(1) The Authority may, by order, prescribe circumstances in which the Authority may apply to the High Court for the appointment by the Court of a person as a manager to manage the affairs of persons in so far as those affairs relate to the carrying on of a regulated activity.

(2) An order made under subsection (1) may contain such incidental or supplementary provisions as the Authority considers necessary or expedient, and may contain different provisions for different types of regulated activity.

(3) The Court may, on an application made to it by the Authority in circumstances prescribed in an order made under subsection (1), appoint, on such terms as it considers to be appropriate, a person to manage the affairs of a person in so far as those affairs relate to the carrying on of a regulated activity.

(4) The Court may make such orders as are necessary to give effect to the appointment of a manager under this section and for dealing with any property connected with the regulated activity.

(iv) Financial Services (Appointment of Manager) Order 2014 ("the 2014 Order")

SCHEDULE

PRESCRIBED CIRCUMSTANCES

1) Where the Authority (referred to as the "Commission" in the 2014 Order) is satisfied that there is sufficient evidence to show that the affairs of the relevant person have been inadequately managed for any reason, including but not limited to —

a) dishonesty on the part of a director or key person of the relevant person;

b) *the Authority by the relevant person of a serious breach of fiduciary duty in respect of a regulated activity*;

c) *a serious failure by the relevant person to maintain proper records*;

d) the Authority by the relevant person of serious and persistent breaches of the Act or of any Regulations, Orders or Rule Book made under the Act;

e) the death or incapacity or prolonged absence of a director or key person of the relevant person which is to the detriment of the regulated activity;

f) the giving with respect to a director or a key person of the relevant person of a direction under section 10 of the Act or section 11A of the Collective Investment Schemes Act 20083 ;

g) the imposition with respect to a director or key person of the relevant person of a prohibition under section 10A of the Act or section 11B of the Collective Investment Schemes Act 2008;

h) the making with respect to a director, secretary or key person of the relevant person of a disqualification order or undertaking under the Company Officers (Disqualification) Act 2009 or similar action taken under equivalent legislation in another jurisdiction; or

i) *a serious failure in the governance of the relevant person or the functioning of its directors or senior management*.

2) Where a relevant person has given notice to the Authority that it has ceased, is ceasing or intends to cease carrying on a regulated activity but the Authority is satisfied that the relevant person —

a) is continuing to carry on such activity; or

b) has failed or will fail to transfer the business in question in an orderly manner or at all.

3) Where the Authority —

a) has issued a notice under section 9 of the Act to suspend or revoke a financial services licence; or

b) is satisfied for any other reason, and such an appointment is necessary to —

i) *protect or preserve assets, books and records or other property for which the relevant person is responsible; or*

ii) protect the interests of a customer, creditor or others who have or have had dealings with the relevant person.

4) Where the Authority is satisfied that there is sufficient evidence that the relevant person has, in relation to a regulated activity, persistently failed —

a) to deliver services in a timely manner; or b) to investigate claims or complaints made by its customers.

5) Where the Authority is satisfied that there is sufficient evidence that the relevant person is carrying on a regulated activity in contravention of section 4(1)(a) of the Act.

6) Where the Authority is satisfied that there is sufficient evidence that the relevant person, in relation to a regulated activity, is unable to or has failed to protect or preserve assets, books and records or other property for which it is responsible.

7) Where the Authority is satisfied that there is sufficient evidence that the appointment of a manager is required due to the failure of a relevant person to take steps to comply with a direction given by the Authority under the Act or the Collective Investment Schemes Act 2008.

8) Where the relevant person is required to comply with the rules of an exchange or clearing house and the Authority is satisfied that there is sufficient evidence to show that the relevant person is in default under those rules.

9) I have italicised the sections of the this schedule that the Authority relies on in support of its application for the appointment of a manager (section 1(b), (c), (i) and 3 (b) (i) and (ii) as well as the statutory provisions, which seem to me to be the key elements that I must be satisfied of by the Authority.

10) This Order was approved by Tynwald on 9th December 2014 and came into operation on 1st January 2015.

11) The parties are agreed that the provisions of this schedule are an important element of these Applications.

(v) Section 5 Companies Act 1974 - Appointment of Inspector

(1) The court may on the application of either the Department of Economic Development or the Authority appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the court shall direct.

(2) Evidence to the court's satisfaction that it is in the public interest that there should be an investigation shall be sufficient to support an application under subsection (1) above, and without prejudice to the generality of the expression "public interest" that expression shall for the purposes of this section include any circumstances suggesting —

(a) that a company's business is being or has been conducted with intent to defraud its creditors or the creditors of any other person or otherwise for a fraudulent or unlawful purpose or that the company was formed for any fraudulent or unlawful purpose;

(b) that persons concerned with a company's formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct.

(3) Nothing in this section shall derogate from the rights of a member of a company under section 7 of the Companies Act 1968.

(4) Subject to the provisions of this Act, the provisions of section 134 of the principal Act shall apply in relation to an application under subsection (1) above.

(5) The court's power under section 134 of the principal Act shall be exercisable with respect to —

(a) a company notwithstanding that it is in the course of being voluntarily wound up;

(b) all bodies corporate incorporated outside the Island which are carrying on or have carried on business in the Island.

Summary of the Authority's claim (CB/1/1-56) [Core Bundle/tab/page/paragraph]

16. The Authority's position can be summarised from its Claim form as follows [**CB/ tab1/p1-56**]:

16.1 the Defendant is a licensed fiduciary services provider (TCSP);

16.2 the sole beneficial owner of the Defendant is **EWG**;

16.3 the Defendant paid very significant sums, amounting to millions of pounds of money belonging to client company and trust structures ("**client monies**") to companies beneficially owned by **EWG** (as a result of his role as chairman and director of the Defendant, **EWG** was able to effect the payment of millions of pounds of client monies to other companies owned by him);

16.4 the payment of millions of pounds of client monies to companies beneficially owned by **EWG** funded the lifestyle of **EWG**, his wife and children;

16.5 the Defendant via these client structures paid millions of pounds of client monies to companies beneficially owned by **EWG** without fully or sufficiently considering the implications and risks of conflict or the best interests of its clients, the relevant companies or the relevant beneficiaries;

16.6 the Defendant via these client structures paid millions of pounds of client monies to companies beneficially owned by **EWG** in breach of fiduciary duties and without disclosing this clear conflict of interest to its clients;

16.7 the Defendant has repeatedly stated to the Authority that client monies were paid "by way of loan" to Bayridge (Isle of Man) Limited ("**BIOM**") (a company beneficially owned by **EWG**) and not to any other company. Furthermore, the Defendant repeatedly stated that the only "loans" were to BIOM and not to any other company. These statements are false. The Authority has discovered that millions of pounds of client monies which were the subject of "loan" agreements with BIOM as borrower were in fact paid to at least two other companies owned by **EWG** and not to BIOM;

16.8 the Defendant (via its client structures) paid millions of pounds of client monies to Bayridge Investments LLC ("**LLC**"), a Delaware company which was cancelled from the Delaware Register of Companies on 1 June 2014. The payments to LLC were in respect of the "loan" agreements with BIOM (as borrower). There was no loan agreement with LLC. The Defendant facilitated the payment of millions of pound of client monies to LLC **after** it was cancelled from the Delaware Register of Companies. LLC is beneficially owned by **EWG**;

16.9 the Defendant (via its client structures) also paid millions of pounds of client monies to Montpelier Insurance Company Inc ("**MICI**"), a Barbados company which held an insurance licence in Barbados until 2011. The payments to MICI were in respect of the "loan" agreements with BIOM (as borrower). There was no loan agreement with MICI. The Defendant procured the payment of millions of pound of client monies to MICI **after** it ceased to be licensed to conduct insurance business and **after** it (according to the Defendant's own admission) "ceased trading in 2011". MICI is beneficially owned by **EWG**;

16.10 either the Defendant repeatedly paid millions of pounds of client monies to the wrong "borrower" and the wrong bank account over a prolonged period of time and was unaware of these repeated errors (which is a serious breach of fiduciary duty, serious failure to maintain proper records and serious failure of governance) or it has intentionally misled the Authority as to the true recipient of millions of pounds of client monies. Either of these explanations warrants the Authority intervening in the management and affairs of the Defendant and supports the Court making the Orders sought in this Claim Form;

16.11 save for the receipt of a single memorandum from **EWG** dated 3 June 2009 mentioned in paragraph 17.12, the Defendant undertook no proper due diligence on the financial standing of BIOM, its capital position, its liquidity, its ability to repay the putative "loans" or its regulatory position (in fact, it did not hold a class 1 deposit-taking licence) before, or indeed since, paying millions of pounds of client monies purportedly to BIOM (note that the client monies were in fact paid to other companies);

16.12 the only information available to the Defendant (not amounting to due diligence) before paying away millions of pounds of client monies (without any security) was the one page 3 June 2009 memorandum from **EWG** confirming that "Bayridge Investments" (stated to be a company of which he was director "but not a shareholder") had assets which "*exceed £90 million and it has no bank or other debt accept [sic] sundry creditors of less than £50k. The company is therefore very secure, perhaps even more so than banks!*". The Defendant accepted that memorandum without enquiry, challenge or verification. That memorandum did not enclose any accounts (audited or otherwise) or any other supporting documentation to prove the veracity of this statement. As at the date hereof, the Defendant has confirmed that it still does not hold any such supporting documentation which could verify the financial position of BIOM. The Defendant told the Authority to contact **EWG** personally in respect of its enquiries into the financial position of BIOM. **EWG** has refused to provide any audited accounts or other financial information for BIOM following a request from the Authority;

16.13 the Defendant has failed to maintain proper records in relation to these loan arrangements;

16.14 statements for the Royal Bank of Scotland (**"RBSI"**) bank accounts held by BIOM and LLC were addressed to "The Directors, Montpelier Trust & Corporate Services Limited, Fernleigh House, Palace Road, Douglas, Isle of Man, IM2 4LB", yet the Defendant repeatedly told the Authority that it did not have such bank statements. The Authority knows of no reason for the Defendant to misrepresent the position: the inference is that the Defendant was reluctant to disclose such documents to the Authority. The RBSI bank statements for MICI were addressed to "The Secretary, MTM Insurance Inc, Fernleigh House, Palace Road, Douglas, Isle of Man, IM2 4LB";

16.15 even cursory reference to those bank statements would have informed the directors of the Defendant that payments made from the bank accounts of BIOM, LLC and MICI included personal expenditure of **EWG** and his family (for example, the purchase of racehorses by **EWGs**' wife and son, the payment to the Isle of Man Courts of Justice of a £700,000 security for costs order made against Montpelier Tax Planning (Isle of Man) Limited – noted by the Staff of Government Division as having been paid personally by **EWG**, hundreds of payments to **EWG**, his wife Maura Gittins, his son Mark Gittins and his son Ellis Gittins);

16.16 the Defendant (and its senior management team) breached multiple fiduciary duties in respect of acting as directors of client companies and trustee of client trusts which purportedly paid millions of pounds to BIOM but actually paid those monies to LLC and MICI.

Even if the monies were paid to BIOM, this would still have amounted to a breach of fiduciary duty (see paragraph 162 below);

16.17 there has been a serious failure in the governance of the Defendant;

16.18 there have been multiple client complaints regarding the security of client assets/client monies and the payment of client monies to companies owned by **EWG**;

16.19 the interests of the clients and creditors of the Defendant need to be protected;

16.20 the public interest requires the Authority to intervene in the management and affairs of the Defendant;

16.21 the appointment of a receiver over the Defendant is necessary in the public interest;

16.22 the appointment of a manager in respect of the regulated activities of the Defendant is necessary;

16.23 the appointment of an inspector to independently investigate the affairs of the Defendant is necessary and in the public interest.

The Defence in summary (CB/5/85-138)

17.1 The Defendant's defence can be summarised as follows:

17.1.1 Whilst the Defendant did, pursuant to loan agreements, transfer client monies to companies of which **EWG** was a director, none of those companies was beneficially owned by him;

17.1.2 It is denied that these transactions involved any conflict of interest or any other breach of fiduciary or other duties on the part of the Defendant;

17.1.3 The Defendant cannot properly defend itself against allegations that statements were false without knowing precisely which alleged statements the Authority is referring to. For this reason, paragraph 17.7 of the claim should be struck out;

17.1.4 It is denied that BIOM is or was at any material time beneficially owned by **EWG**. BIOM is owned by a discretionary trust called the Bala Settlement (the **"Trust"**). **EWG** is the trustee of the Trust but is excluded from the class of beneficiaries. In his capacity as trustee, **EWG** has been the sole legal (but not beneficial) shareholder in BIOM since 3 July 2012;

17.1.5 BIOM's entry in the beneficial ownership database followed this guidance. As the Authority knows (from its own guidance) this does not demonstrate that **EWG** has any beneficial interest in BIOM;

17.1.6 It is denied that the Defendant has made any false statements as to the identity of the party to whom the loans were made;

17.1.7 It is admitted that LLC was a Delaware corporation until it was cancelled on 1 June 2014. However, LLC was not at any material time beneficially owned by **EWG**. It was owned by the Trust. In his capacity as trustee, **EWG** was the legal (but not beneficial) owner of LLC until it was cancelled;

17.1.8 It is admitted that client monies were paid to an account in the name of LLC, paragraph 17.8 is denied. These monies were not paid to LLC. Monies in this account were owned and controlled by BIOM;

17.2 It is admitted that there was no loan agreement with LLC at any time material to this dispute;

17.3 It is admitted that client monies were paid to an account in the name of MICI;

17.3.1 It is admitted that MICI held an insurance licence (issued by the Barbados FSC) and engaged in insurance business in Barbados until 2011. Since 2011 MICI has not carried on insurance business. Its business (and assets) have been in runoff. It now has no assets or liabilities;

17.4 It is admitted that there was no loan agreement with MICI;

17.4.1 The Defendant has not paid any monies to the wrong bank accounts. Nor has it misled the Authority (intentionally or at all). As set out above, BIOM borrowed client monies and directed where they be paid;

17.4.2 The Defendant, through its director **EWG**, had extensive and detailed knowledge of the financial standing of BIOM. Watkin Gittins was also at all material times a director of BIOM (as is pleaded by the Authority at paragraph 31.3);

17.4.3 The 3 June 2009 memorandum (which is defined by the Authority as the "2009 Bayridge Gittins Memo") merely recorded (l) a summary of the rationale for advancing loans to BIOM; (2) a summary of the financial standing of BIOM; and (3) two issues that were to be considered by two of the other directors (at that time) of the Defendant;

17.4.4 The matters addressed in the 2009 Bayridge Gittins Memo were discussed by the directors of the Defendant, as were (subsequently) the individual loans by client trusts and companies;

17.4.5 The Defendant is not required to hold supporting documentation that verifies the financial standing of every entity in which clients monies are invested;

17.4.6 By letter dated 19 November 2018, **EWG** personally (from his home address and not on the Defendant's headed paper) invited questions about BIOM to be directed to him personally, rather than to the Defendant;

17.4.7 It is admitted that BIOM's returns record that it has not prepared financial statements in accordance with the applicable Companies Acts. It was not required to do so. However, the returns also recorded that BIOM did keep accounting records "sufficient both to show and explain the company's transactions and to disclose within a reasonable time and with reasonable accuracy the company's financial position;

17.4.8 It is admitted that **EWG** declined to provide the Authority with detailed financial information about BIOM or audited accounts. That information is confidential and the Authority has no right to demand that BIOM breach its duty of confidentiality and did not (in the correspondence exhibited to the Claim Form or at all) offer any suitable confidentiality undertakings;

17.4.9 It is admitted that bank statements for the RBSI accounts for BIOM and LLC were addressed as alleged. This was the registered office of BIOM. Although addressed to the Directors of

the Defendant, they were not the property of the Defendant nor held by the Defendant. They were held by BIOM and (until removed) LLC. The Defendant had no right to access them or disclose them to any other person. It is admitted that, consistent with this, the Defendant informed the Authority that it did not hold bank statements for BIOM;

17.4.10 The Defendant did not misrepresent the position and was not reluctant to disclose bank statements to the Authority. It could not disclose them;

17.4.11 Response to Appendix 2 of the Claim, it is admitted that the bank statements disclose payments made from the BIOM, LLC and MICI to or for the benefit of **EWG** and his family. Save as aforesaid, the allegation, supported by unparticularised examples, is too vague to respond to. The Authority is required to identify and prove each payment it is referring to and relying on. The Defendant had no interest in what BIOM did with the funds loaned to it: its only interest was in the terms on which the client money was loaned and the security of repayment;

17.4.12 The bank statements reveal nothing about the basis on which the payments were made from the BIOM, LLC and MICI accounts. Where payments were made for the benefit of Watkin Gittins, they were made as partial repayment of sums owed to **EWG** or his wife as deferred consideration for assets sold to the Trust;

17.4.13 The statements do not reveal anything meaningful about BIOM, which is and was at all material times (as recorded in its returns) an investment holding company. BIOM's financial standing is dictated by the value of the investments it holds; not the movements on its bank statements;

17.5 The Defendant did not breach any fiduciary duties whether as alleged or at all;

17.6 There has been no serious, failure in the governance of the Defendant.

17.6.1 It is admitted that there have been some client complaints. Insofar as particulars are set out in paragraphs 106 to 150, these are responded to below. The Defendant cannot properly defend itself against allegations that complaints were made without knowing precisely which complaints the Authority is referring to;

17.6.2 Given the size of the Defendant's business and the number of its clients (several thousand), the number and nature of the complaints does not indicate any failing (alternatively, any substantial failing) on the part of the Defendant

17.7 It is denied that the Authority is entitled to any of the relief sought:

17.7.1 The conditions for the appointment of a receiver and/or manager and or inspector are not satisfied;

17.7.2 Even if, which is denied, one or more conditions is satisfied, the Court should not exercise its discretion to appoint a receiver and/or manager. To do so would be disproportionate and would damage the interests of the Defendant's clients;

17.7.3 The ***Bayridge Arrangement*** was repeatedly disclosed to the Authority, in particular in the August 2018 Loan Schedule, the November 2018 Loan Schedule and the April 2019 Loan Schedule. The Authority does not dispute the accuracy of these schedules. In these circumstances, the Authority cannot properly advance a case that the Defendant intended to mislead the Authority or obfuscate or conceal the true extent of the arrangement: the

Authority admits that the Defendant provided these schedules and accepts that they were accurate.

17.7.4 The purpose (from the Defendant's perspective) was to enable clients to earn interest at a considerably higher rate (frequently 3%) than would be available from a bank, whilst lending on a short or medium term and to a secure borrower. In the Claim Form, the Authority does not dispute this. In particular, it does not plead any case as to what (it says) the true purpose of the arrangement was. In these circumstances, the Authority cannot properly advance a case that the Defendant intended to mislead the Authority or obfuscate or conceal the true purpose of the arrangement;

17.7.5 There was no serious failure to maintain proper records nor any serious failure in governance. Nor was there any "intention to mislead the Authority or obfuscate or conceal the true nature, extent and purpose of the ***Bayridge Arrangement;***

17.7.6 It is denied that the policy and procedures of the Defendant required a specific board resolution for each loan to BIOM (whether an original loan or a roll over). Without prejudice to this, each such loan was considered by the board of the Defendant. It is admitted that, for each loan to BIOM, the consent of the client was also required and given. That consent had to be given by the duly authorised body or individual (whether the board, authorised director or trustee). For both parties, there was no requirement as to the form of any record. In particular, there was no requirement that every decision be recorded in minutes of resolutions;

17.7.7 **Complaints**-each complaint had a particular factual narrative and needed to be seen in the correct context [**s**ee Defence **CB/5/117-128]. EWG's** statement deals with each complaint in detail. **[see CB/5/117-128/103-146**];

17.7.8 The Dominion litigation is irrelevant to the issues raised by the Authority in this claim. It concerned the nature or degree of protection to which a former trustee was entitled when replaced by a new trustee.

18. **The issues that I have to determine applying the statutory framework to the evidence are:**

(i) For section 22, appointment of manager (a) are one or more of the *circumstances* [as set out in the schedule] for the making of an order established? (b) should the court exercise its *discretion* under s22(3) to appoint a Manager?;

(ii) For section 21, appointment of receiver, is the court satisfied that — (a) the appointment is in the *public interest*; (b) the appointment is *necessary* to protect the interests of customers, creditors or others who have or have had dealings with the permitted person (c) pursuant to 42, the court may by appoint a receiver in all cases in which it appears to the court to be *just and convenient* to do so.

(iii) For section 5, appointment of an inspector, (a) a court *may* appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the court shall direct (b)Evidence to the court's satisfaction that it is in the *public interest* that there should be an investigation shall be sufficient to support an application under subsection (1) above, (c)"public interest" that expression *shall* for the purposes of this section include *any* circumstances suggesting that persons

concerned with a company's formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or *other misconduct.*

Evidence (Authority/Authority)

19. Evidence to support the Authority's claim is contained in three statements of **JPM**, dated 17th June 2019 [1][**CB/2/57-64**]; 28th June 2019 [2] [**CB/3/65-66**] and 26th June 2019 [3][**CB/4/67-84**] and the exhibits appended thereto. The 3rd statement deals in detail with the issues raised by the Defendant in its defence and supporting statement of **EWG**. A summary of the three statements is as follows.

20. **JPM** is a senior manager in the Authority and authorised to make the statements on behalf of the Authority.

21. He has exhibited a large number of documents JPM1 (pages 1A to 608), which were collated in the course of the investigation into the Defendant. He has obtained documents from a variety of sources using the Authority's extensive powers.

22. The Authority's regulatory objectives are set out in section 2 of the FSA 2008 and are summarised as follows:-

    (i) securing an appropriate degree of protection for policyholders, members of retirement benefits schemes and the customers of persons carrying on a regulated activity;

    (ii) the reduction of financial crime; and

    (iii) the maintenance of confidence in the Island's financial services, insurance and pensions industries through effective regulation, thereby supporting the Island's economy and its development as an international financial centre.

23. The Authority is mindful of its regulatory objectives in making this application. Moreover, in exercising its functions, the Authority is mindful of its statutory obligation to safeguard the reputation of the Island.

24. On various dates from 26 November 2018 to 10 June 2019, the Authority exercised its powers to compel **RBSI** to produce records and statements in respect of accounts held by RBSI for BIOM, Bayridge Investments LLC, Montpelier Insurance Company Inc, the Defendant and certain of its clients which had purportedly "lent" money to Bayridge (Isle of Man) Limited. He has conducted an analysis of all the material which has been collated.

25. "Exhibit JPM1" includes reference to particular bank statements evidencing those transactions mentioned in the Claim Form: they are drawn from a far larger series of statements which the Authority now has in its possession.

26. In addition to hard copy bank statements, RBSI provided the Authority with electronic bank records in the form of detailed Excel spreadsheets. These electronic bank records are too large in size to print out in a practical way. He confirms that the Authority has reviewed these spreadsheets carefully during its investigations and in preparing this application. Any particular bank transaction referred to in the Claim Form which is not apparent from the individual narrative description on the paper bank statements exhibited has been confirmed by the Authority's review of the relevant electronic spreadsheets provided by RBSI.

Beneficial Ownership Information

27. Section 15(3) of the Beneficial Ownership Act 2017 (the "BOA 2017") enables the Authority, a "competent authorities" as defined in section 15(3) of the BOA 2017 and to access the database for a permitted purpose. Section 3 of BOA 2017 defines "permitted purpose" and includes "the furtherance or discharge of any function under this Act or any other enactment of the competent Authority seeking access to beneficial ownership information".

28. As an officer of the Authority **JPM** accessed the database for a permitted purpose. From the company records of the Defendant held by Companies Registry, exhibit hereto at JPM1.11 a copy of the electronic record identifying **EWG** as its first nominated officer. No recorded changes in nominated officer have been notified to the Department for Enterprise.

29. From the company records of BOIM, Exhibit **JPM1.18** a copy of the electronic record identifying Watkin Gittins as its first nominated officer. No recorded changes in nominated officer have been notified to the Department for Enterprise.

30. **JPM** states that he is satisfied that accessing the beneficial ownership database in respect of the Defendant and of **BOIM** is for a permitted purpose, namely in furtherance or discharge of the Authority's functions under the Act.

31. On 17 May 2019, **JPM** accessed the beneficial ownership database and extracted a print of the registrable beneficial ownership information entered by the nominated officer of the Defendant and **BOIM**. JPM1.10, a copy of the entry in the beneficial ownership database in respect of the Defendant in which **EWG**, as nominated officer, identifies **EWG** as the 100% beneficial owner of the company. [see JPM1.14].

Income Tax Division – Bayridge (Isle of Man) Limited tax returns

32. On 7 March 2019, the Authority used its statutory powers to compel the Income Tax Division to provide copies of all income tax returns submitted by Bayridge (Isle of Man) Limited together with any other information held relating to the submission of tax returns. A copy of the reply from the Income Tax Division dated 11 March 2019 was obtained. The tax returns filed by Bayridge (Isle of Man) Limited state that it has earned zero income since incorporation. [**JPM1.122-123**]

2014 Direction

33. The Authority issued a direction under section 14 of the Act to the Defendant on 31 October 2014 (the "2014 Direction") directing it to, inter alia, ensure that "there is no granting or increase of loans to the directors without the prior written consent of the Authority…." [**JPM1. 282-283** a copy of the 2014 Direction]. The Authority had at that time, and continues to have, concerns regarding the financial resources of the Defendant. Notwithstanding those concerns, the Defendant's auditors have recently signed off on its financial statements to the year ended 31 December 2018 (the "2018 Accounts"). [**JPM1.591-605** a copy of the 2018 Accounts].

34. The 2018 Accounts show that the loan balance due from **EWG** to the Defendant increased from a balance of £532,343 on 31 December 2017 to £911,893 on 31 December 2018 (see Note 15). This increase in loan balance is regarded by the Authority as a breach of the 2014 Direction. That loan balance was reducing since the issue of the 2014 Direction. This significant increase in the loan balance due from **EWG** to the Defendant in the last year is a

cause of concern. This breach of the 2014 Direction is also regarded as a serious failure in the governance of the Defendant. By way of update, the Defendant's auditors Greystone LLC wrote to the Authority on 10 June 2019 stating that it did not believe this increase was a breach of the 2014 Direction: see paragraph 7 of Exhibit **JPM1.606-608** (note that Greystone LLC erroneously referred to the 31 December 2017 balance as "£683,743" whereas the audited accounts state that the balance was £532,343). The Authority does not accept this assessment by the auditors.

Defendant's relationship with the Authority

35. **JPM** states that it is important to give some background to the relationship between the Defendant and the Authority. That relationship between the Defendant and the Authority has not as constructive and positive as the Authority would expect with a licence holder. [see**: JPM1.472-486** a selection of correspondence from the Defendant to the Authority in which the Defendant criticises the conduct of the Authority]. This is produced to the Court in order to provide some of the background context to the relationship between the Defendant and the Authority. The Authority denies the allegations of the Defendant in this correspondence.

Appointment of Receiver – Section 21 of the Act

36. For the reasons set out in the Claim Form, the Authority is satisfied that the appointment of a receiver in respect of the affairs, business and property of the Defendant is necessary: (i) in the public interest; (ii) to protect the interests of customers (clients), creditors and others who have or have had dealings with the Defendant.

Appointment of Manager – Section 22 of the Act/2014 Order

37. In addition, for the reasons set out in the Claim Form, the Authority is satisfied that the appointment of a manager in respect of the Defendant is appropriate. The Defendant makes the point that it is for the court to be satisfied. The Authority accepts that proposition. The Authority is satisfied that there is sufficient evidence to show that the affairs of the Defendant have been inadequately managed on the following grounds set out in the 2014 Order:-

    (i) the Authority by the Defendant of a serious breach of fiduciary duty in respect of a regulated activity;

    (ii) a serious failure by the Defendant to maintain proper records;

    (iii) a serious failure in the governance of the Defendant or the functioning of its directors or senior management.

38. In addition, for the reasons set out in the Claim Form, the appointment of a manager is necessary to protect or preserve assets, books and records or other property for which the Defendant is responsible.

39. The appointment of a receiver and a manager would bring the following benefits:-

(i) a receiver and a manager would bring additional skills to the Defendant to assist in rectifying the failings identified;

(ii) a receiver and a manager would be independent from the directors (which is imperative when it comes to issues of poor corporate governance).

The only director of the Defendant other than **EWG**, who is hopelessly conflicted in view of the ***Bayridge Arrangement*** (as defined in the Claim Form), is Paul Garrett. Paul Garrett has failed since at least 2009 to provide any effective challenge to the control and decision-making of **EWG**. The directors of the Defendant cannot be relied upon to protect the interests of clients, creditors and/or others who have dealings with the Defendant.

40. The Authority considers that the appointment of a receiver and manager is a proportionate response to the deficiencies which have been identified in the governance and operations of the Defendant, as set out in the Claim Form.

41. The appointment of a manager under section 22 of the **FSA 2018** is "to manage the affairs of persons in so far as those affairs relate to the carrying on of a regulated activity".

42. The appointment of a receiver is in "respect of the affairs, business and property of a permitted person". It is wider than the affairs related to the carrying on of a regulated activity (i.e. the manager's role). Given the serious nature of the concerns of the Authority in relation to the widespread failings of the Defendant, the Authority is satisfied that the appointment of a receiver, in addition to a manager, is required in the public interest and so that the interest of clients, creditors and others can be protected. The activities of the Defendant that have raised these serious concerns relate not just to the specific regulated activities.

Appointment of Inspector – Section 5 of the CA 1974

43. For the reasons set out in the Claim Form, the Authority is satisfied that the appointment of an inspector to investigate the affairs of the Defendant and to report thereon is necessary in the public interest.

44. **JPM** makes the following observation on **EWG**'s statement of 19th July 2019 and defence filed on behalf of the Defendant. The Defendant has helpfully admitted many of the material facts contained in the Claim Form including:-

44.1 Save for the receipt of the 2009 Bayridge Gittins Memo and verbally relying on (without documenting any verification or challenge) **EWG** "extensive and detailed knowledge of the financial standing of BIOM", the Defendant did not carry out any due diligence on the financial, legal or regulatory position of BIOM, its liquidity or ability to repay before paying millions of pounds of client monies to it: see paragraphs 23 and 24.2 of the Defence. The Defendant states in paragraph 23.2 of the Defence that the 2009 Bayridge Gittins Memo recorded "a summary of the financial standing of BIOM". I remind the Court that in relation to this issue that Memo merely stated (without exhibiting any accounts or other verification whatsoever):-

"The assets of Bayridge exceed £90 million and it has no bank or other debt accept [sic] sundry creditors of less than £50k. The company is therefore very secure, perhaps even more so than banks!";

44.2 The Defendant does not hold any verified due diligence on BIOM: see paragraph 24.3 of the Defence;

> 24.3. The third and fourth sentences are admitted. The Defendant is not required to hold supporting documentation that verifies the financial standing of every entity in which clients monies are invested.

44.3 The Defendant (as trustee of client trusts) lent millions of pounds of client monies to BIOM;

44.4 Client company structures of the Defendant lent millions of pounds of client monies to BIOM. The directors of those client companies were in most cases Watkin Gittins and Paul Garrett, who were also directors of the Defendant. In some cases, senior member of staff of the Defendant Angela Southern was a director of client company structures;

44.5 **EWG** was at all material times a director of the Defendant and thereby a director of the trustee of the client trusts lending money to BIOM;

44.6 **EWG** was at all material times the controller and ultimate beneficial owner (**"UBO")** of the Defendant;

44.7 **EWG** was at all material times a director of BIOM, the company which borrowed millions of pounds of client monies from client structures of the Defendant;

44.8 **EWG** was at all material times the controller of BIOM. Not only was he (along with his wife) a director of BIOM, but he was also the person who had the power to appoint and remove directors of BIOM by virtue of his ownership (as trustee of the Bala Trust)[1] of the entire share capital of BIOM;

44.9 **EWG** was at all material times the registerable beneficial owner of BIOM in accordance with the BOA 2017;

44.10 BIOM did not hold any regulatory permissions;

44.11 Since incorporation in 2007, BIOM did not prepare any financial statements (balance sheet and profit and loss account/income and expenditure account);

44.12 BIOM has declared zero income on its tax returns since incorporation in 2007;

44.13 Millions of pounds of client monies which was lent to BIOM were actually paid to accounts in the name of LLC or MICI, not to BIOM. These payments were made by the Defendant (as trustee – where the lender was a client trust) or by the client company lenders (whose directors were **EWG** and Paul Garrett, or in some cases Paul Garrett and Angela Southern). Note that in no relevant case were the underlying beneficial owners of these client companies the directors;

44.14 Client monies were paid by the Defendant as trustee or by client company lenders to an account in the name of LLC at a time when that company didn't exist. The Defendant knew this. See paragraph 55 of the Gittins Witness Statement " [LLC] was dissolved on 1st June 2014 having transferred all assets to BIOM";

44.15 Despite the statement by the Defendant that "[LLC] was dissolved on 1st June 2014 having transferred all assets to BIOM", the Defendant admits that LLC continued to operate a bank account at RBSI in the Isle of Man (although, the Defendant argues that the LLC account was "operated by BIOM" – see paragraph 48.2(2) of the Defence. See also paragraph 66 of the Defence "the principle (sic) account used by BIOM is the LLC account");

44.16 BIOM, MICI and LLC (which companies received millions of pounds of client monies in loans from Defendant and its client companies) made payments to or for the benefit of Watkin Gittins and his family: see paragraph 27.1 of the Defence;

44.17 BIOM (either directly or through the accounts it "operated" with LLC and MICI) did not, at the material times, have substantial cash balances.

Beneficial ownership of BIOM

45. The Authority does not have to prove that **EWG** is the absolute beneficial owner of BIOM. The concerns of the Authority regarding the serious breaches of fiduciary duties set out in paragraphs 159-162 of the Claim Form remain in full notwithstanding that the Defendant has submitted that **EWG** holds the shares in BIOM as trustee of the Trust. The Defendant admits that **EWG** is the registerable beneficial owner of BIOM, presumably based on information provided to it by **EWG** *qua* director of BIOM.

46. A material conflict of interest (which exists regardless of **EWG**' beneficial ownership of BIOM) is that **EWG** was clearly interested in:-

a. the Defendant (he was director, controller and UBO) which acted as trustee of client trusts lending to BIOM. In this capacity, he had a duty to act in the best interests of the beneficiaries of the client trusts;

b. the client companies (he was a director of several) lending to BIOM. In this capacity, he had a duty to act in the best interests of the companies lending;

c. BIOM (he was director and controller and sole registered shareholder). In this capacity, he had a duty to act in the best interests of the company borrowing;

d. BIOM (in addition to being the director and controller and sole registered shareholder, he and his family were the recipients of multiple payments from BIOM). In this capacity, **EWG** (in the Defence filed on behalf of the Defendant) admits that BIOM paid money to, or for the benefit of, him and his family. He states that this was in relation to deferred consideration for some unspecified asset sales by him and his wife Maura Gittins to **EWG** as trustee of the Bala trust: see paragraphs 27.2 and 143.2 of the Defence and paragraphs 2.4(3), 3.2, 4, 5, 7.1 of the Defendant's Response to Appendix 2 of the Claim Form (which is appended to the Defence). Regardless of the reason or legal basis for these payments, the making of loans by the Defendant's client structures enabled BIOM to make these payments to **EWG** and family. A review of the bank statements of BIOM, LLC and MICI will clearly show this;

e. **EWG** as trustee of the Bala Trust. In this capacity, he had a duty to act in the best interests of the beneficiaries of the Bala Trust. The class of potential beneficiaries includes employees and former employees of Montpelier Group companies including the Defendant.

47. In addition, a material and substantive conflict of interest also involved the directors of the Defendant and Angela Southern (senior employee of the Defendant and director of certain client company lenders) who had a duty to act in the best interests of the (a) beneficiaries of client trusts and (b) client companies lending to BIOM and who separately had a potential and undisclosed interest as beneficiary in the Bala Trust, whose wholly owned "subsidiary" company (BIOM) was receiving millions of pounds of client monies from the Defendant. The declaration of trust for the Bala Trust (the "**Bala Declaration of Trust**") seeks to exclude any Isle of Man tax resident from benefitting under the trust. It is, of course, possible that employees of the Defendant involved in making loans to BIOM could after leaving the Defendant move from the Isle of Man and cease to be tax resident in the Island, thereby opening up the possibility to be a beneficiary.

Criticism of Authority for not asking Watkin Gittins if he was UBO of BIOM

48. The Defendant heavily criticises **JPM** and the Authority for failing to ask EWG who was the true UBO of BIOM: see paragraphs 152, 158 and 159 of the Gittins Witness Statement. In particular, Watkin Gittins states that it is an error of fact that he is the UBO of BIOM. At paragraph 158 of his witness statement, he states "*at no time has the Authority asked me to confirm who the beneficial owner of BIOM is. Rather it has been assumed by the Authority despite its importance to the Claim*." (emphasis added).

49. **EWG's** witness statement is made qua director of the Defendant and filed in support of the Defence on behalf of the Defendant. Yet, the Defendant did not hold this information (as confirmed below). It appears therefore that Watkin Gittins is conflating his roles as director of the Defendant and director of BIOM in his witness statement. This is further evidence of the inescapable conflict which exists in relation to the Bayridge Arrangement.

50. According to the register of beneficial ownership, **EWG** was at all material times the registered 100% beneficial owner of BIOM by way of both ownership and control (this is admitted by the Defendant).

51. Review of the bank records of BIOM, LLC and MICI, clearly showed hundreds of payments to, or for the benefit of, **EWG** and his family. In the Claim Form, the Authority only gave a small sample of these payments. In view of the Defendant's statement that these payments were in respect of deferred consideration in respect of unspecified asset sales by **EWG** and his wife to the Bala Trust, JPM exhibited bank statements for BIOM, LLC and MICI. A cursory glance of these statements will show that those bank accounts appeared to be operated as the personal bank accounts of **EWG** and family. The transactional activity on those accounts was certainly inconsistent with **EWG** being merely the trustee of the share capital in those companies.

52. In line with that observation by the Defendant, JPMs agree that if Watkin Gittins was merely the registerable beneficial owner of BIOM but not its true UBO. He states "I would expect to see BIOM listed as a client of the Defendant (just like "thousands of other structures administered by the Defendant and other licenceholders"). However, the Defendant has confirmed that BIOM is not a client of the Defendant. Furthermore, the latest client list provided by the Defendant to the Authority does not list either BIOM or the Bala Trust as clients[see: **JPM3.22-60** (copy client list)]

53. On 28 June 2017, EWG sent a completed and signed personal questionnaire ("PQ") to the Authority [Exhibit JPM3.1-21 (copy PQ together with covering letter and follow up letter]. Section 6 Question 2 of the PQ asks "Are you a trustee, enforcer or protector of any trusts

in a personal capacity, other than in the course of your employment? If yes, please provide the total number of appointments. Where possible, please provide a list of trusts on a separate sheet." Watkin Gittins replied in the negative and ticked the box marked "No". In view of this statement by Watkin Gittins, it was reasonable for the Authority to believe Watkin Gittins when he made this statement. If he was a trustee of any trust in the course of his employment with the Defendant, those trusts should be included on the client list;

54. As set out in paragraphs 131-132 of the Claim Form, the Defendant replied to the client in the Dominion Litigation to state that "Bayridge Investments Ltd [erroneous reference to BIOM] is a company wholly owned by Watkin [Gittins] that give (sic) us a higher rate of interest than the bank i.e. 3%"[JPM/1/261-262]. The client's adviser replied to raise a concern regarding the "*clear conflict of interest*" in paying client monies to "*an entity wholly owned by Watkin*". It is reasonable to assume that if BIOM was not beneficially owned by **EWG**, the Defendant would have corrected this statement. It did not;

a. the Authority specifically asked the Defendant by letter dated 26 October 2018 [**JPM/1/518-520**] to confirm the legal owners and UBO of BIOM, LLC and MICI:-

> 9. Details of the legal owners and the ultimate beneficial owners of Bayridge Investments LLC, Bayridge (Isle of Man) Limited, Montpelier Insurance Company Inc. and any other company that is included in the loan schedule related to point 4 above.

b. the Defendant replied to the Authority by letter dated 16 November 2018 **[JPM/1/527-8]** to state:-

> 9. The legal owners of Montpelier Insurance Company Inc and Bayridge are a matter of public record. We hold no further information.

c. on 19 November 2018, **EWG** *qua* director of BIOM requested the Authority to direct questions regarding BIOM to him. The Authority wrote to **EWG** *qua* director of BIOM on 14 December 2018 requesting relevant information on BIOM and on 14 February 2019 requesting the audited accounts for BIOM. On 25 March 2019, Watkin Gittins *qua* director of BIOM replied to state:-

> **Bayridge (Isle of Man) Limited ("the company")**
>
> I refer to your letter dated 14th February 2019 about which I have taken legal advice (privilege in which is not waived).
>
> The company is not regulated by the Authority and therefore the Authority has no jurisdiction over it. The company is in addition under a duty of confidentiality. I cannot therefore provide the information you request. However I can confirm to you that:
>
> 1. The company is not accepting any new loans from clients of Montpelier (Trust and Corporate) Services Limited ("MTC").
>
> 2. Substantial repayments of prior loans have been made recently which no doubt MTC can update you on.

d. given this refusal of **EWG** *qua* director of BIOM to provide information regarding BIOM, it is unlikely that he would have answered the question "who is the UBO of BIOM" if the Authority asked.

55. The Defendant submits that MICI and LLC were not beneficially owned by **EWG** but were owned by **EWG** as trustee of the Bala Trust: see paragraphs 18.1, 39.2 and 151.1 of the Defence.

56. In relation to MICI, the Authority asked the Defendant on 14 December 2018[2] "*Please confirm who the ultimate beneficial owner of MICI is*?" The Defendant replied by letter dated 7 January 2019[3] stating:-

> iii. The Authority has been aware for years that MICI was part of Montpelier Holdings LLC, ultimately owned by Mr Gittins therefore we are surprised that you would need to ask the same question again.

57. This statement completely contradicts the position now taken by the Defendant in the Defence. [see **JPM/1/540-549 10(iii)]**

58. In relation to LLC, at paragraph 55 of the Gittins Witness Statement raises the following contradiction (note the reference to "*beneficially owned by me*"):-

> 55. LLC was formed on 10th March 2004 as a limited liability company in Delaware USA. It was dissolved on 1st June 2014 having transferred all assets to BIOM. At all material times LLC was beneficially owned by me in my capacity as The Trustee of the Bala Settlement ("the trust") to which I refer below.

No substantive or meaningful due diligence on BIOM

59. The Defence confirms the Authority's concerns that the Defendant did not carry out any substantive or meaningful due diligence on BIOM.

60. The Court is referred to paragraphs 23.1, 24.2 and 24.3 of the Defence which for ease of reference state:-

23.1. The Defendant, through its director Watkin Gittins, had extensive and detailed knowledge of the financial standing of BIOM. Watkin Gittins was also at all material times a director of BIOM (as is pleaded by the Authority at paragraph 31.3).

24.2. As set out above, the Defendant (through Watkin Gittins) had extensive and detailed knowledge of the financial standing of BIOM. Paragraph 23 above is repeated.

24.3. The third and fourth sentences are admitted. The Defendant is not required to hold supporting documentation that verifies the financial standing of every entity in which clients monies are invested.

61. The reality is that the Defendant did not have "extensive and detailed knowledge of the financial standing of **BIOM**". **EWG** qua director of **BIOM** may have had that knowledge, but the Defendant as a corporate body did not. These statements are therefore factually and legally inaccurate.

62. In its letter to the Authority dated 7 January 2019, [JPM/1/547] the Defendant confirmed that it did not hold due diligence documentation or evidence but rather relied on **EWG**. The Defendant asked **EWG** for a "current certification" in respect of BIOM's net asset position (stated in 2009 to be over £90 million) and informed the Authority that it expected to receive it from Watkin Gittins during the week of 14 January 2019 when he returned to the Island.

63. The Defendant wrote to the Authority on 7 February 2019 in relation to this "current certification" enclosing a letter from **EWG** qua director of **BIOM** dated 8 February 2019[4] to the Defendant (his own fiduciary services company) in which Watkin Gittins refused to provide the information requested by the Defendant:-

"*Thank you for your enquiry. We are not prepared to divulge detailed financial information due to issues of confidentiality" [***JPM/1/574***]*

64. This is particularly concerning given the Defendant's repeated statements that it relied on Watkin Gittins for due diligence on BIOM including, for example:-

Letter Defendant to the Authority dated 7 January 2019

ii. We have not considered it necessary to obtain continual confirmations from Bayridge and Bayridge has not alerted us to any deterioration. We have asked Bayridge for a current certification but understand that Mr Gittins is in London and Dublin until 14th January so we expect this in that week and will forward it to you.

iii. See ii. Above.

iv. Mr Gittins is a director of Bayridge (Isle of Man) Limited and has undertaken continual due diligence on our behalf since 2009.

Letter Defendant to the Authority dated 7 February 2019

1(i) There has never been any need for repetitive confirmations. Rather Mr Gittins is under a duty to advise of any deterioration. With regard to the net asset we cannot "clarify" the obvious.

65. It is evident from the Defendant's own correspondence that it delegated responsibility for due diligence on BIOM to its heavily conflicted director and controller **EWG** who in turn, *qua* director of BIOM, refused to provide that very due diligence. This is an inescapable conflict which the Defendant has failed to evidence thus far that it managed, adequately or at all. Indeed, as stated in the Defence, the Defendant does not accept any conflict arose in the Bayridge Arrangement.

Complexity of Defendant's business and underlying tax affairs of its clients

66. Pages 1-13 of **EWG's** Witness Statement deal with the complexity of the nature of the Defendant's client business (in relation to tax planning and tax investigations). The Defendant appears to misunderstand what will happen if a manager is appointed. The Authority is not seeking to remove or suspend the directors or staff of the Defendant. They will continue to work their normal hours and discharge their normal duties and responsibilities to the Defendant. The Manager will be in place to manage and supervise the business of the Defendant, not to carry it on.

Failure by BIOM to prepare financial statements

67. The Defendant submits that that BIOM was not required to comply with the obligation on private companies incorporated under the Companies Act 1931 to prepare financial statements (balance sheet and profit and loss account/income and expenditure account) as required by the Companies Act 1982.

68. **JPM** is not aware of an exemption to this legal requirement which would apply to BIOM and no specific exemption is identified in the Defence. Similarly, **JPM** not aware of an exemption which would apply to BIOM to remove the requirement to (a) lay its financial statements annually before a general meeting of members and (b) have its financial statements audited. On 24 July 2019, I conducted an update company search against BIOM and noted that it has not filed a members resolution to (a) dispense with the requirement to lay its financial statements before members (even if it had, it is my understanding that it would still be required to prepare financial statements and circulate them to members) or (b) elect to be audit exempt.

LLC operating bank accounts since being dissolved in 2014

69. The Defendant admits this in the Defence: see paragraphs 48.2(2), 66 and 137 of the Defence. Paragraph 137 of the Defence reads:-

137. Paragraph 147 of the Claim is admitted, save for the reference to the "insurance bond", which is denied. By this time, it was a loan to BIOM. There is, consequently, nothing surprising about the repayment of £120,000 coming from the LLC account.

70. The relevant paragraph of the Claim Form (147) reads:-

"*Furthermore, the Authority has established that a £120,000 payment was made from the purported "insurance bond" with MICI to Invicta BBT in November 2015 but this payment was actually made by LLC, not MICI.*"

71. Contrary to what the Defendant says, a company which didn't exist was repaying £120,000 of client monies to one of the Defendant's clients.

72. The Defendant seeks to argue that LLC was not operating its bank accounts but rather BIOM was using them. On the face of it, based on the Defendant's case, it appears that LLC was providing banking services to BIOM. Whilst this is a serious concern for the Authority, proving this point is not material to invoking the Court's jurisdiction in this case.

MICI ceased trading in 2011

73. In paragraphs 61 and 110 of the Defence, the Defendant queries the Authority's understanding that MICI ceased to trade in 2011. The Defendant states that the fact that MICI no longer carried on insurance business after 2011 would not prevent it undertaking other lawful activities. The Authority's understanding of MICI's trading position was based on the Defendant's letter dated 17 December 2015 to the Authority in which it stated:

"Insofar as concerns MICI you were advised some time ago that the company ***ceased trading in 2011*** *and at that time some 10 policies which were owned by Isle of Man entities administered by MTCSL were treated as at an end by MICI transferring the assets in the policies to the structures as the beneficial owner." (emphasis added)*

Defendant's relationship with the Authority

74. The relationship between the Defendant and the Authority was not as constructive and positive as the Authority would expect with a licenceholder. For the purposes of this Claim, the detailed background to the history of various regulatory matters is not relevant to the material facts which the Authority needs to show in order to invoke the Court's jurisdiction. However, the Authority takes issue with the Defendant's allegations against the Authority.

Invicta Litigation

75. The Defendant states at paragraph 140 of the Defence that it is "*not refusing to hand over trust records and assets. All trust records and assets have been handed over*." It is clear from the Claim Form in the Invicta litigation (Exhibit JPM1.308-313) that the Defendant did not hand over the records and assets and that it took the new trustees to issue proceedings in the Isle of Man High Court to make this happen.

Bank statements

76. It is important for the Court to have an opportunity to review the bank statements of BIOM, LLC and MICI in view of the position adopted by the Defendant.

77. Accordingly, **JPM3.61-747** true copies of the bank statements for Bayridge (Isle of Man) Limited GBP account ending 421; 224 LLC, Montpelier, for the period March 2011 to Januray 2019 are exhibited.

78. In addition to hard copy bank statements, RBSI provided the Authority with electronic bank records in the form of detailed Excel spreadsheets see **JPM3A** in memory stick format.

Appointment of Receiver, Manager and Inspector

79. There is nothing contained in the Defence or **EWG** Statement which removes the need for the Authority to act in this case. The Authority's concerns, including (without limitation):-

a. the statement by the Defendant that a conflict of interest cannot arise in respect of the Bayridge Arrangement (whether or not **EWG** was the beneficial owner of BIOM) unless the lending was either to (a) the Defendant itself or (b) an entity in which the Defendant (not **EWG**) had a financial interest: see paragraphs 76.2 and 151.2 of the Defence. This statement clearly demonstrates a complete lack of knowledge and understanding of conflicts of interest principles which apply to fiduciaries, trustees and directors.

b. the admission that the Defendant knowingly sent millions of pounds of client monies to the bank account of LLC (a Delaware company which didn't exist): see paragraphs 91, 137, 139.1 of the Defence and paragraphs 1 and 7.1 of the Response to Appendix 2 of the Claim Form;

c. the admission by the Defendant that it paid staff salaries from the account of LLC (a Delaware company which didn't exist): see paragraphs 142, 143 and 166.1 of the Defence;

d. the statement by the Defendant that Mt Secretaries Limited is still the secretary of BIOM (see paragraph 78.1(2) of the Defence) despite the Defendant's letter to the Authority on 4 December 2018 stating "please note that Mt Secretaries Limited is no longer the Company Secretary of Bayridge nor does it provide its Registered Office";

e. the statement by the Defendant that BIOM is not a client of the Defendant and that Mt Secretaries Limited is the secretary to BIOM. On the face of it, this involves Mt Secretaries Limited conducting regulated activities out with its exemption and in respect of which, it would need a financial services licence. As a wholly owned subsidiary of a licenceholder (the Defendant), Mt Secretaries Limited benefits from the exemption contained in paragraph 4.4 of Schedule 1 to the Financial Services (Exemptions) Regulations 2011 which provides:-

"*In relation to an activity falling within paragraph (6) or (7) of Class 4, section 4 does not apply to a person which is a directly and wholly-owned subsidiary of a body corporate that is licensed to carry on activities of Class 4 and whose business consists* ***solely*** *of acting as director or secretary (but not both) of the client companies of that licenceholder*." (emphasis is in the Regulations)

f. the Defendant has admitted that Mt Secretaries Limited is acting as company secretary on behalf of a company (BIOM) which is not a client. That activity is not covered by the exemption above;

g. the admission by the Defendant that it provided "logistical and administrative services" to BIOM: see paragraph 79.2 of the Defence. Administrative services such as filing annual returns for a company (which the Defendant did for BIOM) constitute regulated activities;

h. the admission by the Defendant in paragraph 78.1 of the Defence that BIOM's registered office is shared with the Defendant raises concerns as to who is providing that office to BIOM. If BIOM does not have a lease of the property, then at face value the property owner (Montpelier Properties Limited) appears to be conducting regulated activities (the provision of registered office services to a company) without a licence;

i. the admission by the Defendant that it relied on **EWG** to conduct the Defendant's due diligence on BIOM, yet **EWG** (presumably *qua* director of BIOM) continues in the **EWG** Witness Statement to refuse to provide information on BIOM because of the duty of confidentiality on him contained at clause 17 of the Bala Declaration of Trust;

j. despite this duty of confidentiality, **EWG** appears to have chosen to waive or breach it by providing information to the Defendant that BIOM is worth £90 million or £100 million. It appears that **EWG** invokes this duty of confidentiality at his convenience. However, the mere existence of this duty of confidentiality on **EWG** creates an inescapable and unmanageable conflict in respect of the Bayridge Arrangement. The Defendant delegated to, and relied upon, **EWG** in respect of due diligence on BIOM, yet **EWG** (*qua* director of BIOM and trustee of the Bala Trust) cannot disclose anything regarding the trust fund or assets to the Defendant. It is remarkable that the Defendant has pleaded that there is no conflict of interest;

k. in any event, in paragraph 76 of the Defence, the Defendant appears to have a complete misunderstanding regarding conflicts of interests and an ignorance of Rule 6.11(2) of the Financial Services Rule Book 2016 (the "**Rule Book**") which provides:-

"6.11 Conflicts of interest — general

(1) Where a conflict of interest arises —

(a) between the licenceholder or any relevant person and its clients; or

(b) between one client and another,

in the course of carrying on any regulated activities, the licenceholder must promptly notify each of the clients concerned of that fact.

(2) For the avoidance of doubt, any borrowing by the licenceholder or a relevant person[5] from a client amounts to a conflict of interest."

l. the Defendant's belief that the duty to exercise reasonable skill and care is not a fiduciary duty. This will be considered further in legal submissions at the hearing of the Claim;

m. the Defendant's position that its failure to document and record the decision-making regarding the loans made to BIOM does not constitute a serious failure to maintain

proper records and serious failure of governance. Rule 8.28(1) of the Rule Book provides:

"*A licenceholder must keep and maintain proper records to show and explain transactions effected by it on behalf of its clients*." (emphasis added)

n. in paragraph 140 of the Gittins Witness Statement, the Defendant refers to the Authority's Guidelines for Expected Practice for Trust Service Providers. The Authority does not believe that the Defendant has been able to adequately "*provide evidence of the decision making process and the rationale behind the decision*" in respect of the loans to BIOM.

80. For the reasons set out in the Claim Form, supported by evidence in **JPM's** First Witness Statement and Third Witness Statement, the appointment of a manager, receiver and inspector in respect of the Defendant is an appropriate, proportionate and reasonable action.

Defendant's Evidence

[D/1/123; CB/5/85-138; 6/139-200]-defence bundle references /tab/page/para]

81. **EWG** is the director and controlling shareholder of the Defendant and made a statement on its behalf (**D/1/]** in opposition to the Authority's application for the appointment of a receiver, manager and inspector in relation to the Defendant's affairs.

82. He is a Fellow of the Institute of Chartered Accountants in England and Wales and have been so since 1 January 1981 [D/2]. He qualified in 1975. He has nearly 50 years substantial experience in business and finance at a senior level both in industry and public practice. He specialises in offshore tax.

83. The Defendant has had only a limited time to respond to the numerous and wide-ranging allegations made by the Authority which have clearly been assembled over a lengthy period.

BACKGROUND TO THE DEFENDANT AND ITS BUSINESS

84. In November 1992 EWG acquired the whole of the issued share capital of a company called Mt Management Limited a small trust and fiduciary business from Mr Reginald Newton a long time resident of the Isle of Man. On 5th January 1999, Mt Management Limited transferred its book of business to a new company, MTM (Isle of Man) Limited ("MTM"). MTM subsequently changed its name to Montpelier (Trust and Corporate) Services Limited the Defendant. [Change of Name Certificate and the Memorandum & Articles of Association of the Defendant **D/3**]

85. From 1994 to 2010 the Defendant expanded rapidly by in particular pursuing a strategy of managing trust and companies as part of sophisticated tax avoidance schemes primarily set up for UK residents. All of the UK avoidance schemes then and later concerning inter alia UK income tax, capital gains tax and inheritance tax were developed by **EWG** and settled by tax counsel in London primarily at Pump Court Tax Chambers (in particular Andrew Thornhill QC, David Ewart QC, and Professor Adrian Shipwright) and 24 Old Buildings, Lincoln's Inn (James Kessler QC and Mr Robert Argles).

86. The advantage for the Defendant of offering this sort of tax planning was that it could earn not just consultancy fees which it generated but also administration fees for the implementation of some form of legal structure such as a trust, company or partnership or other which generated new trust and company administration fees for the Defendant. Much of this work in that early period revolved around two particular tax planning structures namely: a) Employee Benefit Trusts; b) Arrangements based on the Double Tax Arrangement ("DTA") between the UK and the Isle of Man.

87. Between 1999 and 2010 the Defendant was appointed as trustee to hundreds of Employee type trusts or subsequent variations thereof with thousands of underlying potential beneficiaries. During that period over £300 million of contributions to such trusts were paid to the Defendant as trustee by UK resident employers and most of these contributions were provided to beneficiaries in the form of cash or loans. That is part of the correct context in which to set the record keeping and governance procedures of the Defendant and the size of its business**.** **EWG** explains further below the changes to these types of trust over this period resulting from both anti avoidance regulations promoted by HMRC, and case law culminating in current ongoing UK tax litigation in the First Tier Tax Tribunal.

88. The importance of these employee type trusts to these proceedings is that:

a. Many of them hold or held cash which was often needed at short notice to pay benefits to beneficiaries either based on the decisions of the Defendant as trustee alone or following recommendations from settlor companies or requests from individual beneficiaries which were then considered by the Defendant. Bank deposit rates have been negligible since 2009 therefore the Defendant considered that loans to BIOM were beneficial to the trust beneficiaries because:

b. they paid a rate of interest up to 10 times that available from the High Street banks;

c. they were short term and by custom on demand if necessary;

d. they were not subject to market fluctuations such as would be the case with stocks or bonds;

e. they were to a borrower well known to the Defendant with substantial assets and no bank debt or other significant liabilities standing ahead of the loans from the Defendant;

f. they would not generate UK taxable source income.

89. In 1997 **EWG** developed with tax counsel (Robert Argles) a sophisticated form of tax planning to reduce UK income tax for UK resident property developers. The planning revolved around the exploitation of UK tax law concerning interest in possession trusts and the DTA. In essence the planning typically involved two UK residents individuals setting up interest in possession trusts in the Isle of Man which would form a partnership so as to fall within the meaning of a "Manx Enterprise" in the DTA. The partnership would then typically acquire an option over UK land from the settlors. If the land increased in value by virtue of normal market conditions or often by the granting of planning permission the partnership would either exercise the option or abandon it for a sum of money thereby making an income profit which was exempt from UK tax by virtue of Article 3(2) of the DTA. No partnership had a permanent establishment in the UK.

90. It is important to note that the terms of the DTA are that it is the income and not the person which is exempted from UK tax under the DTA. The position in the Isle of Man is that no Isle of Man income tax was payable by the partners because:- (a) no Isle of Man source income arose; and (b)no person resident in the Isle of Man can benefit from the trust

THE LICENCE OF THE DEFENDANT

91. Under The Corporate Services Providers Act which made introduced compulsory licencing for a person operating as a fiduciary or corporate service provider in the Isle of Man Financial Supervision Authority (subsequently renamed the Isle of Man Financial Services Authority (the Authority)). On 16th February 2005 the Defendant was granted a Category 1 licence by the FSC which it has held ever since subject to minor variations. [**D/8]**

92. Since being licenced the Defendant has been audited by independent auditors as part of its statutory and licence obligations and has submitted detailed annual and other reports to the Authority. In addition, the Defendant has been subject to periodic detailed inspection by the Authority as part of its regulatory functions as explained further below .

93. Attached hereto as **D/9** were a copy of the audited accounts of the Defendant from 2005 to 2018 submitted to the Authority. It is to be noted that no audit report is qualified, and also that pursuant to the Companies Act an auditor of a company must express a view on whether a company has kept proper books and records. For nearly 20 years the auditors have raised no concern about the books and records of the Defendant. In addition to the normal statutory audit report the auditors of the Defendant must file a separate report concerning inter alia the scope of the credit and other matters D/10. Separately the Defendant prepared a client assets report which is agreed and signed off by the auditors and submitted to the Authority. D/10. By way of example **EWG** also attached a copy of the audited accounts of Taxco to 31st December 2008 D/9. He says it can be seen from these accounts that he is well able to fund his lifestyle.

94. Attached herewith as **D/11** are copies of the last two years regulatory returns submitted by the Defendant to the Authority.

THE REGULATORY VISITS/INSPECTIONS

95. Over the years the Authority has undertaken the following formal supervisory visits to the Defendant's premises or alternatively issued questionnaires to the Defendant as part of its regulatory oversight functions under Section 10 of the Corporate Service Providers Act 2000 on the following dates: 23rd – 25th September 2008; 20th – 22nd October 2009; September 2010; November 2011; September 2012 and 23rd to 26th July 2018. The regularity of such compliance visits as part of the powers and actions of the Authority is clear from a letter from Ms Ferrario of the Authority to the Defendant dated 25th July 2007 (but should read 2008.) [**TAB12/ TAB13/TAB14** and again on 14th June 2018]

96. It can be seen from **TAB13** that two key elements of an inspection are record keeping and corporate governance. There has not been any criticism of the record keeping of the Defendant by the Authority after such inspections or questionnaires let alone a finding of "serious failures".

THE HISTORY OF LLC AND BIOM

97. LLC was formed on 10th March 2004 as a limited liability company in Delaware USA. It was dissolved on 1st June 2014 having transferred all assets to BIOM. At all material times LLC was beneficially owned by EWG in his capacity as the trustee of the Trust (i.e. the Bala Settlement). The primary purpose of LLC was to act as a lender to UK clients who entered into certain Derivative Contracts which resulted in margin calls. These loans were transferred to BIOM in 2014 and are still outstanding today.

98. BIOM was formed on 13th June 2007 as a company limited by share capital in the Isle of Man under company number 120034C. It changed its name to Bayridge (Isle of Man) Limited on 27th June 2007. A copy of the Memorandum & Articles of Association and Certificate of Incorporation and Name Change are found at **TAB15**. At all material times the Trust has been the beneficial owner of BIOM. While BIOM has assisted clients of the Defendant with higher rates than they could achieve banks BIOM no longer accepts such loans. The Authority is aware of this.

99. Over the years **EWG** has both gifted and sold substantial assets to BIOM and the Trust. The Trust has no other assets except the shares in BIOM. **EWG** says that he is however under a duty of confidentiality concerning the trust. Clause 17 of the trust deed provides as follows:-

"The trustee shall not except under compulsion of law divulge or disclose to any person any information relating to the Trust Fund or to the assets thereof".

THE BALA SETTLEMENT

100. The Trust was established on 17th February 2004 by **EWG** as the settlor with an initial settlement of the shares in LLC. A copy of the trust deed is attached herewith at **TAB16.** EWG is the trustee. The Trust was formed by declaration of trust. The following terms of the trust deed are of particular note:-

(i) Under Clause 1(d)(2) both **EWG** and his spouse are excluded from benefits as is any person resident for tax purposes in the Isle of Man.

(ii) The beneficiaries of the Trust subject to the exclusion referred to above are defined in Clause 1(d)(1) as:- *"Any person who is or has been an employee of any company wherever situated in which the settlor has or ever had any shareholding in excess of 50%".*

(iv) Clause 19 provides that the Trust is subject to the laws of England and Wales but pursuant to Clause 19(1) the first forum for the administration of the trust shall be the Isle of Man.

(v) Clause 3 provides that the primary objective of the Trust is to build and eventually distribute capital rather than investing capital to generate income.

(vi) The trust deed is essentially discretionary in nature and otherwise unremarkable in its form.

(vii) Clause 17 concerning confidentiality below.

THE MONTPELIER GROUP

101. The Trust was formed in detailed discussions with Mr Robert Jackson and Mr David Yelloly, both were resident in the UK.

102. Between 2005 and 2009 The Montpelier Group as it was descriptively known made acquisitions of over £25 million and was extremely profitable with Group profits to 31st December 2008 exceeding £5 million. The Group had over 40 offices worldwide and over 600 employees and was in the top 20 accountancy practices in the UK.

103. In September 2010 HMRC raided the Montpelier offices in London and the Isle of Man pursuant to search warrants. That destroyed the business of Taxco and significantly impacted on the business of the Defendant as well as the wider Montpelier Group and made it impossible to retain staff and expand the business. [**TAB17** the Order setting aside the Isle of Man search warrants].

104. **EWG** mentioned this background to set the Trust in the proper context. He says that over the years he has both gifted and sold substantial assets to the Trust including the gift of 29% of Holdings in 2007, leaving me with 51% control. He added to that 2010 Holdings was probably worth conservatively £30 million. He says that his purpose in setting up the Trust was to eventually transfer shares to key employees of the Group and build the general trust fund for their long term. The events of 2010 stopped that ambition in its tracks although it still left the Trust with substantial assets other than its shares in Holdings. These shares are now of negligible value as the Group has slowly been sold off or liquidated, including the liquidation of Taxco which took place in 2011.

INFORMATION CONCERNING THE TRUST AND BIOM

105. **EWG** says that as referred to in the Defence he is under a duty of confidentiality regarding the affairs of BIOM as it is owned by the Trust. Clause 17 of the trust deed imposes on me a restriction of confidentiality which he says he cannot breach except under compulsion of law

106. The current loans due by BIOM to clients of the Defendant are £1,558,280 (this figure was reduced to zero in the course of the hearing).

The 2009 Memo and file note

107. The Memo is referred to in paragraphs 40-43 of the Claim Form [see**TAB19**].

108. Paragraph 39 of the Claim Form states that the Defendant has been operating the BIOM "arrangement" for many years and probably since 2009. It would be surprising therefore if the Authority following inspections had not seen such loans in its 5 regulatory visits before July 2018.

109. The context of the file note at **TAB19** is important. **EWG** says he prepared it on 26th March 2009 for discussion with his fellow directors. The general investment policy adopted consistently by the Defendant is that the Defendant prefers to invest in cash normally short term in view of possible urgent requests arising out of the need, for example, to pay employee benefits. Locking employee trust funds up for say 12 months is not considered in the best interest of clients unless by exception. In other types of structures than employee trusts the Defendant has made the decision to invest long term in say a property portfolio. See for example at **TAB20** details of the policy adopted for a client in respect of a property portfolio and **TAB21** for the policy adopted for a client in respect of a power of attorney. In both cases proper professional advice from chartered surveyors and investment advisers

was sought by the Defendant. However, the vast majority of trust and corporate assets for which the Defendant is responsible hold their assets in cash or loans

110. In 2008/09 the global financial system was in crisis with inter alia the failure of major banks and insurance companies. The "bail out" for incompetent and excessive lending by banks in particular was only achieved by Government intervention with new risk capital. Sovereign debt which is the finance of last resort was required to prevent household names such as Royal Bank of Scotland plc collapsing completely. Other household names such as Northern Rock and Lehman Brothers had already collapsed.

111. One immediate consequence of the financial crisis was that Central Banks worldwide eventually recognised the potential for global recession if not depression with falling growth. Consequently many Central Banks reduced interest rates in 2008 and 2009 to try to stimulate economic growth. In March 2009 the Bank of England dropped its base rate to 0.5%. That historically low rate has remained the same for over 10 years. The current rate offered by RBSI is nil for current accounts is 0.76% per annum provided the deposit is at least 45 days. TAB22

112. It is to be noted that the Defendant arranged its client's banking facilities mostly with RBSI.

113. **EWG** reminded fellow directors that in 2008 more than half a trillion pounds of liquidity had to be injected into the UK banking system to avoid its collapse. **EWG** says that he had previously advised his fellow directors in 2008 that he was telephoned by Victoria McInerney the then Regional Director of RBSI Corporate Banking seeking **EWG's** assurance that the Defendant had no intention of moving trust or corporate funds out of RBSI. She said that she needed to report that day to her superior in London who in turn had to report to the Bank of England presumably in respect of the liquidity and solvency of Royal Bank of Scotland plc as a whole. During 2008 the Defendant had substantial monies deposited with RBSI. In the end the Defendant did not move funds away from RBSI for two main reasons. First of all public statements concerning a UK Government bail out and, secondly there was no certainty that funds would be more secure with another bank at that time.

114. **EWG** says that the feedback from fellow directors of the Defendant at that time was that we needed to carefully and continually monitor world financial events to protect the assets in both trusts and companies which the Defendant manage, but there was no need for panic or abrupt action. The Defendant has done exactly that ever since.

115. It is against this backdrop that the Bayridge loans needs to set so that a proper understanding and appreciation of them can be ascertained.

LOANS

116. The loans to BIOM are unremarkable in form. Exhibit **TAB23** is attached as an example of a typical loan agreement. Most often loans are short term but on occasion larger depending on the circumstances. Often if the lender has no immediate need for cash loans are rolled over.

117. BIOM was not always in a position to accept loans but when it could it offered a rate of interest far in excess of High Street banks. **EWG** has no doubt that this was in the best interests of clients.

CONFLICT OF INTEREST

118. Legal submissions concerning conflict of interest will be made in the Defendant's Skeleton Argument. **EWG** says that he has followed these principles set out by the ICAEW during his entire financial career in public practice and industry and has also borne in mind the Guidance of the Authority issued in January 2017. **TAB24/25**

119. The fundamental principles of the ICAEW guidance are:-Integrity; Objectivity; Professional competence and due care –Confidentiality – to respect the confidentiality of information acquired as a result of professional and business relationships and therefore not disclose any such information to third parties without prior and specific Authority unless there is a legal or professional right or duty to disclose, nor use the information for the personal advantage of the professional accountant or third parties. EWG says that he has followed these fundamental principles throughout his career.

120. **EWG** comments that insofar as concerns the Defendant it is important to note that:- a) at no time have any of its past or current directors or senior staff been subject to any disciplinary proceedings of any kind; b)at no time have any of its past or current directors or senior staff been found to be professionally negligent; c) It has never been subject to a Professional Negligence Claim so as to oblige it to notify its Professional Indemnity Insurers. The Authority is well aware that the Defendant has Professional Indemnity Insurance of £10 million any one claim including fidelity cover; d) It has not settled or compromised any claim for professional misconduct against it or any or its directors or senior staff. It is against the aforementioned background that the Claim and Orders sought should be tested together with of course the relevant facts.m

121. In terms of its own public officers the Isle of Man Government published a Staff Guidance Note in April 2007 concerning conflicts of interest **TAB25.** The Guidance Note says this:

"The test which should be applied in relation to a potential case of perceived bias is whether the ascertained relevant circumstances lead a fair minded and informed observer to conclude that there is a real possibility that the decision maker was biased".

It is against this backdrop that the decision to advance loans to BIOM needs to be tested.

The Authority's own Guidance

122. The Guidance Note refers in particular to the need for licence-holders to comply with Rule 8.9 of the Rule Book. The Guidance was aimed mainly at smaller licence-holders who do not have a group policy.

122. The Guidance Note states that the three main benefits of a Conflict of Interest Policy are:-

"1. To protect customers from being unfairly disadvantaged relative to the licenceholder or relative to another customer as a result of an unsatisfied or undisclosed or mismanaged conflict of interest (Limb 1)

2. To set standards for directors and employees of a licenceholder in the conduct of their duties. This helps to protect those who follow the policy from falling below the required standards (Limb 2); and

3. To help protect the licenceholder from complaints or litigation from its customers who consider that a conflict has not been appropriately managed (Limb 3)"

123. Taking each limb separately in the context of this Claim EWG comments as follows:-

a) Limb 1-Insofar as concerns loans to BIOM there was never any question of the Defendant gaining an advantage over a client nor one client being advantaged over the other. In relation to the BIOM loans the only person disadvantaged is RBSI who would otherwise probably have received the cash and paid negligible interest on it.

b) Limb 2-The Defendant has consistently adopted a policy of acting in the best interests of clients.

c) Limb 3-It is accepted that litigation or complaints can be an issue facing the Defendant but not where the Defendant can clearly show that the client is gaining an advantage rather than being disadvantaged.

124. The Defendant's policy with regard to conflicts of interest is included in its Policies and Procedures Manual (see below) and **TAB25.** The Defendant adheres to this policy.

TRUSTEE ACT 2001

124. Reference is made in the Claim to the Trustee Act 2001 ("TA") **TAB26** and the allegation that the Defendant has not paid due regard to it. **EWG** says that is untrue.

125. Part 1 of the TA introduced a safeguard for beneficiaries by imposing on a trustee a statutory duty of care. The Defendant has at all material times been aware of this duty and has never breached it. Essentially the duty of care requires a trustee to exercise such care and skill as is reasonable in the circumstances having regard, in particular, to his or her special knowledge, experience or professional status.

126. Part 2 of the TA sets out the new general trustee power of investment. In essence Part 2 gives the same power of investment to a trustee as an absolute owner would have except in relation to land. Section 3 of the TA gives a trustee a general power of investment to make any kind of investment that he himself could lawfully make if he was absolutely entitled to the assets of the trust.

127. Section 4 of the TA provides that in exercising any power of investment a trustee must have regard to the "standard investment criteria". In brief this requires a trustee to have regard to the suitability of investment and the need for diversification. In addition, a trustee must from time to time review the investments of the trust and consider whether, having regard to the standard investment criteria, the investments should be varied. These duties cannot be restricted or excluded by a trust instrument. The Defendant was at all material times aware of these duties and responsibilities.

128. Section 5 of the TA provides that before exercising any power of investment a trustee must obtain and consider proper advice concerning the proposed investment unless a trustee concludes in all the circumstances that it is unnecessary or inappropriate to do so. For example, a trustee may be satisfied that he or she is qualified to advise without outside advice as in the case of the Defendant in relation to bank accounts and loans.

PURPORTED COMPLAINTS

129. The purported complaints are referred to by the Authority in paragraphs 106-150 of the Claim Form.

130. In paragraph 106 the Authority states that the Authority has received several complaints from clients of the Defendant regarding client monies and assets. The Defendant believes however that the Authority has failed to understand the proper facts and law and background concerning these so called complaints. This is shown by the statement in paragraph 106 that:-

"In many cases, the client is seeking to bring their structure to an end and obtain the release of monies held within those structures".

131. **EWG** says that conclusion drawn by the Authority is untrue for the following reasons:-

131.1 At no time were beneficiaries of trusts clients of the Defendant. While the Defendant owes a duty of care to them no beneficiary is in a position to demand that the trust pay or transfer assets to him or her.

131.2 At no time were settlors of trusts (typically corporate entities) entitled to a "return" of monies held with trusts or companies. Indeed in most cases settlors are specifically excluded from benefit.

131.3 The only person who as a matter of law can bring the relevant trusts to an end is the Defendant as trustee by appointing out all of the assets.

131.4 The complainants in many instances either ignore and/or are disinterested in trust law and the unfettered discretion of the Defendant as trustee.

131.5 The complaints need to be set in context and timing of the loan charge referred to above on 5th April 2019. In this context many settlor companies conflate their interest in terms of corporation tax, PAYE and National Insurance with assets held in trust which they had irrevocably settled or where the settlor had specifically excluded himself from benefit following the creation of the trust. The affairs of the trust are not the same as the settlor.

131.6 The Authority makes no mention of the provisions of many trust deeds, for example, Goldwyns [**TAB27]** referred to below which provides at Clause 10(b) that if any PAYE liability arose from a payment by the Trustee it shall account for PAYE directly to the appropriate Authority or the relevant company. As explain the de facto retrospective planning of the loan charge on 5th April 2019 made every loan previously made by the Defendant as trustee a potential PAYE liability on the Defendant. This appears to be lost on the Authority but is of crucial importance to the Defendant in its administration of relevant trusts.

132. The complaints needs to be contextualised.

133. By email dated 31st July 2018 [**TAB30]** Goldwyns raised certain queries with the Defendant. The Defendant replied by email dated 10th August 2018 TAB30. This correspondence demonstrates a fundamental misunderstanding of the GT by Goldwyns as is self evident from the Defendant's email dated 10th August 2018. The email of 31st July 2018 was logged as a complaint by the Defendant **TAB30.**

134. Essentially the "complaint" of Goldwyns leaving aside its error concerning fees was that the Defendant was not following the instructions (emphasis added) of Goldwyns concerning "its" trust. As carefully explained above the Defendant at all times rejects any such suggestion and in its own time considered the future of the GT and decided to appoint all of

its assets thereby bringing the trust to an end. That was the proper and independent decision making of the Defendant as it should be.

Monza complaints

135. The Defendant was at all material times the trustee of each trust. Following the settlement of each trust the settlor excluded itself from benefit.

136. Exhibit **TAB31** is the relevant correspondence in this matter which is generally similar to Goldwyns. However the trust cannot be considered for closure yet until the settlor provides the Defendant with a copy of the HMRC settlement agreement signed by HMRC. The Defendant prompted the settlor for this by letter **TAB31** dated 22nd October 2018, but has received no reply. As referred to above until the Defendant can be satisfied that the settlor has discharged all relevant PAYE it is exposed and will therefore retain trust assets.

Dominion complaint

137. Attached to EWG's statement at **TAB32** is a copy of the short judgment of Deemster Wild in this matter. To better understand the position of the Defendant however see **TAB33** a copy of the case submitted by the Defendant.

Bronel Group Limited complaint

138. **EWG** attaches as Exhibit **TAB34** the relevant correspondence between Bronel and the Defendant. The purported complaint appears to be twofold. First concerning fees which, as the documentation shows, Bronel failed to understand. The second is why the Defendant was not acting on the instructions of Bronel to close the trust and appoint out all assets. The Defendant rejects any suggestion that fees were charged improperly. **EWG** says that as can be seen from these documents the trust cannot yet be formally signed off by the Defendant as Bronel is still challenging the fees.

Invicta litigation

139. The Claim of the Authority in this matter appears to be that the trust created by Invicta has not been transferred to new trustees, together with all assets. **EWG** says that is not true. He attaches as **TAB35** the ledger account showing the payment from Bayridge of capital of £96,388 plus interest of £6,668.15. The Defendant has now closed its file on this matter, although a second trust which has no BIOM loans is yet to be closed or otherwise dealt with to the satisfaction of the Defendant **TAB35.**

Summary of purported complaints

140. **EWG** says it is clear from the above that the Authority has failed to properly understand and enquire into these purported complaints. Nor has the Authority it seems recognised that one of the complaints (Bronel) principally concerned fees and loan write offs which was fundamentally flawed. One concerned the right of the Defendant to invest trust assets in accordance with its discretion (Dominion). Two were examples of where beneficiaries or settlors of trusts sought to "instruct" the Defendant as trustee to make distributions and/or wind up the trusts (Goldwyns and Monza) and the fifth concerned where the Defendant could not obtain a clear picture of a second trust. Save for the matter of Monza there are no BIOM loans. **EWG** says these are not properly founded complaints.

HM CUSTOMS & EXCISE

141. The position between the Defendant and Isle of Man Customs & Excise is summarised in Exhibit **TAB36** which is a reconciliation of all VAT to 31st March 2019, which shows a nil balance.

DATA BREACH

142. At paragraph 140 of the Claim the Authority refers to a letter dated 3rd June 2019 from Appleby the advocates in the Dominion matter referred to above. In that letter Appleby refer to "further matters" implying that there were previous matters. Those matters are not disclosed by the Authority.

143. The letter of 3rd June appears to be Appleby putting the Authority on notice of a data breach by the Defendant. It refers to "documents" inadvertently included in trust and other documents handed over by the Defendant to Appleby on 18th December 2019. It is to be noted that it was not until nearly 6 months later that Appleby saw fit to advise the Authority and return the document. At TAB37 an internal memo concerning the document which was in error included in the box of documents in the Dominion matter collected by Appleby. This was no more than an unfortunate error by the member of staff when boxing up the files.

144. The Authority refers to this single data breach as further evidence of (a) a serious breach of fiduciary duty (confidentiality and reasonable skill and care); (b) a serious failure to maintain proper records; and (c) a serious failure in governance in not supervising and managing the disclosure of document and relevant filing systems. EWG says that is wrong and unfair and lacks proportionality.

MINUTES OF LOAN DECISIONS

145. Over the years a standard form of loan agreement has been used so that on each and every occasion a loan is made the administrators prepares the loan agreement for execution. **EWG** adds that each loan agreement therefore is the key record of the lending together with the accounting records of the client.

146. The administrator will prepare a Minute at the time of making the loan or at the same time as the execution of the loan agreement. Sometimes the decision is ratified retrospectively by written resolution. [See Exhibit **TAB38** for different examples.]

147. The Authority's Guidelines concerning expected practice for trust service providers Exhibit **TAB39** states that:-

"In establishing whether to minute a decision the Authority expects that licenceholders should take into consideration the advantages of clearly recorded decisions (especially fundamental decisions or decisions that effect the subsequent action of a trustee) such as a distribution and on the other hand the risks involved in not minuting the trustee decision. If as a result of these considerations a trustee draws the conclusion that minutes need not be prepared the Authority expects the licenceholder to be able to provide evidence of the decision making process and the rationale behind the decisions".

The actions of the Defendant are compliant with this Guidance.

148. As stated above the Authority has carried out 6 detailed inspections of the Defendant since 2008 for compliance with its regulatory obligations. The Defendant has received feedback from the Authority of these inspections but to date has received no feedback on the

inspection undertaken in July 2018. Attached as Exhibit **TAB38** are copies of the feedback from previous inspections. Despite the inspections routinely reviewing samples of the Defendant's records, including minutes, it can be seen that at no time has the Authority raised any concerns or criticisms concerning minutes of the Defendant.

149. In addition the Guidelines states this:-

"The Authority recognises that in the absence of trust terms to the contrary trust law is not prescriptive in its requirements for trustee deliberations to be formally documented as minutes. However it expects to see that, when a professional trustee exercises or performs its discretion, powers, or duties, this would normally be recorded in the books of the trust or evidence of the independent decision making process of the trustee is made."

Again the Defendant asserts that it has complied with the spirit of these Guidelines in all of its client dealings as has **EWG**. The accounting records of each trust record the loans and the loan agreements are included in the trust or corporate records.

150. Furthermore in relation to any potential conflict of interest the Guidelines says this:-

"Nevertheless the Authority expects a trustee to be able to demonstrate that it acted honestly, reasonably and fairly to ensure that no actual improper prejudice arises."

The Defendant asserts that it has complied with the spirit of this in all of its dealings including loans as has **EWG** , and no actual improper prejudice has arisen to any client.

GOVERNANCE OF THE DEFENDANT

151. The governance of the Defendant is by reference to its Policies and Procedures Manual ("the manual"). The manual is over 200 pages long and covers all aspects of the Defendant's business.

152. At all material times the Defendant has been aware of the manual and at the start of each regulatory inspection it is provided to the Authority. **TAB40** is the index of all sections of the manual. At no time has the Authority criticised the contents of the manual or the Defendant's compliance with it except for the purported recent concerns.

153. In support of the manual and in good practice the Defendant over the years has developed checklists for administrators to follow in dealing with clients. Examples of these checklists are attached at **TAB41.**

154. Further following detailed inspections the Authority has not identified any lack of governance let alone a serious lack. The allegation therefore of a serious lack of governance by the Defendant is at best misconceived.

THE WITNESS STATEMENT OF JPM

155. **EWG's** comments on the witness statement of **JPM** dated 17th June 2019 and filed in these proceeding in support of the Claim.

156. Beneficial Ownership Information (Point 1)

The statements by **JPM** in paragraphs 13-22 of his witness statement are correct but only for the purposes of the **BOA**. EWG has correctly been identified as the beneficial owner of BIOM for the purposes of the **BOA 2017**.

157. Exhibit **TAB 42** is a copy of the Guidance issued by the Authority with regard to the BOA in June 2017. Example 5 of this Guidance states as follows:

"Matters may become more complicated when trusts form part of the ownership structure. It is important to note that section 102 of the Companies Act 1931 and section 63 of the Companies Act 2006 provide that no notice of any trust is to be entered on the company's register of members." And

"Where the trust is a discretionary trust, its beneficiaries do not have an absolute right to any of the trust property, but only a right to be considered, as any benefit they receive is at the discretion of the trustees. In such circumstances, the beneficiaries of the discretionary trust cannot be beneficial owners and therefore cannot be registrable beneficial owners of the company. In that case, the registrable beneficial owners will, in the case of trustees who are natural persons, be those trustees. [Emphasis added] Where the trustee is a legal person, the registrable beneficial owners may be the trust company's shareholders, if their apportioned shareholding in the company is over 25%."

158. Insofar as concerns BIOM it is clear that as a matter of trust law given the terms of the trust deed **EWG** not entitled to benefit from the trust**.** However, **EWG** is, as far as the BOA 2017 is concerned, the beneficial owner of BIOM by virtue of my position as trustee, given that the shares of BIOM are held by him as a bare nominee for the Trust.

159. It can be seen from the Claim Form that there are no less than 30 references to **EWG** being the beneficial owner of BIOM. That is a crucial error of fact by the Authority. The reason for **JPM** and the Authority's error is that at no time has the Authority asked **EWG** to confirm who the beneficial owner of BIOM is. Rather that has been assumed by the Authority despite its importance to the Claim. This failure on the part of the Authority to properly enquire has led to the Authority drawing a false conclusion as to who the beneficial owner is of BIOM. That was wrong and unfair.

Directions (Point 2)

160. In his witness statement **JPM** refers to a direction which the Authority issued to the Defendant on 31st October 2014 compelling the Defendant to ensure that there is no granting of or increase in loans to the directors nor any dividends paid to shareholders. The Defendant has complied with this direction. However the matter has been the subject of recent queries between the Authority and the Defendant and the Authority and Greystone LLC ("Greystone"), the auditors to the Defendant. [See **TAB43** the relevant correspondence which shows that the view taken by the Authority is misconceived.]

Defendant's relationship with the Authority (Point 3)

161. In paragraph 25 of his witness statement **JPM** states that the relationship between the Authority and the Defendant is not as "constructive and positive" as the Authority would expect from a licenceholder. That is misleading and appears to be code for a licenceholder not being constructive and positive if it does not agree with everything the Authority says

and implies that challenges by a licenceholder means non-cooperative. That is wrong and unfair and appears to be a systemic failing within the Authority.

162. In paragraph 26 of his statement **JPM** sets out what he refers to as a "selection of correspondence" from the Defendant to the Authority in which the Defendant criticises the conduct of the Authority. **JPM** goes on to say that to avoid perusing "volumes" of correspondence which is not relevant to the Claim he has not exhibited all of the correspondence but rather been "selective". In this context "selective" is an understatement because as will be seen from what follows the Defendant has consistently and with good reason complained about the failure of the Authority to competently exercise its regulatory functions.

163. The "selectivity" does not provide the Court with a full and proper factual matrix of the background to the relationship between the Authority and the Defendant which is important to an understanding of the behaviour of the Authority and the conclusions drawn in the Claim. To assist the Court **EWG** has summarised this recent history.

164. In the last five years or so the relationship between the Authority and the Defendant has deteriorated resulting in 2018 in proceedings in the Isle of Man Financial Services Tribunal ("the Tribunal") concerning directions issued by the Authority. These Tribunal proceedings are relevant to these proceedings. However before **EWG** turns to the Tribunal matter, he says there are other relevant matters which will assist the Court in establishing the true and full picture of the relationship between the Authority and the Defendant.

<u>The Tribunal proceedings</u>

165. On receipt of the Directions referred to, **EWG** says that the Defendant carefully considered them and decided that it would exercise its right to appeal to the Tribunal. An appeal was duly lodged on 26th February 2018 Exhibit **TAB76.**

166. The Court is invited to read these documents because they demonstrate amply the manner in which the Authority has acted towards the Defendant. EWG says this because the Authority abruptly revoked the Directions on 6th November 2018.

167. The reasons given for the revocation Exhibit **TAB78** were as follows:-

(a) There has been inordinate delay in obtaining a hearing date from the Tribunal;

(b) The Direction was merely a supervising direction for additional monthly financial reporting from the Appellant and a request for a self-assessment on request of compliance with Rule 6.64 of the Financial Services Rule book, it was not an enforcement condition;

(c) Due to the passage of time since the Directions additional quarterly and other financial information has been produced by the Appellant as required by the Financial Services Rule Book and in response to further requests from the Authority".

168. Insofar as concerns the reason given in (a) above **EWG** says this was rejected by the Tribunal in a written decision dated 30th November 2018 Exhibit **TAB79**.

169. Insofar as concerns the reason given in (b) above the Defendant fails to see the difference in this context between a Direction issued in pursuance of supervisory powers and a Direction issued in pursuance of enforcement powers. It is still a Direction exercising

statutory powers and in fact this is not given as a principal reason for revocation in the Authority's letter to the Defendant dated 6th November 2018 TAB78.

170. Insofar as concerns (c) above first of all the Defendant did not provide the financial information demanded by the Directions to the Authority. The Defendant merely provided the same information as before the Direction. Secondly, if (c) is true then it questions the need for the Direction at all. If (c) is untrue then **EWG** rhetorically asks why did the Authority revoke the Direction?

SUMMARY

171. **EWG** has read the Defence filed in these proceedings and confirms his agreement with it. He says the contents of his statement are true to the best of his knowledge and belief.

172. **EWG** says that the Claim is misconceived as follows:

1. The Claim assumes as a key fact that **EWG** is the beneficial owner of BIOM. That is not true.

2. The Claim alleges that the Defendant has seriously failed in its fiduciary duty. That is not true as a matter of fact and law.

3. The Claim alleges that 3% interest on loans such as BIOM is not commercial or fair. That is not true. At all material times the Defendant has acted in the best interests of its clients. No loan or investment can logically ever be regarded as risk free. In the case of BIOM the risk of a loan default was negligible.

4. The Claim alleges but does not particularise a serious failing of record keeping by the Defendant. That is not true.

5. The Claim appears to allege that the Defendant is obliged to keep minutes of all transactions. That is not true.

6. The Defendant admits a minor data breach which it regrets but that cannot be the basis for the Authority assuming a serious breach of fiduciary duty and governance. That is neither fair nor proportionate.

7. The Defendant admits a minor data breach which it regrets but that cannot be the basis for the Authority assuming a serious breach of fiduciary duty and governance. That is neither fair nor proportionate.

8. The Defendant admits a minor data breach which it regrets but that cannot be the basis for the Authority assuming a serious breach of fiduciary duty and governance. That is neither fair nor proportionate.

9. The Defendant admits a minor data breach which it regrets but that cannot be the basis for the Authority assuming a serious breach of fiduciary duty and governance. That is neither fair nor proportionate.

10. The Claim alleges but does not particularise a serious failure of governance by the Defendant. That is not true.

11. The Claim fails to explain the current relationship which the Authority has with the Defendant.

12. The Authority fails to provide any impact assessment on the clients of the Defendant if the Orders sought are granted.

173. In summary, the Claim is misconceived, lacking in credible or any substantive evidence and proportionality and objectivity.

174. **The Parties' submissions**

In short, the Authority submits that for the reasons given in the amended Claim form and supported by the evidence of **JPM** (statements and exhibits), the applications should be granted and the orders sought, made by the court. The Authority's key submissions are contained in their skeleton argument as developed, at the hearing [insert reference] and can be summarised as:

a) millions of pounds of investors monies has been lent to BIOM using client company structures but without conducting proper due diligence or verification of BIOM [**JPM [3]/3/7.2-7.12**;];

b) millions of pounds of investors monies have been used by the Defendant to make payments to **EWG** and members of his family without the benefit of an inquiry, it is difficult to discern what these are for[**JPM3/7.16 and Defence CB/ /27.1**];

c) millions of pounds of client monies was lent to BIOM but was paid into the accounts of LLC or MICI. These payments were made by the Defendant (as a trustee where the lender was a client trust) or by the client company lenders(whose directors were EWG, Paul Garrett and in some cases, PG and Angela Southern [**JPM3/7.13**];

d) payments in c) above were made into the accounts LLC when the company did not exist(LLC having been dissolved on Ist June, 2015 having transferred all assets to BIOM[**JPM3/7.14**];

e) there is an absence of substantive or meaningful due diligence by the Defendant in BIOM but instead reliance is placed in the Defence at 23.1, 24.2 and 24.3, on **EWG.**

"23.1 The Defendant, through its director Watkin Gittins, had extensive and detailed knowledge of the financial standing of 1310M. Watkin Gittins was also at all material times a director of BIOM (as is pleaded by the Authority at paragraph;

24.2 As set out above, the Defendant (through Watkin Gittins) had extensive and detailed knowledge of the financial standing of BIOM. Paragraph 23 above is repeated

24.3 The third and fourth sentences are admitted. The Defendant is not required to hold supporting documentation that verifies the financial standing of every entity in which clients monies are invested."

f) The Defendant did not have "*extensive and detailed knowledge of the financial standing of BIOM*". EWG *qua* director of BIOM may have had that knowledge, but the Defendant as a corporate body did not [**JPM3/22**]. Further, by in its letter to the Authority dated 7 January 2019, the Defendant confirmed that it did not hold due diligence documentation or evidence but relied on EWG [**JPM1.547-549**, see paragraph

2.ii, 2.iii and 2.iv of the Defendant's letter dated 7 January 2019; paragraphs 2.i-iv of the Authority's letter dated 14 December 2018 **Exhibit JPM1.540-543** to review the specific questions regarding due diligence asked by the Authority. Paragraph 1.(i)-(iii) of the Authority's letter dated 29 January 2019 **Exhibit JPM1.570 Exhibit** and the Defendant's reply to those questions on 7 February 2019 **Exhibit JPM1.574 -575].** These documents confirm that the Defendant did not carry out due diligence nor hold due diligence information or verification on BIOM;

g) At the time, **EWG** was asked for a "current certification" in respect of BIOM's net asset position. By letter dated 8th February, 2019, the Defendant refused to provide this information stating that "*We are not prepared to divulge detailed financial information due to issues of confidentiality*" **[JPM1/574-575; and also see JPM3/25-26]**

h) the features summarised in a-d above alone, it is submitted, warrant the appointment of a Manager and Receiver, in order to conduct an independent examination of these an a multitude of other transactions;

i) **Beneficial ownership of BIOM and conflicts-** the Defendant has submitted that **EWG** holds the shares in BIOM as trustee of the Bala Trust. The Defendant admits that **EWG** is the registerable beneficial owner of BIOM. Whether or not EWG is the absolute beneficial owner of BIOM may not be crucial to the determination of these applications. However, whether this a *actual conflict* of interest or at least a *potential conflict*, is the issue in relation to this particular heading. In either case, it might be thought that there is at the least the appearance of a lack of transparency and or clarity vis-à-vis investors. The following features highlight that conflict[**JPM3/11.1-11.5**]:

   a. the Defendant (**EWG** was director, controller and UBO) which acted as trustee of client trusts lending to BIOM. In this capacity, EWG had a duty to act in the best interests of the beneficiaries of the client trusts;

   b. the client companies (**EWG** was a director of several) lending to BIOM. In this capacity, he had a duty to act in the best interests of the companies lending;

   c. BIOM (he was director and controller and sole registered shareholder). In this capacity, he had a duty to act in the best interests of the company borrowing;

   d. BIOM (in addition to being the director and controller and sole registered shareholder, he and his family were the recipients of multiple payments from BIOM). In this capacity, Watkin Gittins (in the Defence filed on behalf of the Defendant) admits that BIOM paid money to, or for the benefit of, him and his family. He states that this was in relation to *deferred consideration* for some unspecified asset sales by him and his wife Maura Gittins to **EWG** as trustee of the Bala trust: [see paragraphs 27.2 and 143.2 of the Defence and paragraphs 2.4(3), 3.2, 4, 5, 7.1 of the Defendant's Response to Appendix 2 of the Claim Form (appended to the Defence). [*Regardless of the reason or legal basis for these payments, the making of loans by the Defendant's client structures enabled BIOM to make these payments to Watkin Gittins and family*]. A review of the bank statements of BIOM, LLC and MICI will clearly show this;

   e. **EWG** as trustee of the Bala Trust. In this capacity, he had a duty to act in the best interests of the beneficiaries of the Bala Trust. The class of potential beneficiaries

includes employees and former employees of Montpelier Group companies including the Defendant

f. Payments to members of the EWG's family referred to as "deferred consideration" have not been explained with any clarity but the Defendants accepts the payments were made and the bank statements accurately show movements of monies [**see JPM 3/61-142;143-224;225-263;264-605;606-654 and 655-747 and JPM3A** in memory stick format a true copy of the relevant electronic bank records in Excel spreadsheet in relation to RBSI in relation to Bayridge (Isle of Man) Limited, Bayridge Investments LLC and Montpelier Insurance Company Inc **].**

g. Some key payments are highlighted at **JPM/3/264-266** of the RBS accounts which, by way of example show payments from clients/investors, coming in on 2/1/19 from Hazelmere Ltd of £40,000 and on the same day being a paid out into MP Gittins account; a further £40,000 comes in on 4/1/19 from the same entity and on 6/1/19 £2000 is ; £15,000 in on 18/1/19 and paid out to MP Gittins £10,000 paid out to MP Gittins on the same day. There are a very large number of payments over a considerable period of time with at least a correlation between clients monies and payments to the family. These payments were from the LLC account the statement for which were being sent to the Defendant at its registered address [**see JPM/1/460**]. In the absence of a dispute that these sums aswell as others totalling £1.1million and EU1.1.m, were paid to the EWG family, it does not seem necessary to go beyond these examples. There no evidence as to exactly what these payments were for nor has there been any explanation from EWG or the Defendant beyond the fact that these were "deferred payments".

h. Save for the receipt of the 2009 Bayridge Gittins Memo and verbally relying on (without documenting any verification or challenge) EWG's "extensive and detailed knowledge of the financial standing of BIOM", the Defendant did not carry out any due diligence on the financial, legal or regulatory position of BIOM, its liquidity or ability to repay before paying millions of pounds of client monies to it [**see paragraphs 23 and 24.2 of the Defence**];

i. The Defendant submits that that BIOM was not required to comply with the obligation on private companies incorporated under the Companies Act 1931 to prepare financial statements (balance sheet and profit and loss account/income and expenditure account) as required by the Companies Act 1982. There does not appear to have been an exemption to this legal requirement which would apply to BIOM and no specific exemption is identified in the Defence. Section 2A CA 1982 provides that a private company shall be exempt from the requirement to lay accounts before a general meeting if the Articles of the company provide for that. There is no evidence that the Articles provide for that in this case. Otherwise, accounts do have to be laid before the general meeting and should be available.

j. The conflict of interest also involved the directors of the Defendant and Angela Southern (senior employee of the Defendant and director of certain client company lenders) who had a duty to act in the best interests of the (a) beneficiaries of client trusts and (b) client companies lending to BIOM and who separately had a potential and undisclosed interest as beneficiary in the Bala

Trust, whose wholly owned "subsidiary" company (BIOM) was receiving millions of pounds of client monies from the Defendant.

k. There is an absence of records of any detail in relation to the loans. Beyond a template memorandum, there is nothing which one would expect setting out the terms, investment criteria, risk assessments, default provisions, jurisdiction clause, liquidity of BIOM that one would expect in a commercial loan arrangement / document. How, for instance would a director of the Defendant be satisfied about the liquidity of BIOM if there no record of any criteria against which the loan is judged? It therefore makes it difficult to scrutinise the conduct of the Defendant, in order to meet the regulatory requirements and objectives already set out earlier in this Judgment. Record creation and maintenance is a key function of the licence-holder for compliance with the overall scheme of the legislation.

l. Dual roles of EWG as trustee and director of the Defendant. This dual role clearly shows an environment of conflict which needed to be declared to investors and failure to make this disclosure placed EWG in actual conflict or at the very least, potential conflict. Whatever the position, it needs investigation independently of the Defendant and EWG in order ascertain the true position.

m. It will not assist to rehearse the criticism made by the Defendant of the Authority on "assumptions" it is said which were made by the latter as to the UBO. The position of the parties is now clear but the Authority refers to correspondence and various questionnaires sent to the Defendant EWG trying to ascertain the UBO of BIOM which it says is important in demonstrating the Defendant's lack of co-operation and perhaps, candour, in answering relatively straightforward questions [**JPM/3/13-19** and **Exhibit JPM3.1-21** (copy PQ together with covering letter and follow up letter); It takes the application nowhere.] **Exhibit JPM1.518-520**, see paragraph 9; **Exhibit JPM1.527-528**, see paragraph 9; **Exhibit JPM1.540-549**, see paragraph 10.iii]

n. **Failure by BIOM to prepare financial statements-**The Defendant submits that that BIOM was not required to comply with the obligation on private companies incorporated under the Companies Act 1931 to prepare financial statements (balance sheet and profit and loss account/income and expenditure account) as required by the Companies Act 1982.

o. There is no evidence of an exemption to this legal requirement which would apply to BIOM in the Defence.

p. Taken together, with the regulatory landscape in mind, this evidence supports the appointment of a Manager, Receiver and Inspector, appropriate and proportionate. It would be reasonable to court to exercise its discretion.

Defence Submissions

175. Again, this is a summary of the main submissions which is a combination of the defence, defence skeleton argument and points made during oral submissions:

a. A challenge is made to the Authority's decision making, approval and application process for the purpose of these application[Defence skeleton paras 5-7];

b. The focus of the Authority's claim must be on the "relevant person", namely the Defendant [see the 2014 Order]. See Claim Form at [11] and [157]-[177]]. It follows that any breaches alleged must be proved against the Defendant and not **EWG** or any other officer of the Defendant(unless specifically pleaded);

c. **The ownership of BIOM-** It is common ground that Mr Gittins is recorded as the UBO of BIOM (**JPM1 pg. 14**) in accordance with the requirements of the Beneficial Ownership Act 2017. However, that registration does not reflect the true beneficial ownership of BIOM. LLC was owned by the trustee of the Bala Settlement and therefore belonged beneficially to the beneficiaries of the Trust (Gittins [55]). Accordingly, the true ultimate beneficial owners of BIOM, whilst LLC was its shareholder, were also the beneficiaries of the Trust.

d. **The BIOM loans [Gitten [14], [28]-[29]].** Holding cash on deposit with Royal Bank of Scotland or other high street banks after 2008 was unattractive due to the very low rates of interest and potential risk of another banking crisis.

e. A solution to this problem, as pointed out in the 2009 Bayridge Gittins Memo, was to advance short-term loans to BIOM at rates of interest significantly exceeding those on bank deposits. Such loans offered better rates of return (usually 3% per annum) whilst maintaining flexibility - the term could be adjusted to the client's needs and the loans could be rolled over if the client had no immediate need for cash (Gittins [81]). Further, if needed very urgently, the loans could be repaid on demand (Gittins [15.1.2]). There is no suggestion that the fulfilment of these requirements was anything other than in the best interests of the clients - the Authority's case, Claim Form [103], is in essence only that it should not have been BIOM that fulfilled them.

f. The BIOM loans were all documented by means of loan agreements in a standard format - see an example at **EWG1, tab 23, pg. 440-446**. The decisions in respect of individual clients to make the BIOM loans were frequently but not invariably minuted - see example resolutions at **JPM1, pg. 550-563**. It is common ground that the monies borrowed by BIOM were paid into accounts in the name of LLC and MICI and thereafter disbursed as BIOM and MICI saw fit.

g. There is nothing odd about this, as the only relevant obligation on BIOM in the loan agreements was to repay the monies in accordance with the terms of those agreements. BIOM was entitled to direct that the loaned money be paid to any account belonging to any person that it chose. And BIOM could use the loaned money for any purpose (including payment to Mr Gittins or his wife of deferred consideration to which they were entitled in respect of sales of assets to the Trust).

h. The evidence shows that the BIOM loans are being repaid without difficulty. [JPM1/94; 96; Gittins [70] and Schedule submitted during the hearing showing effective a zero balance]

i. **BIOM's financial position-** The 2009 Bayridge Gittins Memo confirmed BIOM's assets as exceeding £90 million, with a minimal level of debt. During the course of the hearing, an application was made to place evidence of the liquidity of BIOM which was opposed by the Authority and which I refused for reasons I give further in this

Judgment. The main reason for wishing to adduce the evidence, albeit very late, was the Defendant's desire to remove the "suspicion" around the liquidity of BIOM. There is no formal obligation on the Defendant in these proceedings to prove the value of BIOM - particularly since the Authority does not overtly challenge the figure contained in the 2009 Bayridge Gittins Memo or the valuation of over £100 million contained in the letter of 8 February 2019 (**JPM1, pg. 575**).

j. In this, the Defendant faces the significant difficulty that the Bala Settlement Trust Deed, clause 17, imposes a strict obligation of secrecy in relation to the Trust and its assets, which include BIOM (**EWG1, tab 16, pg. 401**). As trustee, Mr Gittins can only make the desired disclosure under compulsion of law. A third party disclosure order could be made against BIOM in the context of these proceedings. However, if it is, it is suggested that (whilst this will primarily be a matter for BIOM) orders should also be made under Rule 7.51(2) (restricting use of documents) and Rule 9.2(3) (a hearing on any part of it may be held in private) so as to protect the confidentiality of BIOM's private financial information.

k. **BIOM's assets - the Defendant's due diligence-** The Defendant was provided with information as to the financial standing of BIOM by **EWG**, a director of both the Defendant and BIOM. The ability of BIOM to repay the loans has been amply demonstrated, many times over, by the fact that it has and does repay each loan made to it and that, since BIOM has decided not to accept any further loans from the Defendant's clients there have been very significant reductions in the sums owed on the BIOM loans.

[See letter of 25 March 2019, **JPM1, pg. 581].**

l. In relation to ownership, the shareholders in and the UBO of BIOM are a matter of public record. The strictly-drawn terms of the confidentiality clause in the Bala Settlement, it is difficult to see what enquiries the Defendant could have made to elicit additional information as to ownership.

m. **Ownership of MICI-** MICI was owed by the Trust - i.e. by Mr Gittins as trustee. [Defence at [69]]

n. The orders sought should not be made as the statutory thresholds have not been met and even if they have, it would not be reasonable to exercise the court's discretion to make the orders, whether individually or collectively, as they amount to a disproportionate response to the alleged or actual, even if proven.

Discussion

176. As I have indicated throughout this Judgment, I have read all the documents and in particular the evidence from the parties upon which I have to place reliance in making an assessment. It seems to me that I must keep the regulatory objects envisaged by the statutory framework at the forefront of my mind. I turn to the statutory framework against the background of the evidence that I have summarised which is largely contained in the statement of **JPM** and **EWG**. I now turn to deal with the law.

The Law

The Authority's decision to bring these applications

177. There is nothing in the 2014 Order or the statutory framework of the FSA 2008 which requires the Authority to demonstrate (prove) the process by which it conducted its investigation, analysis and decision making leading up to the making of the applications. The Authority is required to satisfy itself that there is evidence which supports the making of the applications. The *determination* of those applications is a matter for the court. The Defendant submits that I should examine the process. The Authority submits that in my judgment of 15th August, 2019 at paragraphs 7 and 29, I have already rejected this point and it is disrespectful of the Defendant to attempt to raise the matter again. I did not take it as disrespectful but do I disagree with the Defendant. My function is not that of an administrative court judge dealing with an application for judicial review. I have explained my task at the outset of this judgment – it is to make an assessment of the evidence against the statutory framework to see if the Authority has discharged its burden to the civil standard. A regulatory body such as the Authority, empowered by Tynwald, is required to conduct its functions rationally and reasonably. A safeguard for the Defendant in this hearing is the court which conducts its own assessment. If I am wrong and I should undertake the task of analysing the process, then I am able to conclude that in my judgment, the process by which the applications were made, following an investigation (involving extensive correspondence with the Defendant) making a detailed claim and then laying the evidential foundations, as contained in the statements of JPM demonstrate, a rational, reasoned and proportionate approach. Beyond submitting that it has not been proven that this it was not a reasonable decision, the Defendant has not been able to point to any material which would even begin to undermine the process by which these applications have been made. Therefore, I have concluded that there is not anything in that point which requires any further examination by me as part of this case.

Legal Principles

178. I have outlined the statutory framework and deal with each of the sections below. A great deal has been said about the approach that I should take. There is clearly a degree of overlap in the statutory framework which, it seems to me, is entirely intentional by the draftsman and in Tynwald passing the legislation. Frequently, the behaviour and the conduct of an entity which is the subject of the statutory and regulatory framework will involve a multiplicity of issues and require the regulator to exercise a number of powers simultaneously. Therefore the approach I have taken is to give the legislation and the regulatory framework a purposive interpretation. In particular, as set out at the outset of my Judgment, paragraph 2 of Schedule 1 to the FSA 2008; paragraphs 3(f) and section 2 of the FSA 2008. Given the task I am required to perform, I do not have to make any definitive findings, simply an assessment of the evidence to determine the applications. The legal principles can be distilled as follows:

Manager

a. For section 22, appointment of manager (a) are one or more of the *circumstances* [as set out in the schedule of the 2014 Order for the making of an order established (b) should the court exercise its *discretion* under s22(3) to appoint a Manager.

Circumstances

b. The *circumstances* relied on by the Authority are:

(i) Section 1 (b) the Authority by the *relevant person* of a serious breach of fiduciary duty in respect of a regulated activity ;

(ii) 1(c)a serious failure by the relevant person to maintain proper records;

(iii) 1(i)a serious failure in the governance of the relevant person or the functioning of its directors or senior managers;

(iv) Article 3 of 2014 Order states that "*relevant person*" means a person with respect to whose affairs an application referred to article 4 is made (which refers to section 22).

(v) In order to exercise my discretion in making any of the orders sought, I do not have to be satisfied of all of the circumstances alleged in section 1(b),(c) and (i); it will suffice that I am satisfied of *at least* one or more and not all three.

(vi) the relevant person here is the Defendant and not **EWG**.

Receiver

c. For section 21, appointment of receiver, is the court satisfied that —(a) the appointment is in the *public interest*; (b) the appointment is *necessary* to protect the interests of customers, creditors or others who have or have had dealings with the permitted person (c) pursuant to 42, the court may by appoint a receiver in all cases in which it appears to the court to be *just and convenient* to do so.

Inspector

d. For section 5, appointment of an inspector, (a) a court *may* appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the court shall direct (b)Evidence to the court's satisfaction that it is in the *public interest* that there should be an investigation shall be sufficient to support an application under subsection (1) above, (c)"public interest" that expression *shall* for the purposes of this section include *any* circumstances suggesting that persons concerned with a company's formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or *other misconduct.*

Public Interest

179. Section 21 and section 5, above expressly refer to the *public interest* and whilst section 22 nor the schedule do, it must follow that the conduct (or misconduct) of a relevant person, performing or not, a regulated activity, has a public interest element in it especially when looked at with overall regulatory objectives set out in section 2 of the FSA 2008.

180. In **Financial Supervision Commission v Louis Group Structured Capital Ltd and others (No2) 2013 MLR 33**, a case which involved the winding up of companies, the court considered public interest in the context of the Isle of Man. At paragraphs 111, having reviewed a numbers of authorities, Deemster Doyle, the First Deemster, summarised public interest in the following way:

"*111. In respect of the winding up claims I considered the claims, the evidence, the relevant law and the submissions. Having conducted the balancing exercise referred to in the authorities I concluded that it was proper for the companies to be wound up in the public interest. The winding up orders in this case promote the following aspects of the public interest in the Isle of Man:*

(1) the need for investigations by liquidators into the grave concerns raised in these cases to establish whether any wrongdoing has been committed and assisting in bringing any wrongdoers to justice;

(2) the need for further investigations by liquidators to establish the true financial position of the companies;

(3) the need to send out the message that companies must adhere to certain minimum standards of corporate governance including proper management and the keeping of financial records and documents;

(4) the desirability of insolvent companies being wound up in order that the causes of such insolvency be determined and any wrongdoers brought to justice;

(5) the protection of investors, members, the public and those who already have had dealings with the companies and those who may have had dealings with the companies in the future if they were not wound up;

(6) the prevention of any potential further wrongdoing in connection with the companies;

(7) the need to ensure the proper oversight of directors and the persons responsible for the management and administration of the affairs of companies;

(8) the sound regulation of regulated entities and the protection of their clients (in the case of LG IOM);

(9) the need for the court to express its disapproval in respect of those companies who do not keep proper financial records and documents and those companies who are not managed and administered properly;

(10) the protection and enhancement of the Island's reputation and economy."

181. I do not think a clearer statement of the principle of public interest is required here and these considerations clearly apply in the context of this case; in particular (3), (5), (6), (7), (8) and (10).

Fiduciary duty and breaches

182. This heading has caused a great deal of discussion in the written and oral submissions and a degree of complexity has crept in which I think is quite unnecessary. Both parties have cited passages from Snell on Equity 33rd Edition 7-008-10; 0018 and the case of **BRISTOL AND WEST BUILDING SOCIETY *v.* MOTHEW** [1998] Ch 1 and the leading judgment of Millett LJ. It seems to me that the legal position is as follows on pages 16-18 of that judgment.

Breach of fiduciary duty

"16. Despite the warning given by Fletcher Moulton L.J. in In re Coomber; Coomber v. Coomber [1911] 1 Ch. 723, 728, this branch of the law has been bedevilled by unthinking resort to verbal formulae. It is therefore necessary to begin by defining one's terms. The expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those

consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty. I would endorse the observations of Southin J. in Girardet v. Crease & Co. (1987) 11 B.C.L.R. (2d) 361, 362:

"The word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth …. That a lawyer can commit a breach of the special duty [of a fiduciary] … by entering into a contract with the client without full disclosure … and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words."

These remarks were approved by La Forest J. in LAC Minerals Ltd. v. International Corona Resources Ltd. (1989) 61 D.L.R. (4th) 14, 28 where he said: "not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty."

It is similarly inappropriate to apply the expression to the obligation of a trustee or other fiduciary to use proper skill and care in the discharge of his duties. If it is confined to cases where the fiduciary nature of the duty has special legal consequences, then the fact that the source of the duty is to be found in equity rather than the common law does not make it a fiduciary duty. The common law and equity each developed the duty of care, but they did so independently of each other and the standard of care required is not always the same. But they influenced each other, and today the substance of the resulting obligations is more significant than their particular historic origin. In Henderson v. Merrett Syndicates Ltd. [1995] 2 A.C. 145, 205 Lord Browne-Wilkinson said:

17. The liability of a fiduciary for the negligent transaction of his duties is not a separate head of liability but the paradigm of the general duty to act with care imposed by law on those who take it upon themselves to act for or advise others. Although the historical development of the rules of law and equity have, in the past, caused different labels to be stuck on different manifestations of the duty, in truth the duty of care imposed on bailees, carriers, trustees, directors, agents and others is the same duty: it arises from the circumstances in which the Defendants were acting, not from their status or description. It is the fact that they have all assumed responsibility for the property or affairs of others which renders them liable for the careless performance of what they have undertaken to do, not the description of the trade or position which they hold."

I respectfully agree, and endorse the comment of Ipp J. in Permanent Building Society v. Wheeler (1994) 14 A.C.S.R. 109, 157:

"It is essential to bear in mind that the existence of a fiduciary relationship does not mean that every duty owed by a fiduciary to the beneficiary is a fiduciary duty. In particular, a trustee's duty to exercise reasonable care, though equitable, is not specifically a fiduciary duty …"

Ipp J. explained, at p. 158:

"The director's duty to exercise care and skill has nothing to do with any position of disadvantage or vulnerability on the part of the company. It is not a duty that stems from the requirements of trust and confidence imposed on a fiduciary. In my opinion, that duty is not a fiduciary duty, although it is a duty actionable in the equitable jurisdiction of this court …. I consider that Hamilton owed P.B.S. a duty, both in law and in equity, to exercise

reasonable care and skill, and P.B.S. was able to mount a claim against him for breach of the legal duty, and, in the alternative, breach of the equitable duty. For the reasons I have expressed, in my view the equitable duty is not to be equated with or termed a 'fiduciary' duty."

I agree. Historical support for this analysis may be found in Viscount Haldane L.C.'s speech in Nocton v. Lord Ashburton [1914] A.C. 932, 956. Discussing the old bill in Chancery for equitable compensation for breach of fiduciary duty, he said that he thought it probable that a demurrer for want of equity would always have lain to a bill which did no more than seek to enforce a claim for damages for negligence against a solicitor.

In my judgment this is not just a question of semantics. It goes to the very heart of the concept of breach of fiduciary duty and the availability of equitable remedies.

Although the remedy which equity makes available for breach of the equitable duty of skill and care is equitable compensation rather than damages, this is merely the product of history and in this context is in my opinion a distinction without a difference. Equitable compensation for breach of the duty of skill and care resembles common law damages in that it is awarded by way of compensation to the plaintiff for his loss. There is no reason in principle why the common law rules of causation, remoteness of damage and measure of damages should not be applied by analogy in such a case. It should not be confused with equitable compensation for breach of fiduciary duty, which may be awarded in lieu of rescission or specific restitution.

18. This leaves those duties which are special to fiduciaries and which attract those remedies which are peculiar to the equitable jurisdiction and are primarily restitutionary or restorative rather than compensatory. A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work Fiduciary Obligations (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary….

The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.

In the present case it is clear that, if the Defendant had been acting for the society alone, his admitted negligence would not have exposed him to a charge of breach of fiduciary duty. Before us counsel for the society accepted as much, but insisted that the fact that he also acted for the purchasers made all the difference. So it is necessary to ask: "Why did the fact that the Defendant was acting for the purchasers as well as for the society convert the Defendant's admitted breach of his duty of skill and care into a breach of fiduciary duty?" To

answer this question it is necessary to identify the fiduciary obligation of which he is alleged to have been in breach."

183. On the basis of this analysis and summaries in Snell, which effectively quote the above passages, it seems to me the Authority's contention in the Claim form and maintained during submissions, on this point, cannot be correct. A different point relates to the conflict rule 6.11 and 8.9, which are, I accept a broader conflict point and more likely to be applicable in the context of this case. I think that the Authority has conflated a breach of fiduciary duty as discussed in the above passages, by Millett LJ, with the much broader definition of conflict of interest in the Financial Services Rule Book 2016 (the "Rule Book"). For the Para 1(a) Ground, the only *conflict* that is potentially relevant is one that constitutes a breach of fiduciary duty in the sense that Millett LJ envisages. It may well be the case that the overall conduct of the Defendant here may fall foul of the broader conflicts rule 6.11. It may well be that more evidence comes to light at a later time which makes this submission good. I do not think that any further analysis is required of the case law extensively cited in the Defendant's skeleton argument on this point.

184. **Trust Deeds and confidentiality**

I do not think that I need to spend too much time on this aspect but the general point by the defendant is that clause 17 of the Bala Trust Deed prohibits disclosure unless under compulsion of law, any information relating to the Trust Fund or to the assets **[TPM/1/401].** The Authority submits that the defendant (licence holder) could make disclosure to a regulator to assist with its enquiries. The fact is that disclosure was not made and that alone, is not determinative of these applications. A further aspect touched on by the parties was the Trust Deed for Monza Trust **[JPM/1/191],** which allows the trustee to enter into "*any transaction concerning the Trust Fund…notwithstanding that one or more of the Trustee may be interested in the transaction other than as one of the Trustees*". This aspect goes to the conflict and breach of fiduciary duty submissions of the parties. The Authority makes the point that under clause 20 of the Monza Trust Deed, a Trustee may indeed may enter into a transaction provided there are two Trustees, here, there is only one so the terms of clause 20 have not been complied with i.e. at least one Trustee who is not interested. Again, there may be a potential for conflict but for the reasons I give below, I do not think that I need to resolve either of these issues in in order to make my determination.

Discretion

185. The point is made by the Defendant that in exercising its discretion, the Authority must act reasonably, in the *Wednesbury* principle sense (Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 K.B. 223). I have already given my views about as to my task here in paragraph [INSERT]. I must bear in mind that in reviewing the evidence, I have to conduct a balancing exercise. What I am required to do is not necessarily give weight to the Authority's view, notwithstanding the fact that it is preforming a Regulatory function and has conducted an investigation into the Defendant. I must make up my own mind. That I must do by assessing the evidence on both sides and coming to a balanced view.

Determination

185. I have read all the evidence in this case which has been lodged by the parties. I have summarised large parts of it earlier in this Judgment. If I have not expressly referred to a part of the evidence from either party in my summary, it must not be taken to be read that I have not considered it. This Judgment is already quite long and the absence of a particular reference does not mean that I have not taken it in account. I have considered the skeleton arguments and the various matters of law which I deem relevant to the decision I have to make. Only matters of law and fact relevant to my task have been dealt with here.

186. I have concluded that there is nothing in the Defendant's point which requires that I conduct an exercise, which amount to a judicial review of the decision making process of the Authority, which led it to make these applications. I have already said that I find on the evidence that in making the applications the Authority has not acted unlawfully, unreasonably or irrationally.

187. In respect of these applications, I have considered the evidence, the relevant law and the parties' submissions. I have placed reliance on **JPM's** three statements and accept parts of his evidence which are relevant to the making of each of the three orders. His evidence is cogent, well-reasoned and in some areas, compelling in supporting the making of the orders. Having conducted the balancing exercise in respect of each application separately, I have concluded that the orders should be made as the statutory criteria for each is satisfied and there is a strong public interest in that being the case. I do not propose the repeat the factors which relate to public interest which I have recited above from the Judgment of Deemster Doyle in the case of **FINANCIAL SUPERVISION COMMISSION v LOUIS GROUP STRUCTURED CAPITAL LTD & OTRS (No 2) 2013 MLR 33.**

188. In conducting my assessment, I have come to the view that so far as the "complaints" (Monza, Invicta and Dominion and others) are concerned, whilst pleaded in some detail in the pleadings and the subject of much argument in the written submissions of the Defendant (**EWG**'s statement and defence), notwithstanding an absence of agreement between the parties, they do provide *some* support for the Authority's concerns about the alleged conduct of the Defendant. I have taken this narrative into account in my overall assessment of the evidence but make clear, it is not determinative. Again, it may well become necessary to examine these complaints in more detail by others at a later stage.

189. The law in relation to fiduciary duties is as stated by Millett LJ in ***Bristol West Building Society (ibid***). That whole area will need further examination too. Again, I do not have to make a finding and whilst the evidence appears to support, a breach in the broader sense envisaged by the Rules, I am not satisfied it does, in the Millett LJ sense.

190. I have concluded that a Manager should be appointed pursuant to section 22 of the FSA 2008. I am satisfied that the evidence of the Authority supports that there has been a serious failure by the relevant person (the Defendant) to maintain proper records; (schedule 1(c)). This has to be read along with Rule 8.28(1) of the Rule Book which, again, is broadly and clearly drawn and provides that "*A licence-holder must keep and maintain records to show and explain transactions effected by it on behalf of its clients".* Again, the extent of record keeping is one aspect but the ability to *explain* what the records show is another aspect. I am satisfied that the evidence of the Authority when assessed objectively, shows that a serious failure in the governance of the relevant person (Defendant) or the functioning of its directors or senior managers to warrant the appointment of the manager (schedule 1(i)). The word "serious" is not defined nor, in my Judgment, does there need to be a dissection or over analysis of it. It is an ordinary English word but judged in the context of this case, if the evidence raises the spectre (Deemster

Doyle, in **FSC** (ibid) preferred "suspicion") of use or misuse of investors' monies by a licence-holder then, absent a plausible explanation for that, it should be regarded as serious. The evidence on this point appears to be cogent given, for instance, that the Defendant does not challenge that significant payments, running into millions of pounds have been made to members of **EWG's** family. The description given to these payments has been "deferred payments", which the Defendant has not addressed fully in the written evidence or submissions beyond the mere assertion. I am satisfied on the evidence that such an appointment is necessary to protect and preserve assets, books, records and other property as well as a need to protect the interests of a customer, creditor or others who have had dealings with the relevant person(schedule 3(b)(i) and (ii)).

191. These transactions also raise the *potential* for conflict in the wider sense envisaged by the Authority's guidance contained in the Rule 6.11(2) of the Rule Book. That Rule is widely drawn and on one interpretation, capture the conduct of the Defendant and EAW. Although the Authority submits that on the evidence, there is *actual* conflict, whether there is potential or actual conflict is not for me to resolve for the purpose of making any orders. The degree of oversight one would expect from an independent source, raises governance issues. The evidence supports a clear lack of open and spontaneous cooperation from a licence-holder to the regulator. This conduct raises concerns about future conduct and it is right that the Authority intervene in a way in which it does not have to rely on the cooperation of the licence-holder to get information about transactions and governance issues.

192. Therefore, I have concluded, for the same reasons, that the evidence supports the appointment of a receiver pursuant to section 21, as I am satisfied that (a) the appointment is in the *public interest*; (b) the appointment is *necessary* to protect the interests of customers, creditors or others who have or have had dealings with the permitted person and that (c) pursuant to 42, it *appears* to me to be *just and convenient* to do so; the meaning of the italicised words needs no further analysis here.

193. For the purposes of Section 5 on the evidence I am satisfied, again, on the balance of probabilities, that it is in the *public interest* that there should be an investigation by an inspector. Pursuant to subsection (1) above, (c)"public interest" that expression shall for the purposes of this section include *any* circumstances suggesting that persons concerned with a company's formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or *other misconduct*. The Authority has been careful not to allege fraud but *"other conduct"* suggests a broad and purposive phrase-deliberately drafted in this way to capture any and all other behaviour of a licenceholder which may not neatly fall into specified categories.

194. Finally, on the evidence, I am satisfied that it is proportionate to make all of these orders recognising that they are "intrusive and described as draconian". I have taken account of the impact the Defendant says these orders could have on its business but the evidence supports the making for these orders not only because of the public interest which necessitates it, but also because the public interest here goes beyond the investors who may be affected by the Defendant's alleged conduct. It goes go to the Isle of Man's reputation as an offshore financial centre and the confidence which the public must have in a regulated entity and indeed the regulator, in performing its statutory functions. In that sense, a broader meaning must be given to public interest and the regulatory framework must be viewed as a purposive instrument attempting to achieve the aims and objectives the Authority is tasked with by Tynwald.

195. The reasons why I have concluded that I should exercise my discretion in making these orders is because as I have said above, I accept the evidence of **JPM** in support of these applications and these can be summarised (not exhaustive) as follows:

a) **Lack of financial information**, namely a clear record of the loan making criteria. At the heart of the Authority's claim is that Bayridge File Note 26th March 2009 and the Bayridge Memo Gittins Memo 3rd June 2009 **[JPM1/87 and 24**]. Leaving aside whether there was any misleading of co-directors by **EWG** in which he describes himself as a *director* but not a shareholder or that he was the sole beneficial owner of BIOM since 2007(eventually registered in 2012), the evidence shows an absence of any challenge by any of the other directors or queries at that stage of BIOM or its financial standing and suitability as a borrower. On the evidence, there appears to an absence of any detailed scrutiny at any stage and much reliance is placed on EWG's assessment of the proposal. The Defendant's position is summarised in this judgment at paragraphs 149-152 and 173 (a-k) where it states that BIOM loans were all documented by means of loan agreements in a standard format – see an example of **EWG1, tab 23, pag.440-446.** The decisions in respect of individual clients to make the BIOM loans were frequently but not invariably minuted – see example resolutions at **JPM1, pg.550-563;**

b) **The Loan Schedules**. See for instance, November 2018 [**JPM/1/96-98]** shows a balance of £4,715,760. The Loan Agreement provided by the Defendant shows BIOM as the borrower. **EWG** is signing as both the *lender* and *borrower* (**JPM/1/101-106 and 108-113**). Some of the Loan Agreements are signed by **EWG** on behalf of BIOM and his wife and fellow director Maura Gittins [**see JPM/1/115-121**].This alone raises issues of *potential* for conflict and is said by the Authority to be an unusual feature of the loan making process. The Defendant's position is summarised at paragraph 173(f) and (g) and 143-148;

c) **Lack of documentation** to evidence important transactions, namely an absence of Trustee and Board minutes documenting transactions. The Defendant said that it did not have these but confirmed that there was a standard loan agreement in place and unless there were changes, it did not see the need for separate board minutes each time a loan was approved. [**see JPM/533/547**].

d) **Diversion of investors' monies**-MICI did not renew its licence to conduct business since 2011. The position having been confirmed by the Defendant in correspondence with the Authority [**JPM/1/23**]. MICI continued to receive monies belonging to investors between 2011-2015. The evidence shows that millions of pounds of investors monies were sent not to BIOM but MICI at time when it no longer held an insurance licence. The use of the monies is summarised in [**Appendix 1 Claim Form**]. Evidence from bank statements which were obtained by the Authority, confirm the schedule in Appendix 1. There are payments to LLC too, a company which had ceased to exist [**see: JPM/1/527**]. By way of example, £490,000 received into the LLC accounts appears to have been paid out to Dominion Fiduciaries on 31st December 2018. The Authority's case is that these are investors' monies being used to repay the client trust [see: **JPM/1/270-277; 278-281; 590; 282-283 and 284**(this is only by way of narrative)]. The Defendant's position remains that there was nothing unusual or untoward about this arrangement as almost all the investors have been paid;

e) **Payments to members EWG's family** [see: para 74-81 above and **JPM/3 61-747** and **Appendix 2** to the Claim]. The analysis of the evidence shows that millions of pounds have been paid to **EWG** and members of his family. Examples payments include £1m

and Euros 380,000 between April 2012 and October 2018 to Mogeely Stud Limited, a company in which Mark Gittins has an interest. There is evidence of payments to **EWG's** wife and children, a yacht owning company and many other payments. The Defendant's position is that these were deferred payments to members of the family;

f) **Complaints of investors**. As I have already said, notwithstanding the detailed pleadings and counter-arguments in the defence and **EWG**'s statement, there appear to be a number of complaints about the Defendant from a variety of investors each with its own particular factual matrix but which tend to provide, at least *some* support for the Authority's concerns in seeking these orders. Monza Contracting Limited (**Monza**), was a client of the Defendants in relation to two Business Benefit Trusts. It raised serious concerns about the distribution of its funds having invested £100,000. The Authority raised queries with the Defendant. It transpired that the "bond was wound up in 2014 and funds transferred to BIOM". A request for minutes and Trustee resolutions was made but they were not provided. Transfers of monies to MICI appear to have taken place in 2013; two years after it ceased to have a licence and stopped trading. Lawyers acting for Monza summarised their position in this way:

"*Monza and its directors who are beneficiaries of the trusts have no confidence in the Isle of Man's financial services industry, or regulatory or legal systems, and consider that the such systems have proved to be completely ineffective to secure responsible conduct by [the Defendant] to protect beneficiaries of trust, and provide effective remedies for irresponsible conduct".* Monza has made a commercial decision not to pursue a claim. **[see: JPM/1 230-236; 247-257; 497-498; 503; 237-238/9; 515; 533**].

There is evidence of other complaints; see Dominion Litigation [**JPM/1/259; 160; 261; 262; 270-277; 278-281; 283];** Bronel Group Limited **[see JPM/1/285 which raises concerns about conflicts] and** Invicta [see**: JPM/1/308-313/314-323**]. Whilst it is correct that each of these examples has its own factual matrix, the underlying evidence supports the Authority's assessment that client monies appear to have been paid into an entity which ceased to exist or trade or at the least, did not possess appropriate licences. I agree with this in my own assessment. The Monza lawyers' letter demonstrates the potential impact of the alleged behaviour of the Defendant on the reputation of the Isle of Man as an off shore financial centre and importantly, the ability of the regulatory framework to check alleged breaches of its **Rules** and guidance of regulated entities. The Defendant submits that these need greater context and the Authority has not understood the detail which lies behind each complaint. I have summarised its position at paragraphs 127-138 in my judgment. Nevertheless, as I have said, they provide *some* support for the Authority's applications.

g. **Lack of openness and lack of co-operation**. The Authority's evidence points to a number of instances which it says demonstrates a lack of openness and candour by the Defendant in dealing with requests for information. The Defendant denies this but accepts that the relationship with the Authority has not been a good one. I do not have to decide that but assess whether there are examples supporting the Authority's position. Again, only by way of an example, the Authority relies on a letter it wrote to the Defendant on 24th April 2014 enclosing a questionnaire requesting information under schedule 2, paragraph 2(1) of the FSA 2008. The Defendant replied on 2nd June 2014. Question 2 and 3 of the questionnaire ask *whether the Defendant (licence-holder) has since January 2012 made or facilitated lending or investment between companies or trusts which it supplied regulated activities other than between*

companies or trusts with the same or closely related beneficial ownership and whether lending arrangements are still in place? The Defendant has replied "No" in each case. But the agreed evidence shows that 2014 the Defendant was providing regulated activities to BIOM. Loans were made in 2013 which remained outstanding until April 2019. During the hearing, I was informed that all loans had been repaid. The correspondence which ensues, the Authority submits, is an attempt to mislead or at the very least shows a lack of candour in dealing with the regulator. [see: **JPM/1 162-167; 168-169; 170-171].** The ***Bayridge Correspondence*** (July 2018-April 2019) is also evidence that the Authority relies on and which I accept, as an example of a lack of co-operation and prevarication by the Defendant in its dealings with the Authority. Following its inspection in July 2018, what the Authority was trying to do was to ascertain what the Defendant had been doing, its record keeping and importantly, application of investors' funds but the evidence suggests erroneous answers and delay in providing documentation for verification. [see **JPM/1/487 onwards and JPM statement 17.6.19 and JPM/1/472-486**]

196. There are many issues which require further investigation. Moreover, the apparent lack of financial records, the lack of documentation to evidence various transactions and the lack of full and frank co-operation raises an evident necessity for further investigation to protect the investors, creditors and third parties. The regulatory framework requires and underpins the importance of corporate governance which goes hand in hand with proper record keeping in the form of financial information, books of account, minutes of meetings and documents to evidence transactions. The absence of the same may excite suspicion of potential or alleged wrongdoing. I am not required to make findings about those matters.

197. On the evidence of **JPM** contained in his three statements, which I accept, in support of the claim and the applications in my Judgment the making of the orders is the necessary, proportionate and entirely justified in the public interest. The protection of investors and members of the public is equally important as well as third parties, the interests of all of whom need to be protected. The Authority has placed a cogent body of evidence before the court which shows that serious issues in respect of the Defendant's management, record keeping and governance. The way in which the Defendant has been managed requires further investigation by receivers and inspectors to assess the risk and to protect the rights and positions of third parties, investors, creditors and the public.

198. For the reasons given above, I grant the Authority's claim and make the orders sought in the draft order.

199. I invite the parties to agree the costs.