



Case number FS/2011/0019

*FINANCIAL SERVICES – alleged breaches of Principle 7 (communication of information) and Principle 9 (suitability of advice) of Principles for Businesses and related Conduct of Business Rules in relation to Geared Traded Endowment Policies - whether Authority and Tribunal have jurisdiction - yes - whether Applicant breached Principles and COB Rules – yes - whether financial penalty appropriate - yes - amount of penalty confirmed - reference dismissed*

**UPPER TRIBUNAL  
TAX AND CHANCERY CHAMBER**

**WESTWOOD INDEPENDENT FINANCIAL PLANNERS**

**Applicant**

**- and –**

**THE FINANCIAL CONDUCT AUTHORITY**

**The Authority**

**Tribunal: Judge Greg Sinfield  
Nick Douch  
Andrew Lund**

**Sitting in public in London on 9 - 12 and 15 - 18 April and 10 May 2013**

**Gerard McMeel, counsel, instructed by Financial Services Advocacy Limited for the Applicant**

**Sarah Clarke, counsel, instructed by the Financial Conduct Authority, for the Authority**

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## DECISION

### Introduction and decision referred

1. This is a reference by Westwood Independent Financial Planners (“Westwood”) of a decision made by the Financial Services Authority, now the Financial Conduct Authority (together “the Authority”). The reference concerns the Authority’s  
5 decision, in a Decision Notice dated 31 May 2011, to impose a financial penalty of £100,000 on Westwood under section 206 of the Financial Services and Markets Act 2000 (“the Act”).

2. The Authority decided to impose the penalty because it considered that,  
10 between September 2005 and October 2007, Westwood sold geared, traded endowment policy (“GTEP”) plans to its retail customers in breach of the Authority’s Principles for Businesses (the “Principles”) and rules relating to the conduct of business (“COB Rules”).

3. Specifically, the Authority alleges that Westwood breached Principle 7 and  
15 COB 2.1.3R and COB 5.4.3R in that it failed to pay due regard to the information needs of its clients, and communicate information to them in a way which was clear, fair and not misleading. The Authority further alleges that Westwood breached Principle 9, COB 5.3.5R and COB 5.3.10AR in that it failed to take reasonable care to ensure the suitability for its customers of its advice and recommendations in relation  
20 to the GTEP plans.

4. For the reasons set out below, we have found that Westwood breached Principles 7 and 9 as well as the related COB Rules. We confirm the penalty of £100,000 and remit the matter to the Authority to take such action as it thinks appropriate to enforce the penalty. The reference is dismissed.

### 25 Applicable legislation, Principles and COB Rules

5. Section 138 of the Act provided at the relevant time:

“(1) The Authority may make such rules applying to authorised persons

(a) with respect to the carrying on by them of regulated activities, or  
30 (b) with respect to the carrying on by them of activities which are not regulated activities,

as appear to it to be necessary or expedient for the purpose of protecting the interests of consumers.”

6. The Authority made rules under section 138 at differing levels of detail. The  
35 Authority made rules with a high level of generality, such as the eleven Principles, and the detailed rules in COB. The Principles are a general statement of the fundamental obligations of firms under the regulatory system. COB contains detailed rules which relate to the conduct of particular regulated activities or unregulated activities. The rules are contained in the Authority’s Handbook and are designated  
40 with the status letter R. COB also contains provisions that are marked with the status

letter G to indicate that they are guidance rather than a rule. There are also evidential provisions with the status letter E but they are not relevant to this reference.

7. Principle 7 (Communications with clients) provides that:

5                   “A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.”

8. The relevant COB Rules are COB 2.1.3R and COB 5.4.3R. COB 2.1 applies to a firm when it communicates information to a customer in the scope of, or in connection with, the firm’s designated investment business. COB 2.1.3R requires that, when a firm communicates information to a customer, the firm must take reasonable steps to communicate in a way that is clear, fair and not misleading.

9. COB 5.4 applies to a firm that conducts designated investment business with or for a private customer. COB 5.4.3R requires that a firm must not, among other things, make a personal recommendation of a transaction to a private customer unless it has taken reasonable steps to ensure that the private customer understands the nature of the risks involved.

10. Principle 9 (Customers: relationships of trust) provides that:

20                   “A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment.”

11. The relevant COB Rules are COB 5.3.5R and COB 5.3.10AR. COB 5.3 applies to a firm when, among other things, it makes a personal recommendation concerning a designated investment to a private customer. COB 5.3.5R(1) requires that a firm must take reasonable steps to ensure that, if in the course of designated investment business, it makes any personal recommendation to a private customer to buy a designated investment, the advice on the investment is suitable for the client. COB 5.3.5R(3) also states that if the recommendation relates to a packaged product, the firm must have regard to the facts disclosed by the client and other relevant facts about the client of which the firm is, or reasonably should be, aware.

12. COB 5.3.10AR provides that a firm, which holds itself out as giving personal recommendations to private customers on packaged products from the whole market (or the whole of a sector of that market), must not give any such personal recommendation unless it:

35                   (a) has carried out a reasonable analysis of a sufficiently large number of packaged products which are generally available from the market (or sector of the market); and

                     (b) conducts the analysis in (a) on the basis of criteria which reflect adequate knowledge of the packaged products generally available from the market as a whole (or from a relevant sector).

13. COB 5.3.29G (H) states that, when considering the suitability of a particular investment product which is linked directly or indirectly to any form of loan or mortgage, a firm:

5 (a) should take account of the source of the funds being invested and the suitability of the overall transaction; and

(b) must follow any relevant suitability and other rules in COB and MCOB.

14. Section 206 of the Act provides that if the Authority considers that an authorised person has contravened a requirement imposed on him by or under the Act, it may impose a financial penalty, in respect of the contravention, of such amount as it  
10 considers appropriate.

### **Alleged breaches of principles and rules**

15. It is the Authority's view that GTEP plans are high risk products which are inappropriate for anyone other than high net worth individuals with a penchant for high risk investments. The Authority alleged that Westwood breached Principle 7 and  
15 COB 2.1.3R and COB 5.4.3R in relation to its clients in that it failed to pay due regard to the information needs of its clients, and to communicate information to them in a way that was clear, fair and not misleading. Specifically, the Authority alleged that Westwood failed to explain the following adequately to its customers:

- (1) the characteristics of a GTEP plan;
- 20 (2) the complexities of a GTEP plan;
- (3) the risks associated with a GTEP plan, in particular the risks associated with the geared nature of the investment;
- (4) the particular risks for the client concerned;
- (5) the reasons for recommending an investment in the GTEP plan; and
- 25 (6) why a GTEP plan was a suitable investment for that particular customer.

16. The Authority alleged that Westwood's communications (meeting minutes and suitability reports) were not specifically tailored to the individual customers and did not set out the key risks relevant to that particular customer's personal and financial  
30 circumstances. The Authority contended that the documents provided to customers were not sufficiently clear and balanced and, as a result, Westwood failed to ensure that clients understood the nature of the risks involved. The Authority stated that the evidence showed that Westwood produced spreadsheets for clients which focused only on the "upside" of the projected returns and did not deal with possible "downside" scenarios.

35 17. The Authority further alleged that Westwood failed to take reasonable care to ensure the suitability of its GTEP plan recommendations for its customers. In particular, the Authority contended that Westwood did not make an adequate assessment of the customer's attitude to risk and accordingly Westwood failed to ensure that each customer's attitude to risk was consistent with the recommended

product's risk rating. The Authority also contended that Westwood failed to take account of the fact that, in many cases, the clients raised the funds to invest by way of a mortgage secured on their home and it failed to give sufficient weight to this factor when considering the overall suitability of the GTEP plan for those clients. The Authority submitted that, as a consequence, Westwood sold GTEP plans to customers for whom such an investment was plainly unsuitable.

18. Westwood refuted the Authority's allegations and maintained that it had, at all times, complied with Principles 7 and 9 and the associated COB Rules. Westwood contended that the GTEP plan was not high risk and the product was suitable for those clients to whom it recommended it.

19. Mr McMeel submitted that the Authority had not alleged, let alone quantified, any consumer detriment said to have resulted or possibly resulted from the conduct issues alleged. We do not accept the Authority was required to establish consumer detriment. In our view, the allegations of breaches of Principles 7 and 9 do not require any actual consumer detriment. We consider that Principles 7 and 9 will still be breached if the risk of detriment was not properly explained to the client or meant that the firm's advice and recommendation were not suitable for the client.

20. Both parties made submissions on the evidence which we incorporate into our discussion of the evidence below.

## 20 **Jurisdiction**

21. Westwood contended that neither the Authority nor the Tribunal had jurisdiction in this case because Principles 7 and 9 and the associated COB Rules were not engaged. Mr McMeel submitted that the Authority's case was based entirely on gearing, ie borrowing to invest. He contended that the Principles mainly apply to regulated activities and that Principles 7 and 9 do not apply to unregulated activities. Mr McMeel relied on PRIN 3.2.3R which stated that Principles 3, 4 and, in a particular context, 11 also apply to the carrying on of unregulated activities so that, by implication, the other Principles did not apply to such activities. Mr McMeel stated that the gearing in relation to the TEPs was not a regulated activity for these purposes so Principles 7 and 9 had no application.

22. The Authority submitted that Westwood had mischaracterised its case which was not simply about gearing but the GTEP plan viewed as a whole. The Authority submitted that the Principles applied to the GTEP plan because PRIN 3.2.1R(1) stated that the Principles applied with respect to the carrying on of regulated activities and PRIN 3.2.1R(3) extended that to ancillary activities in relation to designated investment business. The Authority contended that the GTEP plan, viewed as a whole, was a regulated activity but if that were not the case then the activities of Westwood in relation to the GTEP plans were ancillary activities in relation to designated investment business.

23. Mr McMeel contended that it was wrong in principle to treat an activity which was unregulated in the sense that it was not regulated by the Authority, although it

was regulated by another body, the Office of Fair Trading, as a regulated activity merely by virtue of being an ancillary activity. It was common ground that the GTEP plan was a single product but Mr McMeel said that the different elements of the GTEP plan must be disentangled.

5 24. Regulated activity is widely defined and includes advising on investments and  
on mortgages. It was common ground that each life policy and thus each portfolio of  
TEPs was a designated investment. Westwood’s submission on this point was that the  
Authority’s allegations related exclusively (or almost so) to the gearing which was an  
unregulated activity and should be regarded separately from the other elements of the  
10 GTEP plan. Westwood contended that, considered in isolation, the gearing was not  
subject to Principles 7 and 9. We do not accept Westwood’s submissions on this  
point.

15 25. First, we do not consider that it is right to regard the gearing separately from the  
other elements of the GTEP plan. The GTEP plan was a single product and  
recommended to clients as such. The gearing was an important and necessary part of  
the GTEP plan: it was necessary to enable the investor to buy more TEPs, pay the  
premiums and take monthly drawdown payments. The term “gearing” was  
incorporated in the name that the plan was given, and it is likely that clients viewed  
the gearing as a necessary part of the plan. As such we consider that it would be  
20 wrong to consider the gearing in isolation. Viewing the GTEP plan as a single and  
indivisible product, we conclude that Westwood was carrying on a regulated activity  
when it advised clients and made recommendations and arrangements concerning the  
GTEP plan which included the purchase of TEPs including, in many cases, the use of  
a mortgage to provide funds for the purchase and, in all cases, borrowing by way of a  
25 loan facility secured on the TEPs to pay the premiums, interest and monthly  
drawdowns.

30 26. Secondly, we accept the Authority’s submissions that the gearing aspect of the  
GTEP plans was an ancillary activity in relation to designated investment business,  
namely the TEPs. If it is not correct to regard the GTEP plan as a single and  
indivisible product then it is, in our view, clear that the gearing element was a lesser  
and dependent part of the plan. The principal element of the GTEP plan was the  
portfolio of TEPs which were intended to produce gains to fund the costs of the plan  
and, possibly, a surplus to pay off a mortgage or provide a lump sum. The gearing  
had no independent purpose. We do not accept that there is any rule that prohibits an  
35 activity that is regulated by one body from being ancillary to an activity that is  
regulated by another body. The concept of an ancillary activity suggests that it was  
intended to extend the application of the Principles beyond regulated activities and  
there is nothing in the Principles to limit ancillary activities to ones that are not  
regulated by anyone else.

40 27. Westwood contended that the Authority was wrong to rely on COB 2.1.3R as it  
related to “designated investment business” and gearing was not designated  
investment business. Westwood also submitted that the Authority was wrong to rely  
on COB 5.3.5R because it related to personal recommendations to buy a “designated  
investment” and, although Westwood accepted that the TEPs were designated

investments, gearing did not fall within that category. Westwood further submitted that the Authority was wrong to rely on COB5.3.10AR which is only relevant to the independence of whole of market advice in relation to “packaged products”. Although Westwood accepted that a single endowment policy is a packaged product, Mr McMeel submitted that neither the TEPs nor the GTEP plan fell within the letter or spirit of COB5.3.10AR. Our view is that the COB Rules associated with Principles 7 and 9 apply to the GTEP plan for the same reasons as we have given in relation to the Principles: viewed as a single product, the GTEP plan is a regulated activity or an ancillary activity in relation to designated investment business.

28. For the reasons given above, we conclude that Principles 7 and 9 and the associated COB Rules apply. Even if some or all of the specific COB Rules do not apply to the information and advice provided by Westwood in relation to GTEPs, the more general Principles still apply. Accordingly, we conclude that the Authority and this Tribunal have jurisdiction in this case.

**Role of the Tribunal on a reference**

29. Section 133(4) of the Act provides that, on a reference, the Tribunal may consider any evidence relating to the subject matter of the reference or appeal, whether or not it was available to the decision-maker at the material time. This is not an appeal against the Authority’s decisions but a complete rehearing of the issues which gave rise to the decisions.

30. Section 133(5) of the Act provides that, on a reference, the Tribunal must determine what (if any) is the appropriate action for the Authority to take in relation to the matter referred to it. Under section 133(4) of the Act, the Tribunal reviews the appropriateness of the penalty taking into account all relevant circumstances, including the situation of Westwood at the time of the hearing, not at the time that the breaches occurred. Section 133(6) and (7) provide that the Tribunal must remit the matter to the Authority with such directions as the Tribunal considers appropriate for giving effect to its determination and the Authority must act accordingly.

31. Section 133A(5) of the Act provides:

"The Tribunal may, on determining a reference (whether made under this or any other Act) in respect of a decision of the Authority, make recommendations as to the Authority’s regulating provisions or its procedures."

32. Mr McMeel, who appeared on behalf of Westwood, invited us to comment adversely on the Authority’s procedures and the conduct of the investigation in this case. We refer to this point further at [187] below.

33. Mr McMeel also submitted that there should be no retrospective application of current compliance standards to Westwood’s conduct in the period 2005 to 2007. The evaluation of Westwood’s compliance should be determined in the light of the applicable standards in 2005 to 2007 and not in the light of the Authority’s current thinking. In our view, we should measure Westwood’s conduct against the



requirements of the Principles and COB Rules, properly interpreted, that applied at the relevant time ie 2005 to 2007, without regard to the views of the Authority at that or any later time.

### **Issues**

- 5 34. The issues for this Tribunal to decide, in these proceedings are:
- (1) whether Westwood:
    - 10 (a) failed to pay due regard to the information needs of its clients, and communicate information about the GTEP plan to them in a way which was clear, fair and not misleading, in breach of Principle 7 and COB 2.1.3R and COB 5.4.3R; and/or
    - (b) failed to take reasonable care to ensure the suitability of its advice and recommendations to its clients in relation to the GTEP plan recommendations in breach of Principle 9, COB 5.3.5R, COB 5.3.10AR and COB 5.3.29G (H); and
  - 15 (2) if we find that Westwood has committed all or any of the alleged breaches of the Principles and rules, whether it is appropriate to impose a financial penalty in respect of the breaches and the amount of any penalty.

### **Burden and standard of proof**

- 20 35. It was common ground that the burden of proof is on the Authority and that the standard of proof to be applied in this case is the ordinary civil standard of proof of the balance of probability, namely whether the alleged conduct more probably occurred than not.

### **Evidence**

- 25 36. The Authority submitted 15 bundles of documents, not all of which were referred to at the hearing, before the hearing and Westwood submitted one bundle and some loose documents during the course of the hearing. The Authority called five clients of Westwood who had invested in GTEPs as witnesses, namely Mrs Moira Dolan, Mrs Victoria Latchford, Mr Craig Rich, Mrs Fiona Mortimer, and Mr David McLeod. Mr John Chiesa, a partner in Westwood, and Mr Charles Conway, an  
30 employee of Westwood, gave evidence on behalf of Westwood. Both parties tendered expert evidence. Mr Trevor Gray, a non-executive director of a Channels Island company which provides financial advice and with 35 years' experience as a financial adviser, gave evidence on behalf of the Authority. Mr Jonathan Purle, a director of a financial services consultancy company and with 15 years' experience in technical  
35 product analysis and regulatory compliance, gave evidence on behalf of Westwood. On the evidence before the Tribunal, we find the material facts to be as set out below.

### **What is a TEP?**

37. Traded endowment policies ("TEPs") are with-profits endowment policies (a long term, regular savings plan with a life policy attached) which are no longer required by their original holder and have been sold on the secondary market. The purchaser of such policies agrees to pay the remaining premiums on the policy and, in return, receives the value of the policy either at maturity or when the purchaser is aware that the original owner has died, whichever occurs first. This pay-out will include attached bonuses already declared at the time of the sale and subsequent bonuses, though such subsequent bonuses are not guaranteed in advance.

### **What is a GTEP?**

38. Westwood recommended a product developed by Integrity Financial Solutions Limited ("Integrity") called either the Integrity Self-Funded Mortgage Plan or the Integrity Cash Maximiser Plan which utilized TEPs. This product involved an initial investment to buy a selection of TEPs and borrowing a further amount to purchase additional TEPs (ie gearing, hence GTEP). The portfolio of TEPs acquired were used as security for the loan facility to buy the additional TEPs and to fund the various payments throughout the life of the GTEP plan, including the following:

- (1) premiums for the TEPs in the portfolio;
- (2) any agreed monthly drawdowns;
- (3) interest on the loan; and
- (4) annual review charges or fees made by Integrity and the loan provider.

39. Several of Westwood's clients borrowed to fund the initial investment by way of a mortgage on their home. In such cases, the monthly drawdowns under the loan facility were intended to be used to pay the monthly mortgage costs.

40. The object of the GTEP plan was that the monies paid on maturity of the TEPs would be sufficient to repay the initial investment and the amount borrowed under the loan facility (including the premiums for the TEPs, any monthly drawdowns, any interest charges and the various fees charged under the GTEP plan) together with, in some cases, an additional amount which might pay off a mortgage or provide a gain.

41. Between September 2005 and October 2007, Westwood advised 50 clients who invested in an Integrity GTEP plan. Typically, the steps involved in investing in a GTEP plan were as follows:

- (1) Westwood would hold an initial meeting with each client to gather know your customer ("KYC") information and discuss the client's investment objectives. Westwood would then hold subsequent meetings with the client during which it would advise the client how they might achieve their investment objectives.
- (2) The money for the initial investment could come from any source but, in most cases, Westwood advised the clients who did not have sufficient liquid funds to remortgage their homes to invest in the GTEP plan.

- 5 (3) Westwood sent customers a record of the advice provided after each meeting in the form of minutes which also included risk warnings. Westwood asked its clients to read the meeting minutes carefully and let Westwood know if they were not a correct record of the meeting or if anything was unclear. Westwood also provided its clients with an Integrity client brochure for the product. Westwood prepared suitability reports for the clients which referred to the meeting minutes, repeating the advice and risk warnings, and made a specific recommendation to invest in an Integrity GTEP plan.
- 10 (4) If the client decided to invest in an Integrity GTEP plan, Westwood would inform Integrity. Integrity would then inform the loan facility provider who would start organising the loan facility while Integrity started to purchase TEPs.
- 15 (5) There were normally 10 to 15 TEPs in a GTEP plan with maturity dates spread over the life of the plan which was normally 15 Years. The purchase money for the TEPs was provided by way of contribution from the investor (which in some cases came from a mortgage loan on their home) and borrowing under the loan facility. The borrowing under the loan facility was secured against the value of the TEPs purchased with the initial amount invested used to increase the funds available to purchase more TEPs. The amount advanced under the loan facility was limited to a percentage of the value of the TEPs it was secured against by way of a covenant in the loan documentation; this covenant was assessed at every annual review date.
- 20 (6) The loan facility increased as payments were made under the GTEP plan which included the premiums for the TEPs, any agreed monthly drawdowns, the annual review charges or fees and the interest on the loan facility itself. The loan facility decreased by the amount from any TEP that matured during the life of the plan.
- 25 (7) The loan facility agreements provided that the amount of the loan must not exceed a specified percentage, usually 80%, of the current surrender value (“CSV”) of the TEPs (“the LTV ratio”).
- 30 (8) Where the amount of the loan was greater than the LTV ratio, the loan provider was entitled to (and did) ask clients to contribute additional funds or to add further life policies (invariably their own) to the portfolio of TEPs held as security and, if such request was not met, could refuse to make further advances to pay premiums and/or fund monthly drawdowns.
- 35 (9) Each year of the GTEP plan, Integrity reviewed the portfolio of TEPs to determine the CSV and the loan facility provider conducted a loan review. Integrity and the loan facility provider both charged the client a fee for the annual reviews.
- 40 (10) The loan facility was renewable annually if the loan provider agreed to continue the facility. One of the lenders, the Bank of Scotland (“BoS”), agreed that it would renew the facility for the following year provided the amount of the loan relative to the current surrender values at the time of the annual review did not exceed the LTV ratio. The other lender, Newcastle Building Society (“NBS”), made no such commitment.

42. None of the GTEP plans has yet reached final maturity. Integrity forecast and Westwood communicated to its clients that, at the end of the GTEP plan, the maturity values of all of the TEPs within the portfolio would be enough to repay the loan facility, including monthly drawdowns, as well as any interest that had been charged.

5 In addition, the GTEP plan was intended to produce additional funds that could be retained by the client or used to pay off any mortgage. In order for the investor to make a profit, the underlying TEPs must, across the life (usually 15 years) of the portfolio, grow faster than the rate at which interest, policy premiums and other costs accrue to the policy loan. It is, however, problematic to determine whether or not the

10 portfolio is keeping pace because the actual return on each policy is known only at maturity. Similarly, it is difficult to determine whether the LTV ratio is likely to remain below the required percentage on an ongoing basis as policy surrender values, on which the ratio is calculated, do not necessarily enjoy consistent growth and cannot be predicted with accuracy.

15 **Witnesses for Westwood**

43. We received evidence from Mr John Chiesa, who carried on the business of Westwood in partnership with his wife, and Mr Charles Conway, Westwood's compliance officer. As the substance of the allegations is how Westwood dealt with its clients and the disputed issues relate to the information and the documents

20 provided to them, we have dealt with the evidence of Mr Chiesa and Mr Conway in relation to the various clients who gave evidence when describing those clients' evidence rather than in a separate section. Mr Chiesa also gave evidence in relation to more general matters which we set out below.

44. Mr Chiesa stated in evidence before us that the objective of all the clients we consider below, apart from Mrs MacKechnie, was to build up wealth for the future and so he always recommended that they accumulate the monthly drawdowns, which he described as a cashflow benefit, from the loan facility. For Mrs MacKechnie, the objective was to obtain additional income to improve her standard of living.

45. Mr Chiesa explained that, having had an initial meeting with the client, he would contact Integrity by telephone and ask for an illustration for an investment in a GTEP plan of the amount that the client wished to invest. Integrity would send the illustration to Westwood together with application forms. The illustration would include a specimen portfolio and Integrity would also advise Westwood of what the underlying borrowing from BoS or NBS was likely to be.

35 46. Mr Chiesa or someone else from Westwood would meet the client again and run through the illustration. Mr Chiesa said in evidence that he would use interactive illustration software provided by Integrity to explain the GTEP plan to clients. The software was, essentially, a series of spreadsheets that Mr Chiesa put on his computer and projected onto a screen or wall to show clients charts and spreadsheets during

40 presentations. Mr Chiesa could change interest rates and bonus rates. Mr Chiesa said that he did this and reviewed the consequences of the changes to those assumptions with the clients on screen.

47. In cross-examination, Mr Chiesa said that in every case, with every client, he changed the numbers to illustrate to the clients what might happen if interest rates went up or bonus rates went down but he accepted that no document in the bundles corroborated his evidence.

5 48. As we set out below, the Integrity documentation and Westwood's suitability reports provided to clients referred to the asset share value of the portfolios of TEPs. That figure was always higher than the purchase price of the TEPs. Mr Chiesa accepted that there was no record in any minutes or in the suitability reports of the meaning of asset share value being explained to a client but he said in evidence that it  
10 was explicitly explained in straightforward language to all of them and continued:

“Otherwise I would have expected the clients to come back and ask me for an explanation. No one did.”

15 49. Mr Chiesa said that he explained to every client that the consequences of a breach of the LTV ratio would be that the monthly drawdowns would stop and the client could be required to introduce further assets to the GTEP portfolio to bring the breach back into line with the ratio set out in the lender's facility letter.

20 50. Only the standard illustration for the recommended GTEP plan was printed for the client and included in the suitability report (and sometimes provided with the minutes). Each suitability report was accompanied by a report by R J Lawrence, an actuary, giving his view of the state of the Endowment Policy market and how it might develop in the future.

25 51. If the client decided to invest, Westwood would complete the Integrity application form and the application form to the provider of the loan facility and send them off with the appropriate money laundering information to Integrity. Integrity would then attempt to buy a portfolio of TEPs to match the client's objectives. It could take Integrity up to a year to find and purchase the TEPs. Integrity would then send a 15 year, month by month, cashflow forecast to either BoS or NBS, depending which was providing the loan facility, so that the proposed lender could consider whether to provide the loan facility. Mr Chiesa's evidence was that perhaps one time  
30 in every three, the lender would require a change in the portfolio and Integrity would have to find an alternative TEP or TEPs. It was only after the TEPs had been found and the lender had confirmed that it was willing to grant the loan facility that the client was given a schedule of the actual TEPs and asked to provide a cheque to make the investment. The final illustration came from Integrity once they had sourced the specific policies for the portfolio. That illustration was provided to the client. The  
35 client could decide not to make an investment in the GTEP plan at any time prior to sending the cheque for the investment.

40 52. Mr Charles Conway worked as a compliance consultant for Compliance First. Around June 2006, Compliance First sent Mr Conway to Westwood to provide compliance advice to the firm. Mr Conway joined Westwood as its compliance officer in July 2007. Mr Conway was not involved in advising the clients of Westwood to invest in the GTEP plan. Mr Conway was able to give evidence of events after he joined Westwood and more generally from a compliance perspective,

having reviewed the relevant client files. Although Mr Conway was asked to comment on aspects of Westwood's advice to clients and its assessment of the risk rating of the GTEP plan, he was not giving evidence as an expert. His evidence was, therefore, of limited assistance in relation to the issues that we have to decide.

5 **Experts' evidence as to risk rating of GTEP plan**

53. Both parties put forward experts to give their views on the risk rating of the GTEP plan, their suitability as a product for the clients of Westwood and the adequacy or otherwise of the communications, especially the risk warnings, given by Westwood.

10 *Mr Trevor Gray*

54. Mr Trevor Gray was the Authority's expert. In reply to questions from Mr McMeel in cross-examination, Mr Gray said that, in his opinion, GTEP plans were always high risk. He had assessed the GTEP as a high risk product because of the fact that interest rates can go up and investment returns from maturity values were on a downward trend so that a small shift in the wrong direction could cause problems for investors. In cross-examination, Mr Gray was asked to describe the risk on a scale of 1 to 10. He described the GTEP as probably 8 on such a scale and then said that without the gearing it would be 3. He stated:

20 " ... without the gearing, you are buying something at a price, you know the future value, you haven't got to go back to other funds, you haven't got to pledge other funds, you haven't -- it will be no different to buying any other medium to long-term investment. It's the gearing that puts the individual into the dangerous situation that cannot be managed in many cases."

25 *Mr Jonathan Purle*

55. Westwood contended that an individual TEP is low risk and that TEP plans are low to medium risk. Westwood acknowledged that borrowing to invest in a TEP plan increased the risk profile but not so much as to make a GTEP plan high risk. Westwood tendered Mr Jonathan Purle as an expert. Mr Purle said in evidence that on two occasions in the past, when working at two separate firms, he had concluded that it was not appropriate for those firms to sell GTEP plans to their clients on the grounds that the advisers in those firms were not able to understand the complexities of the product and so would not be competent to recommend it to clients. Mr Purle accepted that gearing increased the risk.

35 *Conclusion on risk rating of GTEP plan*

56. In this case, we found that the experts' views as to the appropriate risk rating for the GTEP plan were of limited assistance. Their evidence tended to show that different people, with different but relevant experience, may hold different views about the classification of the level of risk associated with an investment product.

57. Both parties agreed that the risk of investing in TEPs is increased by the gearing. We consider that the GTEP plan cannot be regarded as low or medium risk. Our view is that the GTEP plan was high risk because of the gearing and other factors which, when taken together, raise the level of risk inherent in the plan. The other aspects of the GTEP plan which, in our view, contribute towards it being high risk include the following.

(1) The GTEP plan loan facility was reviewed annually. At that time, the loan provider could change the terms of the loan facility eg as to interest rate, or in the case of one lender terminate it. The GTEP plan loan facility effectively represents short-term funding for investment in long-term products which is riskier than long-term funding.

(2) The loan provider can refuse to make any further advances, including premium payments and monthly drawdowns, under the GTEP plan loan facility if the amount of the loan exceeds the LTV ratio.

(3) In order to avoid breaching the LTV ratio, the CSV of the TEPs must always exceed the loan by the appropriate percentage and must increase at the same rate as or faster than the rate at which interest, policy premiums and monthly drawdowns increase the loan facility.

(4) It was stated in the documentation provided to clients that the value of the policies might not be sufficient to pay off the loan under the loan facility or to give a surplus at maturity but when this possibility was combined with the use of an interest only mortgage, which is more risky than a repayment mortgage, to fund the initial purchase of TEPs, the risk of losses being incurred is increased.

(5) The TEP market is relatively illiquid as shown by the fact that it could take Integrity up to a year to buy TEPs for a GTEP once a Westwood client had decided to invest. Such illiquidity meant that, having decided to invest in the GTEP plan, the client was effectively forced to hold the investment for the full term, as Westwood advised some of its clients when the GTEP plans ceased to perform as predicted.

58. It is clear that, if the TEPs do not produce the amounts predicted on maturity, the investors in a GTEP plan could find that the amount of the loan facility (ie principal, interest, drawdowns and annual review charges) exceeded the initial amount invested even after all the TEPs had reached maturity. As we have stated at [145] below, we agree with Mrs Mortimer that an investment that has the possibility of such interim and/or final losses is a high risk investment. As none of the GTEP plans has yet reached the end of its planned life, no one can say whether Westwood's clients will experience such losses. Those clients have, however, experienced losses or, more accurately, been put to unforeseen expense in the interim in that they have lost the ability to take monthly drawdowns and/or been forced to contribute additional cash and/or assets to the GTEP plan. For the reasons set out above, we conclude that the GTEP plan was high risk.

### **Clients who gave evidence for the Authority**

59. We must be careful, when considering the evidence of the clients in this case, to distinguish an investor who can justifiably say that he or she was wrongly induced into making an investment from an investor whose real complaint is that the investment did not perform as well as they had hoped and is therefore expressing “buyer’s regret”. There is no doubt that all of the Westwood clients who gave evidence expressed “buyer’s regret” to some extent but we disregard those elements of their evidence. The fact that the Integrity GTEP plan has not performed as well as predicted is not, in our view, a significant factor in the case given the difficult and unprecedented economic situation that has occurred in the relevant years. We look at the advice and recommendations without the benefit of hindsight. As Mr Gray observed sometimes low risk investments can go wrong. He was careful to point out that different investors have different appetites for risk and what really matters is that the adviser explains the risks clearly to the investor. In this decision, we concentrate on what Westwood told its clients about the GTEP plans as investments and how Westwood’s advice and recommendations reflected the clients’ requirements and circumstances.

#### *Mrs Moira Dolan*

60. Mr and Mrs Dolan are a married couple with two children now in their late teens and early twenties. Mr Dolan is a self-employed writer and Mrs Dolan is a teacher. In 2004, they wanted to buy a larger home and needed to borrow £180,000 to do so. Mrs Mortimer (see below), who was Mr Dolan’s accountant, suggested they seek advice from Mr Chiesa at Westwood. Mrs Dolan said that, until that point, they had had a cautious attitude to risk. Mr Chiesa’s advice was that Mr and Mrs Dolan would not be able to fund their retirement. He suggested that they borrow more than they required to buy their new home and use the excess to invest in a Skandia Investment Bond. When asked in cross-examination if they agreed to take out a mortgage of £340,000, Mrs Dolan said:

“We were persuaded that it would be a good idea. It was something we had never really considered doing and probably wouldn’t have thought of doing. What we originally wanted to do, when we first saw Mr Chiesa, was we were asking for advice because it occurred to us that it might be a good idea, given the fact that the flat that we were selling or about to sell had such a small mortgage on it, we wondered if there ... could be a possibility of not selling it and letting it to have income from it, but Mr Chiesa ... I don’t know if he didn’t think it was a good idea but certainly we didn’t dwell on that very long and we moved on to this possibility of borrowing more money than we needed on an interest-only loan which was something we had never done before.”

61. On Mr Chiesa’s advice, Mr and Mrs Dolan borrowed £340,000 and used £170,000 to invest in the Skandia Investment Bond in August 2004 and, initially, it did well.



62. On 18 January 2006, Mr and Mrs Dolan had a further meeting with Mr Chiesa to discuss the Skandia Investment Bond which was no longer performing as well as it had been. Mr Chiesa suggested the Integrity GTEP plan as a replacement for the Skandia Investment Bond. Mr Chiesa described the GTEP plan as one of the best products he had ever seen. Mr Chiesa called the GTEP plan a “self-funding mortgage”. He said that it would provide a monthly income and, at the end of its life, would provide enough money to pay off their mortgage. This was very tempting to Mr and Mrs Dolan because, at the time, they had a relatively low guaranteed income and their children were about to go to university which they would have to fund. They were also worried about pensions in the future. Mr Chiesa did not suggest any alternative products to Mr and Mrs Dolan nor did he suggest simply using the Skandia Investment Bond to repay all or part of their current mortgage.

63. Mr Chiesa said that there would be less volatility in the portfolio of TEPs than in the Skandia Investment Bond. Mrs Dolan said in evidence that they were told that the Integrity GTEP plan was a much lower risk, much safer and much better option than the Skandia Investment Bond. During the meeting, Mr Chiesa broke down the parts of a GTEP plan and said that each part was low risk. Mrs Dolan had no recollection of the risks of a GTEP plan being specifically explained to them. Mr Chiesa asked them to sign an attitude to risk form stating that they were medium/high risk investors. Mr Chiesa told them that the GTEP plan had a similar risk to a bank loan and said that the attitude to risk form was required by the Authority. Mrs Dolan said in evidence that

“We were told that this form ... had to be signed as a procedural thing for the Financial Services Authority; that the context of it was that we were signing in reality about a product that was much lower risk than the Skandia Bond but, that for the purposes of the FSA, who think that even a bank loan is a high risk, we would probably have to sign it as medium to high risk. In reality that didn't mean anything because this product was a much better, safer product, less risky product, than the Skandia Bond had been and that really it was just a formality ...”

64. Mr and Mrs Dolan understood that the GTEP plan would provide them with a monthly income of £1,500 and also a lump sum of £270,000 at the end to pay off part of the outstanding interest only mortgage of £340,000. In evidence, Mrs Dolan said:

“At the time I thought that I understood the GTEP. In hindsight this turned out not to be true and because of this I do not think we asked the right questions and were not in a position to make a properly considered decision whether to invest in the GTEP. The notes from our meetings with Mr Chiesa set out some risks with the GTEP. However, I do not recall that these were specifically brought to our attention or adequately explained. At no point did Mr Chiesa go through any of the Integrity literature with us.”

65. The minutes of the 18 January 2006 meeting described the purpose of the meeting as “To discuss ways in which your monthly mortgage could be reduced”. The minutes stated

“Recommendation:

I believe that by purchasing a carefully selected portfolio of traded endowment plans (TEPS) using a leveraged loan from Bank of Scotland you should be able to generate sufficient income to cover your monthly mortgage payment, which is currently £1,489.16.

This could be done by purchasing £277,871 worth of TEPS. Such a portfolio would generate sufficient income to meet your monthly mortgage costs and thereby achieve your objective.

If you take a withdrawal of £180,000 from your Skandia Investment Bond this would be sufficient to allow you to do this.

There would be a cash flow benefit to you of approximately £1,500 per month. This money could be saved or utilised for your own purposes.

A spreadsheet showing the calculations is enclosed with this minute.

At the end of the plan term the anticipated value of the TEP will be £270,000.

During our meeting we reviewed an illustration of the structure of the TEP portfolio. Your initial investment is increased by an interest only loan from Bank of Scotland and this enables you to increase the value of the TEPs purchased.

In addition, Bank of Scotland will provide a facility that will enable you to draw an income on a monthly basis. As the income is being drawn from an overdraft account, it is not subject to tax and this income will be used to pay the monthly mortgage and the term assurance costs.

I have recommended that the money saved in monthly outgoings should be accumulated in order to provide further capital for the future. There is a significant difference between voluntary savings and compulsory payments in relation to your mortgage. If you decide in the future to stop accumulating these funds you could do so at any time.

By saving all or some of the monthly cash flow benefit the risk involved with this strategy would be reduced from medium to low in my view.

The withdrawal from the Skandia bond should be achieved by encashment of entire policies within the plan. This will create a chargeable event that may create a small liability to tax. You accept however the savings of £1,500 per month is (sic) so significant that this is not relevant.

I therefore recommend that the capital raised of £180,000 is used to invest in the Integrity Self-Funded Mortgage Repayment Plan.”

66. The minutes of the 18 January 2006 meeting set out certain risk warnings as follows:

## “Risk

### The value of TEPS

The addition and level of future bonuses applied to ‘With Profits’ policies is not guaranteed.

5 The sum assured and attached bonuses are not guaranteed unless all premiums are paid to maturity.

The surrender value of ‘With Profits’ policies can fall as well as rise.

The resale value of TEPS may be less than the price paid and premiums to date.

10 There may not be an active market in TEPS should you decide to trade in your TEPS and close your plan.

### Investment loan

15 The investment loan interest rate can rise as well as fall. While no one can predict with certainty where interest rates will be in the future, we do now seem to be in a low inflation low, (sic) interest rate environment. As an indicator of this I undertook some research on long term fixed mortgage interest rates and details of the result are attached to this minute. As you can see, there are a number of fixed rate mortgages at under 5% per annum for periods of 10 years and longer. While this does not guarantee future interest rate policy, I believe it gives some comfort as to what the overall market view is of interest rates for the medium to longer term.

The Lender reserves the right to demand repayment of the loan at any time.

25 TEP premiums and any income you have elected to draw from your portfolio can be suspended in times of adverse conditions, subject to the Lender’s discretion.

30 The Lender could request further funds or liquidation of assets held as security if the Investment Loan exceeds 100% of the surrender value of the TEPS.

The Investment Loan may not be fully repaid at the date of the last maturing TEP, you should refer to the Lender’s facility letter regarding repayment options.

### Returns

35 The best returns are achieved by maintaining the whole plan to the last maturing TEP as early encashment may lead to a loss of capital.

40 The level of return is influenced by the spread between the lender’s interest rate and the life office bonus rates. Historical With Profits investments have grown faster than the corresponding interest rates, but the past should not be taken as a guide to future performance.

TEP gearing plans have a higher risk profile than TEPS purchased outright.

## Tax

All views on tax are based on our interpretation of current tax legislation, and are subject to change at any time, without warning.

5 The level of Capital Gains Tax payable will depend on legislation at the time the gain is crystallised and your personal tax situation at that time.

You are responsible for ensuring that all appropriate tax is paid and checking on the appropriate legislation.

Levels and bases of, and relief(s) from Taxation are subject to change.”

10 67. Westwood also provided a “Self-Funding Mortgage Report” dated 19 January 2006 that stated that Mr and Mrs Dolan required advice in relation to their mortgage and described their specific requirement as follows, “You need advice on the repayment of the loan in the future and reducing the current cost of your mortgage”. The Report described Mr and Mrs Dolan's risk profile as follows:

15 "You would like to ensure your short-term financial security through medium risk investments, but also wish to benefit from long-term investment returns to provide for future security; meaning your attitude towards investment risk is moderate."

20 68. The report set out the options considered and a comparison of those options as follows:

### "Options Considered

In researching a suitable product for you I looked at a number of alternative arrangements. Three potential solutions were considered.

25 1 Utilising existing funds into a collective investment with a high income and capital growth potential.

2 Using some of the equity release plans available in the marketplace to raise capital and provide income.

30 3 An Integrity Self-Funded Mortgage Plan that works by investing capital to purchase a leveraged Traded Endowment Portfolio. The leveraged Traded Endowment Portfolio is designed to and aims to provide an income sufficient to fund the entire mortgage interest costs and accumulate a lump sum to partially repay the mortgage balance at the term end.

### Options Comparison

35 1 Existing capital invested into a collective investment was excluded as collective investments that match your risk profile are very unlikely to produce sufficient income and or capital growth.

2 Use of release plans available in the market place to raise capital and provide income was discounted due to your ages.

40 3 The Integrity Self-Funded Mortgage Plan will pay off most of your current mortgage and aims to produce sufficient withdrawals to fund your new mortgage interest and accumulate a lump sum to repay the new mortgage balance. The Integrity Self-Funded Mortgage Plan aims

to provide a no cost solution to servicing and repaying your mortgage although there is no guarantee of this. However the plan is based on sound financial fundamentals and has an acceptable probability of achieving its objectives.”

5 69. Under the heading "General Recommendation" the report described the GTEP plan as an investment. The report stated:

10 "Although future bonuses are at the discretion of the Life Office and are not guaranteed, the TEPs that feature in your Portfolio should have the best potential for future bonus additions as the strongest life companies issue them.

15 Your portfolio pays the purchase price of each TEP and takes over the responsibility for paying future premiums. All benefits of each TEP are legally assigned to your Portfolio by specialist practice of solicitors. Benefits are paid to your Portfolio as each TEP matures, or on the death of the original life assured if earlier ... The purchase price paid for each TEP by your Portfolio may represent a discount to the underlying value of each policy and therefore the potential for an attractive growth rate may be increased, even though the risk attaching to TEPs is regarded as low to moderate.

20 Combining your capital with an investment loan significantly increases the potential returns from your Portfolio, as a greater number of TEPs can be purchased.

25 The level of return from your Portfolio will depend largely on the difference between the interest cost of investment loan and the growth of each TEP. Historical data shows that a differential has existed between the interest cost of investment loans and returns from "With Profit" funds. Although we are now in a low inflation environment a positive differential should still exist."

70. Under the heading "Specific Recommendation", the report stated:

30 "I recommend that you invest £180,000 of existing assets in the Integrity Self-Funded Mortgage Repayment Plan. These funds will be available by means of a withdrawal from your Skandia Investment Bond.

35 Your investment of £180,000 together with a leveraged investment loan of £97,871 will purchase a portfolio of Traded Endowment Policies (TEPs) with an initial asset share value of £418,539. The leveraged investment loan aims to fund all future costs, to include mortgage interest on your property, TEP premiums, leveraged loan interest, and management fees. The TEP portfolio aims to repay  
40 £270,186 of your mortgage in 15 years. In order to do so the portfolio will need to achieve a growth rate of 7% during the term."

71. The report stated that the investment loan would be charged at an interest rate of 1.5% above the Bank of England base rate. It stated that the base rate would vary during the duration of the investment loan and, therefore, so would the rate charged  
45 on the loan. The report advised Mr and Mrs Dolan to read the investment loan facility letter from the lender. The report also set out certain risk warnings which were

materially the same, if rather briefer, as those set out in the minutes of the meeting on 18 January 2006.

5 72. The Self-Funding Mortgage Report included a table that showed how the loan facility would increase over the life of the GTEP plan. The table was merely an illustration as the actual TEPs had not been identified at that point so their maturity dates and estimated maturity values could not be known. The table showed the loan facility increasing from £146,117 to £394,893 in year 10 of the plan before reducing and the GTEP plan eventually producing a surplus in year 15 after all the TEPs had matured. All of Westwood's clients received similar tables.

10 73. Mr and Mrs Dolan invested in an Integrity GTEP plan in 2007. For the first 12 months or so, Mr and Mrs Dolan received monthly payments of £1,500. After 15 September 2008, the monthly drawdowns on the loan facility stopped because the surrender value of the TEPs in the portfolio did not grow sufficiently to prevent the LTV covenant being broken. Mr and Mrs Dolan had previously taken out two  
15 endowment policies worth £30,000 which were nearing maturity. Westwood suggested adding these to the GTEP. They did this and the monthly payments restarted in March 2009. They also received £7,500 in relation to the previous unpaid monthly payments.

20 74. Mr and Mrs Dolan had not realised that, in taking the monthly payments, they had been borrowing more money from BoS or how much. In giving evidence, Mrs Dolan said of the monthly drawdown payments:

25 "The awareness that I didn't have was that by taking the monthly payments, the amount of money owed to the Bank of Scotland, that was actually essentially borrowing money from the Bank of Scotland and that we were eventually going to be in a situation of owing the Bank of Scotland over £300,000. That's what I wasn't aware of. Actually, if I had been aware of it, I wouldn't have been taking the  
30 £1,500 at any point because to owe £345,000 in an interest-only mortgage, and 340 -- I'm not sure how much -- to the Bank of Scotland seemed to me, even in a year if my husband did earn £100,000, seems to me to be a bit excessive. So we didn't actually understand the Integrity product until two years ago when we realised what the implications were for us. So the customer satisfaction survey was done before we realised the hole we were in."

35 75. The reference to the customer satisfaction survey is a reference to a document completed by Mr and Mrs Dolan in 2009, ie after they had invested in the Integrity GTEP plan, in which they expressed themselves very satisfied with the services of Westwood and, in response to a question about how well they understood the products Westwood recommended to them, stated "Partially understand". Mrs Dolan said that,  
40 at that time, she was only beginning to understand the position that they were in. Mr and Mrs Dolan decided to stop taking the monthly payment in an attempt to stop the value of the loan exceeding the LTV ratio any further. The last monthly payment was made on 17 August 2009 and no more were received after that time.

76. In August 2011, Mr and Mrs Dolan considered selling their TEPs. Mrs Dolan's evidence was that, at that time, the sale of the TEPs would have raised around £6,000, which would have meant a total loss of about £180,000. Mr and Mrs Dolan now have an interest only mortgage of £350,000 secured on their home and a similar debt with BoS. Mr and Mrs Dolan do not know the current value of their TEPs because they stopped the annual reviews due to the high charges.

77. We find that Westwood did not pay due regard to the information needs of Mr and Mrs Dolan and it failed to communicate information about the Integrity GTEP plan, particularly the consequences of the plan not performing as predicted, to them in a way that was clear and fair. We have reached this conclusion on the basis of Mrs Dolan's evidence, which we accept, and the documents that we have seen. Our view of Mr and Mrs Dolan is that they were unsophisticated investors with little, if any, understanding of the nature of the risks the GTEP plan. When dealing with investors such as Mr and Mrs Dolan, Principle 7 and the associated COB Rules require advisers to communicate information about all aspects of the product clearly to the clients and also to ensure that the clients understand that information, including the nature of the risks involved. We accept Mrs Dolan's evidence that she and her husband did not fully understand the Integrity GTEP plan, particularly the fact that the monthly drawdown payments were increasing the loan facility from the BoS. On the basis of Mrs Dolan's evidence about what she was told in meetings and the documentation that we have seen, we find that the information about the Integrity GTEP plan communicated by Westwood to Mr and Mrs Dolan was weighted towards the positive with insufficient emphasis and inadequate explanation of the risks so that, although it was not misleading, it was not clear and fair.

78. We also find that Westwood failed to take reasonable care to ensure that its advice to invest in the Integrity GTEP plan was suitable for Mr and Mrs Dolan. If we are satisfied on the evidence that the Integrity GTEP plan was plainly unsuitable for Mr and Mrs Dolan then we must find that Westwood did not take reasonable care to ensure that its advice to invest in a GTEP was suitable for them. In our view, the Integrity GTEP plan was clearly unsuitable for Mr and Mrs Dolan for the general reason that, given their attitude and circumstances at the time (desire to move to a safer investment than the Skandia Investment Bond, need to provide funds for children about to go to university, concerns about future pensions), they should have been regarded as low or medium risk investors and the GTEP plan was a high risk investment product. In our view, Westwood should have realised that the Integrity GTEP plan was not suitable for Mr and Mrs Dolan and should not have recommended it to them.

*Mrs Victoria Latchford*

79. Mr and Mrs Latchford are a married couple in their fifties with a joint annual income of £50,000. Mr Latchford was formerly a professional footballer and is now a goalkeeping coach at three leading Scottish clubs. Mrs Latchford is a receptionist.

80. In 2005, Mr and Mrs Latchford owned their home and a buy to let property, each with mortgages of approximately £66,000. They had £12,000 in savings and

Mrs Latchford inherited some money from her late mother. Mr and Mrs Latchford consulted Westwood about obtaining further mortgages to enable them to buy two more buy to let properties. Mr and Mrs Latchford dealt with Kevin Healy at Westwood.

5 81. Mr and Mrs Latchford had meetings with Mr Healy on 20 January 2006, 1 March 2006 and 19 January 2007 to discuss the Integrity GTEP plan. Each meeting lasted an hour to an hour and a half. During the meetings, Mr Healy illustrated the Integrity GTEP plan using flip charts and spreadsheets.

10 82. At the meeting on 20 January 2006, Mr Healy went through the Integrity brochure to explain the self-funding mortgage. He also gave Mr and Mrs Latchford a copy to take home and Mrs Latchford said that she read through it briefly. When asked about this, Mrs Latchford said:

15 “... all the things that Mr Healy pointed out to us were the positive things. He did it on flip charts, spreadsheets. He never actually went into any detail of the risks of the way that worked.”

20 83. Mrs Latchford’s evidence was that Mr Healy advised them to invest in a GTEP plan. He said that if they used the equity in their house to purchase £100,000 worth of TEPs, then BoS would lend them a further £100,000 that would be secured against the TEPs. Mr Healy said that they would receive a monthly drawdown throughout the life of the policy and when the TEPs matured there would be sufficient capital to repay the mortgage and the BoS loan with, possibly, a lump sum left over. Mr Healy did not discuss any alternative investments with Mr and Mrs Latchford and his recommendation to release some of the equity in their residential property to invest in the GTEP plan was made on his own initiative and not at their request. Mrs Latchford said that they were not told that the drawdown income could stop, or that there might be insufficient funds to pay off the loan or mortgage, or that there may be a need to contribute further assets to the portfolio. She said that they were never told they might have to pay in extra money to cover interest or include any of their own insurance policies in the portfolio in order for the GTEP plan to continue. Mrs Latchford said that they were led to believe that, once it was set up, the loan facility would continue for the duration of the GTEP. She said that they understood that the monies produced when the policies matured would be offset against the loan as soon as they matured bringing down the interest.

35 84. On 26 January 2006, Mr Healy sent Mr and Mrs Latchford some minutes of the 20 January 2006 meeting. The covering letter advised Mr and Mrs Latchford to read the minutes carefully on receipt and let Mr Healy know immediately if they felt that the minutes did not represent an accurate account of the discussions and the conclusions reached. The minutes included the following:

40 “Purpose of Meeting:  
To discuss ways in which your monthly mortgage costs could be reduced while at the same time improving your overall levels of family protection and increasing your disposable income.



Recommendation:

5 I believe that by purchasing a carefully selected portfolio of Traded Endowment Plans (TEPS) using a leveraged loan from Bank of Scotland you should be able to generate sufficient income to cover your monthly mortgage payment which is currently £293, improve the overall level of your family protection and increase your disposable income by £348 per month.

10 This could be done by purchasing £100,000 worth of TEPS. Such a portfolio would generate sufficient income to meet your monthly mortgage costs, provide additional life cover and thereby achieve your objectives.

15 Therefore, if you remortgage your property for £166,000, the monthly cost would be approximately £691 and you would be left with approximately £100,000 for investment in order to achieve your objective.

...

20 At the end of the planned term the anticipated value of the TEP will be £206,000. By inclusion of the life cover your secondary objective of ensuring that in the event of death the survivor is adequately protected will be achieved.

25 During our meeting we reviewed an illustration of the structure of the TEP portfolio. Your initial investment is increased by an interest only loan from Bank of Scotland and this enables you to increase the value of the TEPs purchased.

30 In addition, Bank of Scotland will provide a facility that will enable you to draw an income on a monthly basis. As the income is being drawn from an overdraft account, it is not subject to tax and this income will be used to pay the monthly mortgage and the term assurance costs.

35 I have recommended that the money saved in monthly outgoings should be accumulated in order to provide further capital for the future. There is a significant difference between voluntary savings and compulsory payments in relation to your mortgage. If you decide in the future to stop accumulating these funds you could do so at any time.

By saving all or some of the monthly cash flow benefit the risk involved with this strategy would be reduced from medium to low in my view.”

40 85. The section on risk in the minutes was the same as in the meeting minutes sent to Mr and Mrs Dolan. There was also a reference in the meeting minutes under the heading “Returns” which stated that gearing plans have a higher risk profile than TEPs purchased outright. Mrs Latchford’s evidence was that she did not remember receiving any explanation of the potential risks or benefits of the gearing aspect.

45 86. The minutes of the 1 March 2006 meeting “reiterate the background to the TEP investment along with more accurate figures”. The disposable income arising as a result of investing in the GTEP plan is shown as £336 and £366 (in different places). The minutes refer to an “initial asset share value of £187,859” without explaining how

this figure is calculated. The minutes state that, “by saving all or some of the monthly cash flow benefit the risk involved with this strategy would be reduced from medium to low”. Much of the material, for example the risk warnings, are the same as the previous minutes.

5 87. Mr Healy sent Mr and Mrs Latchford a Self-Funding Mortgage Report dated  
20 May 2006. The report set out the options considered and a comparison of those  
options in the same terms as for options 1 and 2 in the report sent to Mr and Mrs  
Dolan described at [68] above. The general recommendations were in exactly the  
same terms as those for Mr and Mrs Dolan as were the risk warnings. The specific  
10 recommendations were also materially the same save as to amounts.

88. Mr Gray commented on the Self-Funding Mortgage Report provided to Mr and  
Mrs Latchford. The report referred to an initial asset share value of TEPs as  
£294,628. It did not explain how this figure, which we understand was provided by  
Integrity, was calculated. Having stated that the purchase price for each TEP may  
15 represent a discount to the underlying value of each policy, Mr Gray said that it  
should however go on to say “However some policies may be purchased at a premium  
to the underlying value thereby increasing the risk.” Mr Gray also said that the  
statement “Combining your capital with an investment loan significantly increases the  
potential returns from your Portfolio as a greater number of TEPs can be purchased.”  
20 should also have said that there was a greater potential for losses to be made. Mr  
Gray also said that the statement that “TEPs must already have an attractive level of  
guarantee built into them. This comes from the sum assured and the attached bonuses  
to date.” was meaningless in isolation without knowing the actual purchase price,  
surrender value, future premiums, prospects for that insurer, trend in that insurers  
25 bonus. The statement “The TEPs are purchased at the discount to their estimated  
asset value offering greater growth.” is far too general in circumstances where each  
company has a different policy on surrender values. Further, "estimated value" is  
nowhere explained.

89. The minutes of the final meeting on 19 January 2007 confirmed that the 12  
30 TEPs had been put together by Integrity and were available for purchase. The minute  
stated that:

35 “We reviewed the capital spreadsheet incorporated in the original  
breakdown of the projections of capital accumulation over 15 years  
and a revised spreadsheet taking into account an increase in interest  
rates and purchase price of the endowment policies. Based on these  
factors, the cash accumulation at 15 years decreased. However, no  
account has been taken on (sic) the anticipated increased bonus rates in  
association with the increased interest rates and I confirmed that  
allowing for a revised reduction in capital accumulation, you will still  
40 be able to repay your mortgage and have a cash surplus when taking  
into account your monthly drawdown arrangement.”

90. Mr and Mrs Latchford’s attitude to risk, as shown on the form completed in  
October 2007, was medium/high.

91. Mr and Mrs Latchford invested in the GTEP plan. They received the monthly drawdowns which they saved until interest rates rose when they used the drawdowns to help meet their mortgage payments which had increased. In February 2009, the monthly drawdowns stopped and BoS asked Mr and Mrs Latchford to pay £2,043.  
5 Mr Healy advised Mr and Mrs Latchford to contribute an existing endowment policy with Scottish Provident to the GTEP plan. Mr and Mrs Latchford were told this would be a short term arrangement. Since contributing the Scottish Provident policy to the portfolio, Mr and Mrs Latchford have not received any further requests for money or further security from BoS.

10 92. Mr and Mrs Latchford now have a mortgage of £189,000 and also a loan from BoS of £178,000. Their GTEP portfolio, including the endowment that they contributed, was valued at £199,518 as at February 2012. The first and second TEPs realised £17,000 less than expected when they matured. Mr and Mrs Latchford have no idea of the final maturity values of their remaining TEPs.

15 93. We find that Mrs Latchford had a good understanding of the structure of the Integrity GTEP plan, ie how it was supposed to work. She knew and understood that the plan involved buying TEPs and that BoS was lending them money to buy more TEPs for their portfolio. Mrs Latchford also understood that the monthly drawdowns, as well as premiums and charges, were funded by the loan facility. She had read the  
20 BoS facility letter dated 4 January 2007.

94. We find that Mr and Mrs Latchford did not have a good understanding of what could go wrong under the GTEP plan. Mrs Latchford's evidence was that the gearing was not specifically brought to their attention or explained in any detail. She said that Mr Healy explained that whatever happened, there would be enough money to repay  
25 the loan and the mortgage. It was never explained that they might not have enough money to repay both. Mrs Latchford said that the only risk that was explained to them was that, after having paid off the BoS loan and the mortgage, there might not be much or any capital left over. When asked about this in cross-examination, Mrs Latchford said:

30 "[Mr Healy] never actually did anything to explain the risks or the way that GTEPs worked, the gearing loans. He never explained how much ... more money we would be borrowing. He only ever explained the positives to us. He never explained that the loan could be withdrawn at any time.

35 ...  
Mr Healy never went through any of the negatives. He never explained to us these things in any detail. As I say, if he explained them to us, they were glossed over; they were not in any detail. He explained all the positives to us in great detail, you know, flip charts, spreadsheets. None of the negative were ever explained us to in that  
40 way or shape or form, no flip charts, no spreadsheets, nothing."

95. We accept Mrs Latchford's evidence on this point. Our assessment of Mrs Latchford is that she is an intelligent and financially astute person who was capable of understanding the risks associated with the GTEP plan if they had been explained to

her properly. On the basis of her evidence, we find, on the balance of probabilities, that Westwood did not adequately explain the risks associated with the GTEP plan to Mr and Mrs Latchford. The various minutes and the Self-Funding Mortgage Report contained risk warnings but we find that those were not explained in detail but were  
5 glossed over. The approach to the issue of risk is exemplified by the passage from minutes of the final meeting on 19 January 2007 quoted above. Notwithstanding the increase in interest rates, the minutes confirmed that the GTEP plan would still provide monthly drawdowns, repay Mr and Mrs Latchford's mortgage and provide a cash surplus at the end of the plan. The minutes made no mention of the possibility or  
10 impact of further interest rate rises over the life of the plan.

96. We also find that Westwood failed to take reasonable care to ensure that its advice to invest in the Integrity GTEP plan was suitable for Mr and Mrs Latchford. We have concluded that the GTEP plan was a high risk investment product and, as stated above, Mr and Mrs Latchford's attitude to risk was medium/high. It was,  
15 therefore, unsuitable. Mr and Mrs Latchford had low or medium risk assets in the form of buy to let property and were looking to buy more but were advised to invest in the Integrity GTEP which was a high risk investment.

*Mr Craig Rich*

97. Mr and Mrs Rich are a married couple. They were both graduates and, in 2005,  
20 had a young baby. In late 2005, they sold their home for £368,500 and had found a new house to buy for £410,000. On 21 November 2005, they met with Kevin Healy of Westwood to discuss a new mortgage to fund the purchase of the new home. At the meeting, Mr Healy discussed the Integrity GTEP which he described as a new product on the market. The minutes of the 21 November 2005 meeting stated:

25                   “Integrity ... purchased traded endowment plans in your name with your finance and the Bank of Scotland backs up the purchase with a loan facility which repays the mortgage over a term of 15 years. Your funds would also be geared to cover the mortgage over a 15 year term.”

30 98. At the meeting on 21 November, Mr Healy explained the concept of gearing in relation to the GTEPs by using the gears of a motor car and a bicycle as an illustration and then he gave an example of an investment property purchased with a 80% loan and finally other investments such as art. In evidence, Mr Rich stated (with the benefit of hindsight,) that neither he nor his wife really understood the examples or  
35 the gearing. We note that the examples all showed the effect of gearing as increasing returns and none referred to the possibility of gearing increasing losses.

99. Mr Healy told Mr and Mrs Rich that the TEPs were all guaranteed. There was a sliding scale of how much the TEPs could return but on a worst case scenario they would still get their money back. Mr Rich did not recall the risks being talked about,  
40 or if they were, this was done almost as a joking aside but, in giving evidence, Mr Rich stated that: “I never believe in a free lunch so I presumed that there was downsides but they weren't necessarily made that clear.” They were not told that they may have to make extra cash contributions or that monthly drawdown payments

might stop. Mr Healy suggested that an illustration of the GTEP should be prepared for the next meeting on 29 November to discuss it in more detail.

100. At the first meeting, Mr and Mrs Rich completed an attitude to risk form that they had been sent previously. The form contained three boxes for mortgages,  
5 pensions and investments. Mr and Mrs Rich ticked the low risk box in relation to mortgages but Mr Healy persuaded them that they were medium risk. Mr and Mrs Rich left the other two boxes for pensions and investments blank but Mr Healy ticked the medium/high boxes for those categories of investment.

101. On 29 November 2005, a further meeting took place at Westwood. The minutes  
10 of the 29 November 2005 state that the purpose of the meeting was to discuss ways in which Mr and Mrs Rich's monthly mortgage costs could be reduced while at the same time increasing their disposable income. Mr Healy recommended that they mortgage their new property for £281,500 and purchase a portfolio of TEPs for £180,000. The minutes of the meeting on 29 November stated that Mr and Mrs Rich's "attitude to  
15 risk with regard to your mortgage could be described as medium". The minutes stated that

20 "You understand that an investment based product used to accumulate capital for the eventual repayment of your mortgage does not guarantee to repay the loan. Repayment will depend on the performance of the investment provider's funds during the term of the plan. You are prepared to see investments fluctuate in return for a higher level of prospective growth for your capital."

The minutes of the meeting of 29 November did not contain the standard risk warnings.

25 102. In cross-examination, Mr Rich did not accept that the GTEP plan was an investment. He said:

30 "... the portfolio is sold as a mortgage. It's a mortgage review, a mortgage report, so we just presumed that it was part of the mortgage funding, more than an investment, because endowments, from our perspective, are always used for mortgages."

103. Mr and Mrs Rich had a third meeting on 20 December 2005 at their home. In his witness statement, Mr Rich said that Mr Chiesa joined them in the meeting on 29 November but in cross-examination he accepted that this occurred during the third meeting on 20 December. Although nothing turns on it, we find that Mr Chiesa  
35 joined them at the meeting at Westwood on 29 November. Whatever the date, Mr Chiesa agreed that he joined a meeting of Kevin Healy and Mr and Mrs Rich. Mr Rich said that Mr Chiesa said how good the GTEP was. Mr Rich asked if there was any risk and Mr Chiesa said there was no risk unless "the whole economy goes up in smoke". Mr Chiesa did not challenge Mr Rich's account of their conversation. In  
40 cross-examination, Mr Rich said that they all joked and laughed about the state of the economy and how things would have to go spectacularly wrong for the portfolio not to work. Mr Rich accepted that Mr Healy went through a list of risk warnings with

them at 20 December meeting. Mr Healy also provided Mr and Mrs Rich with the Integrity brochure. Mr Rich said that they read it, including the risk warnings.

104. Westwood produced a Self-Funding Mortgage Report dated 23 December 2005. It stated that Mr and Mrs Rich wanted to utilize some of the equity in their property for investment purposes to reduce their mortgage costs and increase their disposable income. The report stated that three potential solutions had been considered but only describes two: using the proceeds of sale of their existing home with a capital and interest repayment mortgage of £140,000 to acquire a new property, which would leave £40,000 for home improvements; and an Integrity Self-Funded Mortgage Plan. The first option was dismissed briefly on the ground that utilizing all their funds as a large deposit on the new property meant that the funds “would not be used to the maximum benefit for your capital requirements in the future”. In relation to the second option, the report stated that:

15 “The Integrity Self-Funded Mortgage Plan will pay off for your current mortgage and aims to produce sufficient withdrawals to fund your new mortgage interest and accumulate a lump sum to repay the new mortgage balance. The Integrity Self-Funded Mortgage Plan aims to provide a no cost solution to servicing and repaying your mortgage although there is no guarantee of this. However the plan is based on sound financial fundamentals and has an acceptable probability of achieving its objectives.”

105. The General Recommendations in the Self-Funding Mortgage Report included the following statements:

25 “The TEPS that feature in your Portfolio should have the best potential for future bonus additions as the strongest life companies issue them”

...

30 “The purchase price paid for each TEP by your Portfolio may represent a discount to the underlying value of each policy and therefore the potential for an attractive growth rate may be increased, even though the risk attaching to TEPs is regarded as low to moderate”

...

35 “Combining your capital with an investment loan significantly increases the potential returns from your Portfolio as a greater number of TEPs can be purchased.”

The statement last quoted that gearing significantly increases the potential returns was not balanced with any warning that it would also increase the risk. The report contained the same risk warnings as the reports provided to other clients.

106. Mr Rich said in evidence:

40 “I don't know enough about financial things, which is why I went to a financial adviser. I am an IT person. My job involves making information easy to get to, but from a financial perspective I have no clue. I can do maths, I can do sums, and all the rest ... and I can get a

computer to do it all for me but I don't understand financial things enough to do this on my own."

107. Mr Rich said that he understood that the Integrity GTEP plan involved buying a portfolio of other people's second-hand endowments. He knew that their portfolio  
5 consisted of 13 or 14 policies and that he had documents listing them with maturity dates and surrender values.

108. Mr and Mrs Rich decided to reduce their initial intended investment from £180,000 discussed at the meeting on 29 November 2005 to £175,000 at the meeting on 20 December and eventually to £100,000. Mr Rich said:

10 "... in December we got even colder feet and dropped to 120. And then when we actually went to do it we said actually we're just going to go with 80 because we're just really, really not sure ... But minimum we could put into the Integrity portfolio was 100,000 so we took it back up to 100,000."

15 109. In January 2006, Mr and Mrs Rich decided to purchase a GTEP for £100,000 using a £200,000 interest only mortgage. Mr Rich recalled that it took about six months for Integrity to purchase all the TEPs.

110. Mr and Mrs Rich had a fourth meeting with Westwood on 13 November 2006. The purpose of the meeting was to review the cash injection into the integrity GTEP  
20 and finalise the documentation. The minutes of the meeting summarised the current position as follows:

25 "An application has been made to Integrity to purchase a Portfolio of Traded Endowment Plans with the original input £185,000. Since this application you have utilised £105,000 of the available funds for your house renovation project. To boost the capital back to £100,000 as a minimum investment, you have extracted £20,000 on a further advance basis from Halifax. Your new borrowing level on your mortgage is therefore £301,500."

30 111. The minutes noted the consequences of the reduced injection of capital as follows:

35 "By reducing the capital input by £85,000 and the loss of gearing these funds with the Bank loan, you will not have sufficient funds to repay the mortgage utilising the Integrity Portfolio only. The policies have also been purchased at a higher price due to the high demand for the policies and therefore this has reduced the expected return to £138,000. You will also receive £833 per month tax free and I recommend that this be placed in a long-term savings plan to cover the difference on the maturity of the TEP portfolio against the required amount to repay your mortgage.

40 You have confirmed that you will invest the drawdown but you retain the funds the 12 months to enable you to finalise your renovation projects within your property."

112. Before an annual review of the GTEP plan in November 2008, Mr Healy advised Mr and Mrs Rich to assign their existing Norwich Union endowment policy, worth £55,000, to act as a buffer against the loan to value ratio. This allowed the drawdown facility to continue.

5 113. In January 2009, Mr and Mrs Rich moved to New Zealand. In May 2009, the  
monthly drawdown payments under the GTEP plan stopped. On 6 May 2009, Mr  
Healy emailed Mr and Mrs Rich to say that NBS, which had lent them the money to  
buy the TEPs portfolio, had decided that the amount of the loan had increased in  
10 relation to the LTV ratio and NBS would not continue to make advances under the  
loan facility to pay both the monthly drawdowns and the premiums. Mr and Mrs Rich  
stopped taking the monthly drawdowns and relied on the balance in the NBS cash  
account which Mr Healy had said acted as a buffer to service policy premiums. This  
had about £4,000 in it at the time. Mr Rich said that he understood that the loan  
15 facility that they had with BoS, which made the payments for the TEPs premiums,  
also created a “buffer”. In evidence, he stated:

20 “We have an overdraft facility with the Bank of Scotland ... which  
allows payments to go in, so the drawdown payments to go in so that  
money can be used to pay the policies in the portfolio. So that means  
in that way there's always a buffer, which meant that we would never  
have to pay the individual policies themselves.”

114. In November 2009, Mr and Mrs Rich had to start paying the premiums on the  
TEPs which amounted to £1,612 each month. Mr and Mrs Rich considered selling the  
TEPs but Westwood advised them not to do so as the sale value was very low and  
they would be better off maintaining the TEPs until maturity. In November 2010, a  
25 number of the TEPs matured and the funds reduced the amount of the loan which,  
with the value of the Norwich Union endowment policy contributed previously, meant  
that the LTV ratio was sufficient to allow the TEPs premiums to be paid under the  
loan facility and for Mr and Mrs Rich to stop paying them.

115. Mr and Mrs Rich are not required currently to make payments to fund premiums  
30 in the plan. Mr Rich accepted that the product may still perform well and that he  
could only speculate about its eventual performance. Mr Rich stated:

35 “It could all go beautifully for the next nine years and we will be multi-  
millionaires. However, I'm not convinced that's likely. ... although  
we have lost our own endowment to it, we're not funding those policies  
at the moment. But we have to always bear in mind whatever we do at  
some point we might have to pay those policies again, and that will  
hurt.”

116. In giving evidence, Mr Rich said stated:

40 “Kevin [Mr Healy] was excellent. He always returned our calls and I  
had no problems with the information he gave me. It's just I didn't  
always necessarily understand it. ... I don't think he was ever out to  
bamboozle us or anything like that. I don't think that was the case.”



117. He also said that

5 “... neither Kevin nor John were out to pull the wool over our eyes or anything like that. ... from our perspective, I'm not sure that the portfolio was low enough risk for us and that we should probably have just gone with our regular mortgage and just gone the same route as everyone else. It was way too financially complicated for us and ... they did their best to try and explain it - and the buy-to-let example was definitely the easiest of the three – but ... I don't think we really understood it well enough to have ... gone into it, and that's why we said that we would put less than we originally were going to go with, so we reduced our risk by reducing the amount we put into it.”

15 118. Mr Rich understood the main elements of the Integrity GTEP plan. He understood that they were buying TEPs using their own money from a mortgage on their home and a further loan provided by NBS and that they were assigning the TEPs to NBS as security for its loan. Mr Rich understood that the loan, as well as allowing them to buy additional TEPs, also covered the premiums for the TEPs and for the Norwich Union policy after they contributed it to the portfolio.

20 119. It is clear from Mr Rich's evidence that he understood that the Integrity GTEP plan carried some risks. He assumed that there were downsides and knew there was no such thing as a free lunch. Mr Rich said that he understood that the monthly drawdown payments came from the policies maturing but he had seen from the list of policies that the policies were not maturing so he knew that could not be the case. He said that he did not know where the monthly drawdown payments were coming from. Mr Rich said in evidence that he had not been aware that the monthly drawdown payments were further borrowing from NBS or that he was paying a higher rate of interest than he would obtain on saving the monthly drawdown payments as he was advised to do. Mr Rich also said that he did not understand at the time of entering into the GTEP plan that both the monthly drawdown payments and the TEPs premium payments could just stop and he was very surprised when they did. Mr Rich said that, had he been told that there was a risk that the payments could just stop then he and his wife would have gone with a normal mortgage rather than a GTEP plan. On the basis of what Mr and Mrs Rich were told in the meetings and the documentation that we have seen, we find that Westwood treated the risks inherent in the Integrity GTEP plan lightly or failed to explain them adequately to Mr and Mrs Rich.

35 120. In our view, the evidence shows that Westwood failed to communicate information about the GTEP plan to Mr and Mrs Rich in a way that was clear and fair, although it was not misleading, and failed to take reasonable steps to ensure that they understood the nature of the risks associated with it. Accordingly, we conclude that Westwood breached Principle 7 and the associated COB Rules.

40 121. We also find that Westwood did not pay sufficient regard to Mr and Mrs Rich's attitude to risk as shown by the way that Mr Healy completed the attitude to risk form to show that they were prepared to accept medium risk in relation to mortgages and medium/high risk for pensions and investments. Mr and Mrs Rich had originally ticked the low risk box in relation to mortgages and left the other boxes unticked. Mr

and Mrs Rich also indicated that they were uncomfortable with risk when they repeatedly tried to reduce the amount to be invested in the Integrity GTEP plan until they even fell below the minimum investment and had to increase the amount they were prepared to commit. In our view, that should have indicated to Westwood that  
5 Mr and Mrs Rich were probably low risk investors and that they were primarily interested in a low risk mortgage product rather than an investment which carried a significant level of risk. We find that Mr and Mrs Rich were low risk investors who consulted Westwood because they wanted a mortgage for their new home. Westwood contend that the Integrity GTEP plan was medium risk and we have found that it was  
10 a high risk investment product. On either view, the Integrity GTEP was clearly not a suitable product for Mr and Mrs Rich and, on the information available to Westwood, Westwood should never have recommended it to them.

*Mrs Fiona Mortimer*

122. Mrs Mortimer is a chartered accountant and was a longstanding client of  
15 Westwood. In 2005, Mrs Mortimer's mother, Mrs MacKechnie, who was then 73, sold her flat to a third party and received £70,000 from the sale. Mrs Mortimer asked Mr Chiesa what her mother should do with this money.

123. At a meeting on 24 November 2005 with Mrs Mortimer and her mother, Mr Chiesa advised Mrs MacKechnie to invest in the Integrity GTEP plan. He produced  
20 documents and diagrams setting out the benefits of GTEPs. Mr Chiesa told Mrs Mortimer that her mother's capital would double in value over the course of the investment and, in addition, Mrs MacKechnie would receive payments of £8000 in each year of the plan, paid in monthly instalments. These were the drawdown payments under the GTEP plan.

124. Mr Chiesa stated in cross-examination that Mrs MacKechnie's need was income and nothing else. Mr Chiesa's evidence was that, at the first meeting with her mother, Mrs Mortimer was quite clearly told that there was a risk that the drawdown payments could stop. Mr Chiesa stated that Mrs Mortimer responded by telling him that she would make up the income to her mother if that happened. Mrs Mortimer's evidence  
30 was that Mr Chiesa did not tell her that the payments could be stopped or reduced. Mrs Mortimer also said that she was not told that her mother's capital may be at risk or that she might need to put in additional money in future.

125. Mrs Mortimer had a meeting with Mr Chiesa when it appeared that the payments to her mother were going to stop. Mrs Mortimer said:

35 "The whole purpose of the investment for my mother was to generate income. If there was an issue with regard to her receiving the income, then that would be a problem. I do recall, when things went wrong with the product, that we had a meeting with John Chiesa, my mother and I, and I said that I would step in and cover any shortfall, because at  
40 that time we were discussing the possibility of income having to stop. ... the income was the important thing, as far as my mother was concerned. It was all about generating income."

126. Westwood submitted that Mr Chiesa's evidence as to the timing of Mrs Mortimer's statement that she would support her mother is to be preferred. We prefer Mrs Mortimer's evidence on this point. The minutes of the meeting on 24 November 2005 state:

5                    "Your existing capital will provide you with the £75,000 for the TEP portfolio. There would be a cash flow benefit to you of approximately £8,000 per year. This money could be saved or utilised for your own purposes.

10                   Although this will utilise all of your existing capital and leave you without a fund for emergencies, you are not overly concerned by this as you will have family support if it is needed and you will also be able to accumulate most of the additional income."

127. The only reference to family support is in the context of emergencies. There is no suggestion of family support in the event that the monthly drawdown payments are suspended. We note that the recommendation is that Mrs MacKechnie should accumulate most of the £8,000 yet the minutes stated that Mrs MacKechnie's objective was "to obtain as high an income as possible". The minutes also state under the heading Risk – Investment Loan, as they did in all cases, that:

20                    "TEP premiums and any income you have elected to draw from your portfolio can be suspended in times of adverse conditions, subject to the Lender's discretion."

128. Mrs Mortimer's evidence was that she could not recall the risks being discussed. She said that she would have been aware that interest rates could change and the values on maturity of the policies might not be as forecast, but she did not believe that the risks had been discussed, fully or in any way, at the meeting. The minutes of the 24 November meeting stated the risks in the same terms as the minutes of the meetings with other clients and they did not address Mrs MacKechnie's situation specifically. The minutes contained no illustrations of the impact of interest rate rises or lower than predicted TEP maturity values.

129. On 25 November 2005, Westwood produced a report for Mrs MacKechnie headed "Maximising Your Income" which, under the heading "Your Aims and Objectives", stated:

35                    "You would like to invest the sum of £75,000 over a term of 15 years. You require me to select an investment plan that has the potential to deliver an income of £8,000 pa and provide capital growth from a range of investments that match your risk profile."

130. Under the heading "Current Position", the report stated:

40                    "You would like to ensure your short-term financial security through medium risk investment, but also wish to benefit from long-term investment returns to provide the future security; meaning your attitude towards investment risk is moderate."

131. The report set out the options considered as follows

“In researching a suitable product for you I looked at a number of alternative arrangements. A number of potential solutions were considered.

5 I have assessed the potential returns from a range of investment products that match your risk profile. These include investments such as:

1. With Profit Bonds

2. Distribution Bonds

10 3. Cautious Managed funds

4. Unit Trust funds

5. a portfolio of Traded Endowment Policies [TEPs].

Options Comparison

15 1. With Profit Bonds, Distribution Bonds, Cautious Managed funds and Unit Trust funds were excluded as collective investments that match your risk profile are very unlikely to produce sufficient income and or capital growth.

20 2. The Integrity Cash Maximiser Plan is considered suitable as it aims to produce sufficient withdrawals to provide an income in your case of £8,000 per year and return your investment capital over a term of 15 years, although there is no guarantee of this. However the plan is based on sound financial fundamentals and has an acceptable probability of achieving its objectives.”

132. Under the heading “Specific Recommendation”, the report stated:

25 “I recommend that you invest £75,000 in the Integrity Cash Maximiser Plan.

30 Your investment together with the leveraged investment loan of £54,059 will purchase a portfolio of Traded Endowment Policies (TEPs) with an initial asset share value of £201,267. The leveraged investment loan aims to fund all future costs, to include TEP premiums, leveraged loan interest, and management fees. The TEP portfolio aims to return a capital value of £152,717 in 15 years.

35 Please refer to illustration enclosed with this report that shows potential withdrawals and plan surplus at the maturity date of the plan.”

133. In cross-examination, Mrs Mortimer said that she was happy that it was a long-term product despite her mother’s age. She also said that her mother would have read the documents.

40 134. On 7 December 2005, Mr and Mrs Mortimer met with Mr Chiesa to discuss investing in an Integrity GTEP plan themselves. Mr Chiesa advised them to release capital from their home to invest. They were shown illustrations from the Self-Funded Mortgage Plan which indicated they would receive £1,350 per month which

was sufficient to cover the monthly payments under the new mortgage. On the same day, Westwood produced a Self-Funding Mortgage Report for Mr and Mrs Mortimer. The report set out the options considered and options comparison as follows

"Options Considered

5 In researching a suitable product for you I looked at a number of alternative arrangements. Three potential solutions were considered.

1 Re-mortgaging your property and re-investing the capital raised into a collective investment with a high income and capital growth potential.

10 2 Using some of the equity release plans available in the market place to raise capital and provide income.

15 3 An Integrity Self-Funded Mortgage Plan that works by the release of capital using a mortgage over your property. The capital raised repays your current mortgage and the balance purchases a leveraged Traded Endowment Portfolio. The leveraged Traded Endowment Portfolio is designed to and aims to provide an income sufficient to fund the entire mortgage interest costs and accumulate a lump sum to repay the mortgage balance at the term end.

Options Comparison

20 1 The re-mortgage and capital invested into a collective investment was excluded as collective investments that match your risk profile are very unlikely to produce sufficient income and or capital growth.

2 Use of release plans available in the market place to raise capital and provide income was discounted due to your ages.

25 3 The Integrity Self-Funded Mortgage Plan will pay off your current mortgage and aims to produce sufficient withdrawals to fund your new mortgage interest and accumulate a lump sum to repay the new mortgage balance. The Integrity Self-Funded Mortgage Plan aims to provide a no cost solution to servicing and repaying your mortgage although there is no guarantee of this. However the plan is based on sound financial fundamentals and has an acceptable probability of achieving its objectives.”

35 135. Under the heading "General Recommendation" the report described the TEPs portfolio investment in the same terms as the report for Mr and Mrs Dolan described above at [69].

136. Under the heading “Specific Recommendation”, the report stated:

40 "I recommend that you set up an interest only mortgage of £370,000 [this was an error and should have said £270,000] on your property. ... The capital raised of £135,000 is used to invest in the Integrity Self-Funded Mortgage Repayment Plan.

Your investment of £135,000 together with a leveraged investment loan of £105,033 will purchase a portfolio of Traded Endowment Policies (TEPs) with an initial asset share value of £406,234. The leveraged investment loan aims to fund all future costs, to include

mortgage interest on your property, TEP premiums, leveraged loan interest, and management fees. The TEP portfolio aims to repay the mortgage of £270,000 in 15 years.”

5 137. The report gave details about the investment loan and set out certain risk warnings in the same terms as the report for Mr and Mrs Dolan described above.

10 138. In July 2006, Mr and Mrs Mortimer remortgaged their home for £285,000. They paid off their existing mortgage of £135,000 and planned to invest £135,000 into the GTEP plan. However they didn't sign the loan agreement until 24 September 2006 by which time the forecast for the plan's maturity had reduced and the monthly payments were now £1,125. Mr Chiesa said this was due to a change in interest rates. He went back to Integrity and the portfolio was adjusted so that there was an increased maturity value but no increase in the monthly income. In November 2006, Mr and Mrs Mortimer invested £135,000 into a GTEP.

15 139. Also in July 2006, Mrs MacKechnie began receiving monthly drawdown payments of £625. In April 2008, Mrs MacKechnie received a letter from Integrity and NBS. This stated that her monthly payments may be stopped because the fall in the surrender value of her TEPs meant that the amount of the loan was likely to exceed the LTV percentage specified by NBS. Mr Chiesa sent a letter stating that he and Integrity were working to find a solution. At a meeting with Mr Chiesa on 1  
20 October 2008, no solution was proposed. In November 2008, Mrs MacKechnie's monthly drawdown payments stopped.

25 140. Also in November 2008, the monthly drawdown payments from Mr and Mrs Mortimer's GTEP plan stopped. On 19 November 2008, Mr Chiesa wrote to them with various projections and setting out the options regarding putting in further cash or suspending the payments.

30 141. In March 2009, Mrs Mortimer contacted NBS to find out what was required to ensure that the LTV ratio for her mother's TEPs was within the required parameters. Mrs Mortimer agreed to pay £15,000 to NBS and to pay the premiums for her mother's TEPs. If Mrs Mortimer had not taken this action, there was a risk that NBS would have insisted on the loan being repaid and the policies surrendered so that the proceeds could be used to repay the loan which would have left Mrs MacKechnie with virtually nothing. Mrs Mortimer made 16 payments of £500 between March 2009 and September 2010.

35 142. In May 2009, Mrs Mortimer met with Charles Conway, one of the financial advisers at Westwood, to discuss Mr and Mrs Mortimer's GTEP plan. She decided to encash part of a Skandia bond, invest £39,000 in a new bond and assign this to the GTEP. This bond was assigned in June 2009. In August 2009, the income payments restarted. However these were suspended again in November 2009 and have not restarted.

40 143. In November 2010, NBS started funding the premiums for Mrs MacKechnie's TEPs again. In March 2011, Mrs MacKechnie began receiving monthly drawdown payments of £500.

144. On 25 July 2011, the first TEP in Mr and Mrs Mortimer's GTEP plan reached maturity. It realised £20,053 which was £13,787 below the original illustrated maturity value. This policy had been purchased for £19,777 and premiums paid over the period amounted to £2,437.80. On 8 August 2011, Mrs Mortimer complained to Mr Chiesa. He continued to defend the GTEP and blamed the financial crisis.

145. In our view, Mrs Mortimer has a good understanding of financial matters. Mrs Mortimer (and, by inference, Mrs MacKechnie) understood the required LTV ratio and its significance, the fact that the premiums, the drawdown payments and interest on the loan were paid by the loan facility and that the loan bore interest at 1.5 per cent above BoS's base rate which was usually the same as the Bank of England base rate. Mrs Mortimer was willing to accept medium risk as an investor and content for her mother to describe herself as a medium risk investor although Mrs Mortimer said that, in her view, GTEPs were a very high risk product. Mrs Mortimer put it as follows:

"I suppose with hindsight, I now know the exposure that my mother, myself and other clients have been put to. In any investment, one expects there to be a risk of the product not performing as well, and there is a risk of loss of investment, as well as the prospect of a gain. However, in this particular product, the risk was that you would lose more than your investment. And if I could say, even in the casino, if I can put it that way, not that I go to a casino, one would not expect to lose more than one's bet, and that is what this product does. When I put my claim in to the -- against Westwood and the Bank of Scotland, my loss was quantified at £165,000. My investment was £135,000. You don't expect to lose more than you invest. That's why I regard this as a very high risk product, and I don't believe it should have been put in front of us."

We accept Mrs Mortimer's evidence and agree with her view that the Integrity GTEP plan was a high risk product.

146. We consider that Mrs Mortimer was a knowledgeable and aware investor. She had an appreciation of the risks of the GTEP plan and this led her proactively to contact NBS about her mother's GTEP when she realised that the surplus in the BoS servicing account was about to run out in March 2009. Mrs Mortimer's evidence was that Mr Chiesa did not tell her that the payments could be stopped or reduced but we consider that Mrs Mortimer was aware of those risks through her careful reading of the documents provided by Westwood or otherwise. Mrs Mortimer's evidence was that she could not recall the risks being discussed fully at the meetings but she did not say that she was unaware of those risks. We are not satisfied, on the balance of probabilities, that Westwood failed to communicate information about the GTEP plan to Mrs Mortimer and by inference, her mother, in a way that was clear and fair or that Westwood failed to take reasonable steps to ensure that they understood the nature of the risks associated with the GTEP plan. In this instance, Westwood may have formed the view that, having regard to Mrs Mortimer's information needs, Mrs Mortimer was best able to understand the GTEP plan and the nature of the risks inherent in it by reviewing the documents provided even though, as we accept, the risks were not fully discussed at the meetings. Accordingly, our conclusion is that the

Authority has not established that Westwood breached Principle 7 and the associated COB Rules in relation to its dealings with Mrs Mortimer and Mrs MacKechnie.

147. We do not take the same view in relation to Principle 9 and its associated COB Rules. We agree with Mrs Mortimer's view that the Integrity GTEP plan was a high risk product. It follows that it was, therefore, unsuitable for investors, such as Mr and Mrs Mortimer and Mrs MacKechnie, whose attitude towards investment risk was medium or moderate. Further, the Integrity GTEP plan was also plainly unsuitable for Mrs MacKechnie because:

(1) Mrs MacKechnie required income yet payment of the monthly drawdowns was not guaranteed; and

(2) Mrs MacKechnie was 73 at the start of the GTEP plan and there must be a real risk that she would die during the 15 year life of the plan which would cause the loan facility to terminate which could lead to the policies being surrendered or sold at less than the predicted maturity value with insufficient funds to repay the loan.

148. We conclude that Westwood failed to take reasonable care to ensure that its advice to invest in the Integrity GTEP was suitable for Mr and Mrs Mortimer and Mrs MacKechnie and, accordingly, Westwood breached Principle 9 and the associated COB Rules.

*Mr David McLeod*

149. Mr and Mrs McLeod are a married couple in their fifties. Mr McLeod runs a heating and plumbing business, Mrs McLeod works in a school. Mr and Mrs McLeod had previously made a few investments, including a Scottish Widows Bond and a geared wine investment, on the advice of Mr Chiesa and which had generally not performed well.

150. On 27 January 2006, Mr McLeod had a meeting with Mr Chiesa at which Mr Chiesa suggested that Mr and Mrs McLeod could use the equity in their home to invest in a GTEP plan. Mr McLeod's evidence was that he did not ask Mr Chiesa for advice on investments to utilize the equity in his home and it was purely Mr Chiesa's idea.

151. On 21 February 2006, Mr McLeod had a meeting with Mr Chiesa to discuss the Integrity GTEP plan. At that time, Mr and Mrs McLeod's house was valued at £208,000 and they had no mortgage. Mr Chiesa advised Mr McLeod to use the equity in his home to invest in the Integrity GTEP plan. Mr Chiesa showed Mr McLeod illustrations and computer projections which focused on the positive outcomes of investing in a GTEP plan, namely the plan would provide a monthly income that would cover the outstanding mortgage, the portfolio of TEPs would pay off the mortgage loan and it would provide extra profit. Mr McLeod said that very little time was spent discussing the risks and no particular mention was made of the possibility that:



- (1) the monthly payments might stop;
- (2) the BoS loan could be withdrawn at any time;
- (3) extra payments might be required; and
- (4) the TEPs might not provide enough capital on maturity to repay the loan and the mortgage.

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152. Mr McLeod signed a document stating his attitude to risk was medium/high. Mr McLeod said that he did so because Mr Chiesa told him all investments were high risk. Mr McLeod said that he would never have invested in a GTEP had he known of the real risks. He told Mr Chiesa this was the biggest commitment of his life and needed to be guaranteed. His evidence was that he asked Mr Chiesa whether he had any of his own money invested in GTEPs. Mr Chiesa said that he did not but that he had some money in an equally good scheme.

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153. The minutes of the meeting on 21 February 2006 stated that the purpose of the meeting was, “to discuss ways of improving your overall levels of family protection and increasing your disposable income”. However no report on family protection was produced. The minutes are in a very similar form to the examples already discussed. They refer to an “asset share value” figure of £443,155 but give no explanation of what this figure means or how it was calculated. The minutes focus on the benefits of the GTEP plan. The risk warnings are identical to those in the minutes of meetings with other clients that we refer to above.

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154. On 27 February 2006, Mr McLeod telephoned Mr Chiesa. Mr Chiesa made a note of the call which stated

“David phoned me to say he has had second thoughts about the TEP and he is very worried that the thing might go pear-shaped in the future. He thinks that the borrowing within the TEP portfolio is secured against his house, and I told him this is not the case. I explained that the only borrowing secured in his property was the remortgage and the TEP borrowing was secured against the TEP portfolio. I suggested we have a further meeting on Wednesday 1 March with Lynn to review the products and go over the recommendations again.”

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155. On 28 February 2006, a “Self-Funding Mortgage Report” was produced for Mr and Mrs McLeod which was sent to them by email during the afternoon of 1 March not long before the meeting. Under the heading “Your Aims and Objectives”, the report stated that Mr and Mrs McLeod required advice in relation to their proposed mortgage arrangements and described their specific requirement as follows:

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“You want to utilize some of the equity in your property for investment purposes to increase the disposable income available to you.”

156. Although the report said that Mr and Mrs McLeod’s requirement was to increase their disposable income, Mr Chiesa said in cross-examination:

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“Mr McLeod's aim here is not to generate income, it's to build up capital”

157. The report then set out the Options Considered and Options Comparison using exactly the same words as were used in the report for Mr and Mrs Mortimer. The General Recommendations and Risk Warnings also used the same words as the other report. Although the report states that two other investment options were considered,  
5 Mr McLeod's evidence was that, in reality, hardly any time was spent discussing these options.

158. Under the heading "Specific Recommendation", the report for Mr and Mrs McLeod stated:

10 "I recommend that you that you (sic) set up an interest only mortgage of £178,000 on your property with an indicative interest rate of 5.19%. ... The capital raised of £178,000 is used to invest in the Integrity Self-Funded Mortgage Repayment Plan.

15 Your investment of £178,000 together with a leveraged investment loan of £145,812 will purchase a portfolio of Traded Endowment Policies (TEPs) with an initial asset share value of £443,155. The leveraged investment loan aims to fund all future costs, to include mortgage interest on your property, TEP premiums, leveraged loan interest, and management fees. The TEP portfolio aims to repay the mortgage of £178,000 in 15 years. In order to do so the portfolio will  
20 need to achieve a growth rate of 7.7% during the term."

159. The report gave details about the investment loan and set out certain risk warnings in the same terms as the report for Mr and Mrs Mortimer described above. Mr Chiesa said in evidence that he went through all the risks associated with the GTEP plan and explained them in detail to Mr McLeod at the meeting on 1 March  
25 2006. There were no minutes of that meeting but there was a client contact note that referred to the meeting and stated:

30 "David came in this evening to review the recommendation for the TEP portfolio. We discussed in some detail the principle of investment gearing and reviewed details published in the press about the returns announced by Prudential, Norwich Union and Standard Life on their with-profits funds. We reviewed the illustration in depth."

160. Mr McLeod took out a 15 year interest only mortgage for £178,500. Monthly interest payments were approximately £700. The aim was that the value of the portfolio of TEPs at the end of the 15 year period would be sufficient, as a minimum,  
35 to repay the mortgage.

161. On 28 June 2006, Mr Healy produced a "Mortgage Report" which explained the mortgage advice he had given to fund the GTEP plan. There was no discussion about whether Mr and Mrs McLeod would be able to afford to continue to pay the mortgage if the income from the GTEP plan stopped or whether they could afford to make extra  
40 payments into the GTEP plan if required.

162. In due course, BoS raised problems at the annual review. Mr McLeod went to see Mr Chiesa to discuss why the GTEP plan was not performing as predicted and whether he should stop or reduce the monthly drawdown payments. Mr Chiesa

advised him to hold off reducing the payments as things might improve and the GTEP plan might be able to provide income as intended.

163. In December 2009, BoS informed Mr McLeod that the value of the TEPs was not sufficient to continue the GTEP plan. BoS told Mr McLeod that the monthly payments had to stop and he had to pay £17,500 to BoS in order to allow the GTEP plan to continue. Mr McLeod went to Mr Chiesa who said there was not a lot that could be done and that Mr McLeod should pay the £17,500 to BoS as it would be worse if the GTEP did not continue to full term.

164. In December 2009, Mr McLeod stopped receiving the monthly payments and paid £17,500 to BoS. Mr and Mrs McLeod have not received any monthly payments since December 2009. Mr and Mrs McLeod now have a mortgage of £197,494 secured on their home in respect of which they pay £449.68 per month.

165. Mr McMeel submitted that Mr Macleod (and by inference Mrs Macleod) had a very clear understanding of the Integrity GTEP plan as a result of Westwood's advice. We do not accept that proposition. Although Mr McLeod ran his own business and had made various investments, including a geared investment in wine, before investing in the Integrity GTEP plan, our assessment of him is that he was not a knowledgeable investor. We find that Mr McLeod did not have a good understanding of the Integrity GTEP plan as demonstrated by his telephone call to Mr Chiesa on 27 February 2006. That call came after the meeting on 21 February when Mr Chiesa was supposed, according to the minutes, to have explained the structure and the risks of the Integrity GTEP plan to Mr McLeod. We accept that Mr Chiesa had a further meeting with Mr McLeod on 1 March 2006 to explain the GTEP plan but we do not consider that, following that meeting, Mr McLeod understood the structure of the GTEP plan.

166. Although Mr McLeod said in evidence that when Mr Chiesa explained to him how it all tied together, he was quite happy because the GTEP plan sounded like a good investment, our view is that Mr Macleod did not have a clear understanding of the GTEP plan or the risks associated with it. Mr McLeod's evidence was that:

“I feel that Mr Chiesa and Westwood did not fully make me aware of all the risks with the GTEP and the genuine potential that the income could stop and that I may have to pay more funds into the GTEP. If the risks had been fully explained I would never have obtained a mortgage on my previously mortgage free property to fund the investment in GTEPs.”

167. In cross-examination, Mr McLeod was asked about the concept of gearing and said

“It was quite a difficult thing to get your head round. I am still not sure I've got a proper understanding of it yet”

168. Our assessment of Mr McLeod is that he was easily influenced by Mr Chiesa who he trusted and believed when, at the first meeting, Mr Chiesa told him that GTEPs were “a sweet investment, a no brainer”. We do not regard Mr McLeod's

evidence as merely disclosing “buyer’s regret”. Mr McLeod was concerned about the risk of investing money raised by borrowing on the value of his home. He expressed concerns when he told Mr Chiesa that investing in the GTEP plan was the biggest commitment of his life and needed to be guaranteed and in the telephone call to Mr Chiesa on 27 February 2006. We consider that these concerns should have indicated to Westwood that Mr and Mrs McLeod were risk-averse investors who did not wish to risk losing the amount, derived from the equity in their home, invested. We find that, on the balance of probabilities, Westwood did not pay due regard to Mr and Mrs McLeod’s information needs and did not communicate information to them in a way which was clear and fair, although it was not misleading. In our view, the evidence also shows that Mr and Mrs McLeod did not have a full understanding of the nature of the risks inherent in the Integrity GTEP plan and would not have invested in it had they understood those risks. Consequently, we conclude that Westwood breached Principle 7 and the associated COB Rules.

169. We also find that Westwood should have concluded that Mr and Mrs McLeod were low risk investors. We acknowledge that they had undertaken a geared investment in wine previously, but whilst that was a high-risk investment, we do not believe that Mr and Mrs Macleod really understood the nature of gearing. Their aversion to risk was shown by Mr McLeod’s expressions of concern about the level of commitment, the fact that the investment in the GTEP plan needed to be guaranteed and the (mistaken) belief that his house was security for the TEPs and at risk. In our view, that should have indicated to Westwood that Mr and Mrs McLeod were low risk investors and that an investment which carried a significant level of risk was not suitable for them. We have found that the Integrity GTEP plan was a high risk investment product and, in our view, it was clearly not a suitable product for Mr and Mrs McLeod. We find that Westwood failed to take reasonable care to ensure that its advice to invest in the Integrity GTEP was suitable for Mr and Mrs McLeod and, accordingly, Westwood breached Principle 9 and the associated COB Rules.

#### **Other clients of Westwood who did not give evidence**

170. In addition to those clients of Westwood who made witness statements and gave evidence before the Tribunal, the Authority invited us to have regard to the documents, taken from Westwood’s client files, in relation to several other clients. We were taken through some of the documents but we do not make any findings in relation to these clients. Allegations of breaches of Principles 7 and 9 relate to the communications between an adviser and its clients and the understanding of the clients as well as how the advice given and products recommended match the clients’ circumstances and needs. We consider that, in general and certainly in this case, such matters cannot be determined on the documents alone. The testimony of the clients is essential in such cases if the Authority is to establish, on the balance of probabilities, that an adviser failed to pay due regard to the information needs of its clients or failed to take reasonable care to ensure that its advice and recommendations were suitable for those clients. In the absence of such evidence in this case, we conclude that the Authority has not established that Westwood breached Principles 7 and 9 and the associated COB Rules in relation to those clients from whom we did not have witness statements or live testimony.

## Conclusions on alleged breaches of Principles and rules

171. In relation to Principle 7 and the related COB Rules, we must consider whether Westwood:

- (1) paid due regard to the information needs of the clients who gave evidence;
- 5 (2) communicated information about the GTEP to the clients in a way which was clear, fair and not misleading; and
- (3) took reasonable steps to ensure that the clients understood the nature of the risks involved in investing in the GTEP plan?

172. It is clear from the evidence of Mrs Dolan, Mr Rich and Mr McLeod that they, at least, did not have a proper understanding of the GTEP plan at the time that they invested in it. We consider that their lack of understanding is unsurprising given the documents that they were given and the complexity of the GTEP plan. We prefer the evidence of the clients and do not accept that the advisers, Mr Chiesa and Mr Healy, adequately explained in meetings the features of the GTEP plan, especially the risks, which were not clear from the documents. Accordingly, we find that Westwood failed to pay due regard to the information needs of its clients.

173. In our view, Westwood's communications about the GTEP plan were neither clear nor fair in that, while they were not misleading, the communications were unbalanced because they emphasised the positive aspects of the GTEP plan without properly considering alternative investments or the risks inherent in the GTEP plan. The minutes and suitability reports referred to an "initial asset share value" for the TEPs which were to be purchased (although at the time of the documents no TEPs had been bought by Integrity) without explaining what that value represented.

174. Further, we consider that Westwood failed to communicate the nature of the risks, as described above in [57] and [58] clearly. The risk warnings in the minutes and suitability reports were stated briefly in general terms and were effectively discounted by Westwood's endorsement of the GTEP plan by statements such as:

- "the plan is based on sound financial fundamentals and has an acceptable probability of achieving its objectives"
- 30 "the TEPs that feature in your Portfolio should have the best potential for future bonus additions as the strongest life companies issue them".

175. We also find that Westwood did not take reasonable steps to ensure that the clients understood the nature of the risks involved in investing in the GTEP plan. We reach this conclusion on the basis of the evidence of all the clients, which we accept, that risks were either not discussed at meetings or were discussed very briefly. Sometimes a brief discussion of a risk may be all that is needed but, where an investment product is complex or the potential investors are inexperienced or unsophisticated, we would expect an adviser to take great care to ensure that the client understood the nature of the risks involved. We consider that the evidence shows that Westwood, at best, assumed that those clients understood the nature of the risks involved in investing in the GTEP plan. Accordingly, we find that Westwood failed to pay due regard to the information needs of those clients who gave evidence.

176. For the reasons given above, we find that Westwood breached Principle 7 and COB 2.1.3R and COB 5.4.3R.

177. In relation to Principle 9 and the related COB Rules, we must consider whether Westwood took reasonable care to ensure that, having regard to what Westwood knew  
5 about its clients, its advice and recommendations to invest in a GTEP plan were suitable for those clients. The Authority submitted that, as Westwood had categorised each of the clients who gave evidence as either medium or medium/high risk, if we find that the GTEP plan was a high risk investment then it must have been unsuitable for those clients. We accept that submission. Even if we had not found that the  
10 GTEP plan was high risk, we have found, on the evidence, that the GTEP plan was plainly unsuitable for Mr and Mrs Dolan and Mrs MacKechnie because of their personal circumstances and objectives in investing. Regardless of the risk rating of the GTEP plan, we do not regard Westwood's advice to save monthly drawdowns as suitable for the clients who did not need them to meet immediate expenditure. The  
15 rate of return that the clients could obtain on such funds would inevitably be less than the rate they were paying on the loan facility yet Westwood never advised the clients not to take the monthly drawdown in order to maintain the LTV ratio and save interest under the loan facility.

178. For the reasons given above, we find, on the balance of probabilities, that  
20 Westwood breached Principle 9 and the associated COB Rules.

## **Penalty**

### *Is a financial penalty appropriate?*

179. The remaining question is whether the imposition of a monetary penalty was appropriate and, if so, the amount of that penalty. We consider that conduct such as  
25 that of Westwood clearly requires that a substantial financial penalty should be imposed. In our view, there can be no doubt that breaches of the Principles and COB Rules are a very serious matter.

### *What is the appropriate amount of the penalty for the breaches?*

180. Section 206 of the Act provides that if the Authority considers that an  
30 authorised person has contravened a requirement imposed on him by or under the Act, it may impose a financial penalty, in respect of the contravention, of such amount as it considers appropriate. The legislation does not provide any guidance on what is an appropriate amount for a financial penalty. The Authority considers that the minimum penalty for breaches of the type considered in this case should be £100,000.  
35 In this case, the Authority considered a penalty of £100,000 to be appropriate.

181. In considering the appropriate level of a penalty we are not bound by the Authority's tariff for particular misconduct, or even the factors the Authority takes into account, but may reduce or increase a penalty which is the subject of a reference on any grounds we think fit, within the parameters of the proper exercise of judicial

discretion. In practice, the Tribunal respects the Authority's tariff, in the interests of consistency between applicants, while departing from it in an appropriate case.

182. We note that Westwood made £509,123 commission from the sale of 50 GTEPs during the relevant period. We consider that the amount of the penalty should be set at a level that both punishes Westwood for the breaches and deters others from similar conduct. We take the view that a penalty of £100,000 or more is a significant amount and would be an effective deterrent to others. Our conclusion is that a penalty of £100,000 is an appropriate starting point in this case.

*Should the penalty be reduced?*

183. A penalty might be reduced below what would otherwise be the appropriate level, where there are mitigating factors and also where paying that level of penalty would cause the person serious financial hardship or financial difficulties. The fact that a person will experience serious financial hardship does not necessarily mean that a penalty should be reduced. We agree with the observations of the Tribunal in *David John Bedford v FSA* [2011] UKUT B42 (TCC), at [36], that:

"It is inevitable that the imposition of only a modest penalty because of the personal circumstances of the offender will diminish the deterrent effect, since the amount finally determined becomes the "headline" figure."

184. In this case, Westwood did not put forward any mitigation in relation to the breaches but continued to maintain that there had not been any breaches. We note that the Authority accepts that there is no evidence to show that Westwood acted in a deliberate or reckless manner. The Authority also accepts that Westwood has co-operated with the Authority's investigation and has worked with clients, none of who have lost their homes, to resolve difficulties caused by underperforming GTEP plans.

185. Having considered the evidence, we remain of the view that a penalty of £100,000 is an appropriate starting point and do not consider that there are any mitigating factors that would justify reducing the penalty below that point in this case.

**Conduct of the investigation**

186. Westwood complained about the conduct of this investigation by the Authority's officers as was made clear in the Reference Notice dated 23 June 2011. Westwood alleged that the conduct of the investigation was flawed and that there was a significant risk (given its thematic projects) that the Authority approached the investigation with pre-conceived views, a blinkered approach, and which entailed that it did not treat Westwood or its officers fairly. Further, Westwood submitted that a review of 13 files for the purpose of an investigation of this length, time, seriousness and complexity, was wholly inadequate. Our view is that such criticisms are not matters for this Tribunal except in so far as they cast doubt on the Authority's case in a reference. In this case, we have found that the Authority's allegations against Westwood were well founded. We make no comment, under section 133A(5) of the Act or otherwise, in relation to the procedures and conduct of the Authority's investigation into Westwood.

### **Determination**

187. For the reasons given above, we have found that Westwood breached Principle 7 and Principle 9 as well as the related COB Rules. We consider that the appropriate course of action for the Authority to take in relation to the breaches is to impose a financial penalty of £100,000 on Westwood. We confirm the penalty and remit the matter to the Authority to take such action as it thinks appropriate to enforce the penalty. The reference is dismissed.

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**GREG SINFIELD**  
**JUDGE OF THE UPPER TRIBUNAL**  
**RELEASE DATE: 22 NOVEMBER 2013**

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