The Renewable Energy Consumer Code
Non-Compliance Panel Hearing

In the matter of

Smart Save Solutions Ltd

held on

16 April, 2015

at

30 Great Guildford Street, London

and

7 May, 2015

at

70 Fleet Street, London

Panel
Mary Symes (Chairman)
Amanda McIntyre
Sally Oakley

Legal Assessor to the Panel
Shane Sibbel, Counsel

Panel Secretary
Andrew McIlwraith

RECC Representative:
Emily MacKenzie, Counsel

In attendance
Sian Morrissey (RECC)
Lorraine Haskell (RECC) (on Day 1 only)
Rebecca Robbins (RECC)

Smart Save Solutions Limited Representatives:
Jeremy Barnett, Counsel
Lee Finch, Counsel

In attendance
Bushra Elzibier, Pinney Talfourd LLP
Attila Hunter, Pinney Talfourd LLP

Preliminary issue

Ms MacKenzie appeared on behalf of RECC and Mr Barnett and Mr Finch appeared on behalf of Smart Save Solutions Ltd ("the Member"). The parties clarified at the outset that there was a preliminary issue in relation to whether or not the mystery shopper evidence was admissible. It was Mr Barnett's point that it was illegal to obtain the evidence, that it was hearsay and anonymous and that the evidence was obtained outside the Regulator's own guidance. It was outside rules of the Market Research Society (MRS), given that permission had not been sought from the third party that had been subjected to the mystery shopping. Counsel for the Member also objected on the grounds that they could not cross-examine the mystery shopper because the evidence was anonymised and they wished to test the evidence in order that proper weight was given to it.

Ms MacKenzie said that the right to mystery shop came under section 5.1 of the Bye-Laws, which contained a list of actions that was non-exhaustive and this came within this list. She also suggested that the Panel should take a very broad and permissive view of monitoring. Members were responsible for the actions of third parties. There was no need for informed consent, because the mystery shopper had taken no personal data. The mystery shopping system would break down if witness statements were taken which would identify mystery shoppers. She also said that the strict rules of evidence did not apply.

The Panel received legal advice from the legal assessor, which it accepted.

The Panel, having considered the documents referred to and having taking note of the oral submissions of both parties and the relevant parts of the bundle, has decided that in this case it is reasonable and fair to admit the evidence of the mystery shopping exercise, but only in regard to the systemic allegation relating to processes, as opposed to evidence of specific events.

The Panel considered the case of White v Nursing and Midwifery Council ([2014] EWHC 520) and how far it applied in relation to the facts of this case. The Panel accepts the submissions by Ms MacKenzie that the anonymous hearsay evidence in White was central not supportive and related to facts on which little if any other evidence was available. The Panel considers that the Member has had a fair opportunity to comment on the evidence of the mystery shopping. The Panel noted that the Member received the letter with regard to the mystery shopping exercise on 23 January 2015 and had itself responded by a letter dated 11 February 2015 to the allegations in relation to process. The Panel therefore finds that not only did the Member have the opportunity to respond as to general process, but they did so. However, the Panel accepts that the Member has not had an opportunity to comment on specific factual allegations in this evidence.

The Panel notes that the mystery shopping exercise was conducted after the Member had failed an audit and after the Regulator had received a number of complaints relating to the behaviour of sales representatives. It was therefore reasonable for the Executive to use its powers under Section 5.1 and

undertake an exercise which may not fall into the definition of mystery shopping in the Bye-Laws but is a reasonable step to have taken to look at the training processes undergone by sales representatives.

The Panel accepts that it is reasonable for the Regulator to explore breaches of the Code through anonymous investigations, as it is an important way of monitoring compliance.

The Panel also considered whether the evidence had been lawfully obtained and whether it was in breach of the MRS guidelines, which are referred to in the Regulator's Monitoring Strategy. The Panel has considered whether the Strategy applies to this evidence. The Panel considers that this investigation was not mystery shopping as defined by Bye-Law 1, but rather a monitoring exercise under Bye-Law 5.1.

Even if the Strategy did apply, the reliance by the Member on Rule 16, which states that members must ensure that participants give their informed consent where personal data are collected directly from them, is misplaced. There is no evidence that personal data was collected. Therefore Rule 16 has not been breached.

Charges

Charge 1

The Member is alleged to have been in breach of Section 5.1 of the Renewable Energy Consumer Code which states "members must make sure that any advertising materials they produce or use are legal, decent, honest and truthful and all performance claims, testimonials and claims about savings, financial payback or income in advertisements or sales promotions must be clearly attributed to a reputable source". The evidence for this breach comes from the statements and claims made by the company as revealed by the audit undertaken by the Regulator in 2014.

Charge 2

The Member is alleged to have been in breach of Section 5.2 of the Code which states "employees must not give false or misleading information about their company or the products, services or facilities being offered, sales employees must not use any selling techniques designed to pressurise the consumer into making an immediate decision, and Code members will be held responsible for the actions of their employees, those individuals they contract with or who sell on their behalf". The evidence for this breach comes from complaint numbers 5009, 5469, 5482, 4355, 4709, 5455, 5452, 5428, 5417, 5407, 4427, from the results of the audit undertaken by the Regulator in 2014and from the results of a mystery shopping exercise undertaken by the Regulator in late 2014, early 2015.

Charge 3

The Member is alleged to have been in breach of Section 5.3 of the Code which states "it is very important that members do not oversell energy generators to consumers, and before the contract is signed members must give consumers a written estimate of how the energy generator will perform in a format that is readily understandable by them, and Code members must make clear to consumers whether or not they are carrying out a technical site survey during their visit. Where they are not, Code members must make clear to consumers that the quotation and performance estimate may change following the site visit and that in such a case they have the right to cancel the contract". The evidence for this breach comes from the complaints as cited under the alleged breach of Section 5.2, complaint number 5029, from the audit and mystery shopping exercise undertaken by the Regulator.

Charge 4

The Member is alleged to have been in breach of Section 5.4 of the Code which states "members must provide consumers with accurate information regarding incentives available for installing small scale generation at the consumer's property; Code members will provide consumers with a proposal which comprises performance and any financial estimates and a detailed quotation before the sale is agreed and Code members must draw the consumer's attention to any variations to the original quotation and how this

will affect the completion date before the contract is agreed". The evidence for this breach comes from complaint numbers 4355, 5455, and 5469, and the mystery shopping exercise undertaken by the Regulator.

Charge 5

The Member is alleged to have been in breach of Section 6.1 of the Code which states Code members will provide consumers with clear and unambiguous terms of business that do not disadvantage consumers. The evidence for this breach comes from the audit and the mystery shopping exercise undertaken by the Regulator.

Charge 6

The Member is alleged to have been in breach of Section 6.2.3 of the Code which states Code members who install an energy generator at the consumer's home during the cancellation period must first have obtained the consumer's express permission to do so and, in such a case, the Code member will make the consumer aware that, should they later decide to cancel the contract within the cancellation period, they may be responsible for the costs of goods and services already supplied and of making good the property. The evidence of this breach comes from complaint numbers 5009, 5407, 5417, and 4709, and from the audit and mystery shopping exercise undertaken by the Regulator.

Charge 7

The Member is alleged to have been in breach of Section 4 of the Code which states "members will not act in any way that might bring the Code into disrepute". The evidence for this breach is from the evidence of the combined alleged breaches of Sections 5.1, 5.2, 5.3, 5.4, 6.1, and 6.2.3 of the Code.

Decision on Facts

The Member admitted all of the above charges. However, there remained nine areas of factual dispute between the parties, namely:

1. What weight should be placed on the individual complaints in evidence?
2. What were the relative responsibilities of Mr S and Mr C ?
3. Was there any pressure selling?
4. Were the following statements misleading under the Code:
   - Solar PV installations would be free or "self-funding"
   - "solar panels increase property values"
   - FiT payments are made either monthly or quarterly
5. To what extent was the Member responsible for statements made by its sales representatives?
6. Was there adequate training of sales representatives and/or customer-facing staff?
7. Were there adequate arrangements for Code compliance with third-party lead providers?
8. What generally was the conduct and culture of the Member in response to the audit?
9. When did the Member take remedial steps in respect of the concerns identified by RECC?

Background

The Member underwent an audit in May 2014 following an increase in the number of complaints being received by the Regulator. The Member was found to be non-compliant with the Code in 42 respects. The Member was given a six-week period of grace in which to address those issues. It replied on 5 August 2014. After a review by the auditor, a large number of areas remained non-compliant. Those were highlighted to the Member in an email sent on 15 August 2014, which included a document prepared by the auditor outlining the required actions that had not been taken.

The Member submitted its response on 18 September 2014, but on review there were still 36 non-compliance issues outstanding. As a result of the issues identified by the audit and the number of complaints received by the Regulator, the Member was referred to the Non-Compliance Panel. In addition, RECC undertook the Mystery Shopper investigation of the Member, the evidential status of which was considered above as part of the preliminary issues.

On 21 November 2014, the Member was notified that disciplinary proceedings were being invoked. The Member responded by a letter dated 27 November 2014.

A charge letter was issued on 28 January 2015.

The Panel had before it three lever arch files of evidence from both parties. It heard submissions from Ms MacKenzie on behalf of the Regulator and Mr Barnett on behalf of the Member, and it heard evidence from Mr S in person. The Panel took account of all the written and oral evidence, the submissions of the parties, the Code and the Bye-Laws. It also received and accepted the advice of the legal assessor.

The Panel will deal with each point of dispute in turn.

1. **What weight should the Panel place on the complaints?**

The Panel considered the weight that it should place on the evidence from consumers who had not been called and had not been cross-examined.

It is normal practice for consumer complaints to be put before the Non-Compliance Panel without calling individual consumers to give evidence in person. The role of the Regulator is to protect consumers and it would not be in the best interests of a consumer who had raised a complaint to be subjected to cross-examination in the course of a disciplinary hearing. Consumers must be able to raise any concerns they may have without the fear that, at some future date, they may become part of a disciplinary process. Furthermore the Panel has no power to require anyone to appear before it and neither does the Regulator, which, it must be remembered, is not a statutory regulator. The Panel has also taken account of the fact that calling consumers to give evidence, even if they were prepared to appear, would considerably increase the length of the hearing.

That being said, the Panel has had due regard, when scrutinising the complaints before it, to the fact that the Member has not had the opportunity to test the evidence of complaints by cross-examination. The Panel also noted that the Member had been able to challenge the specifics of each complaint in its submissions.

Beyond that, when considering the weight to be attached to the complaints, the Panel has had regard to the following general points:

- The complaints were submitted within a wide range of dates.
- The Member asserted that these complaints have been generated by the alleged activities of Mr C against the Member. In particular it was alleged that Mr C was encouraging individuals to complain so as to obtain refunds and then purchase cheaper solar panels from Mr C 's new company. The Panel noted that a number of the complaints precede both the audit and Mr C 's departure from the Member, but has equally borne in mind, when looking at the complaints, how close the date of the complaint is relative to the date of Mr C 's departure.
- The Panel also considers that the fact that a complaint has been made by an aggrieved consumer is something that the Panel can have regard to independent of whether all of the allegations made turn out to be justified.

- The Panel has formed the view that it would have been quite difficult for any third party to persuade a consumer, who was in reality satisfied with the service that they had received, to make a complaint and undergo the disruption and effort that this would entail. The Panel also notes, in that regard, the number and extent of the complaints.
- The Panel also bears in mind that, even where a complaint may have been prompted by a third party, that does not necessarily mean that the contents of the complaint are untrue.
- The Panel also had regard to whether there were patterns that emerged from a holistic review of the complaints.
- Finally, the Panel has considered the weight to be attached to the complaints in the context of all the other available evidence. In particular, the Panel considers that the complaints themselves play to a large extent a supporting role to the failures recorded in the audit.

The Panel has concluded that it rejects the invitation of the Member to place no or negligible weight on the complaints, and considers it safe to treat the complaints as subsidiary or supportive evidence, whilst placing greater weight on the audit evidence.

2. What were the relative responsibilities of Mr S and Mr C ?

The Panel noted that Mr S founded the Member and has always and continues to run the company as its Managing Director. In the Panel's view, that means he took the lead role in the company. The Panel accepts that Mr C was a co-director of the company with particular responsibilities, but considers his role was subordinate to Mr S . It is normal within companies for the Managing Director to take ultimate responsibility for the actions of all those working for the company, both as employees and as directors.

The Panel finds that Mr S was fully aware that an audit had taken place in 2012. The Panel finds that Mr S , as Managing Director, should have made it his business to know that the Member had not passed the audit, and ensured that it did so. In 2014, Mr S had signed the pre-audit document so was aware that an audit was due to take place. The Panel also finds that he was certainly aware, if not on receipt of the first letter in June 2014, then on the second, into which he was copied, in August 2014, that the Member had again failed an audit, and as Managing Director he should have been aware of the extent of the failure.

In addition, the Panel noted that one of Mr S accepted responsibilities was "monitoring senior management". Mr C was a director and member of the senior management team and, whilst Mr S acknowledged that he had quarterly meetings, it appears that Mr S and Mr C operated within "silos". As Managing Director, Mr S cannot absolve himself of responsibility for one half of the Member's operations or compliance with the Code. Further, it is not acceptable for Mr S to now suggest that Mr C was entirely to blame for all the failings of the Member in its audit. It was only after Mr C left the company that Mr S stepped in to take

responsibility. The Panel is of the opinion that Mr S should have taken responsibility from the outset.

3. Was there any pressure selling?

The Panel decided on balance that there had been pressure selling. The Panel looked specifically at complaint numbers 4355, 4427 and 5455 and at the explanations submitted by the Member. The Panel found that there was clear pressure selling in two complaints: 4355 and 5455. The matter was less clear in complaint 4427, where a discount was offered, but the Member denied an intention to pressure the customer.

It is the view of the Panel that it is not the purpose of the Code to prevent a Member offering a consumer a better deal than a competitor, but it is meant to prevent discounts being offered to consumers specifically as a form of pressure selling. In the particular circumstances of complaint 4427, the Panel is not convinced that pressure selling took place.

4. Were the following statements misleading under the Code:

- **Solar PV installations would be "free" or "self-funding"**
- **Solar panels increase property values**
- **FiT are paid either monthly or quarterly**

The expressions "free" or "self-funding" arose from sales representatives' discussions with consumers. The issue as to whether "free" was said or not was not clear from the papers in front of the Panel, so it makes no finding in that regard. The Panel gives due credit to the Member for understanding that if it had been said, it would have been in breach of the Code.

However, Mr S did give evidence in relation to the issue of "self-funding". He said that the panels were self-funding over a long period of time. However, it was clear from the number of complaints that consumers took it to mean that they were self-funding from Day 1. In evidence to the Panel Mr S himself acknowledged that this statement could be "misconstrued" and said that he had taken it out of circulation. The Panel finds that the use of "self-funding" was misleading to customers.

The Member's website contained a claim that the Energy Savings Trust released a report that the installation of solar panels on residential properties would significantly increase the price that house buyers would be willing to pay for those properties. The Panel looked at the full report and in particular two summaries in the Energy Savings Trust report entitled "Investigation into the impact of small scale renewables systems on property values – Scotland Summary Report" dated March 2013 to which this statement purports to refer. The first statement is "Home buyers say they are willing to pay more for a property with small scale renewables system, all other factors being equal, *but other factors take precedence during the buying process* [Panel emphasis]". The second is "From analysis of actual sales of properties with a small-scale renewables system, it is difficult to say what additional value, *if any*, [Panel emphasis] can be attributed to the presence of a renewables system". Neither

of these statements supported the website statement. The Panel finds that the website statement was therefore misleading.

The Panel finds that the statement from the Member that FIT payments could be paid monthly or quarterly implied that this was a choice that was normally available. In fact only one provider was identified that offered consumers monthly payments, and only under certain conditions. It was clear from the complaints that a number of consumers had been misled into thinking that they would receive FIT payments to offset their monthly finance payments as a normal practice, which was not the case. The Panel finds that this statement was misleading.

5. To what extent was the Member responsible for statements made by its sales representatives?

As regards the responsibility of the Member for the actions and statements of sales representatives the short answer is that it is clear, under the Bye-Laws and the Code, that the Member is responsible for ensuring that both its employees and its sales representatives comply with the Code and Bye-Laws.

Section 5.2 of the Code states that "*Code members will be held responsible for all the actions of their employees, those individuals they contract with or who sell on their behalf. Code members must make sure that all these people receive suitable training and that any contact they have with consumers complies with this Code and the law.*"
Bye-Law 4.8.4 likewise states that "*Code members will ensure that all employees, agents, subcontractors and any other individuals who act on their behalf have been effectively trained on the requirements of the Code and that they comply with it.*"

There are clear instances, for example in complaints 5482, 5455, 4355 and 4427 that misleading statements have been made in the sales process.

The Panel's attention was drawn to complaints 5469 and 5009. As regards complaint 5469, relating to performance estimates, the Panel is not persuaded that the performance estimate was wrong. In respect of complaint 5009 the Panel accepts that there was an error on the form and that the Member acknowledged that error.

6. Was there adequate training of sales representatives and/or customer-facing staff?

The Panel finds on balance that training was inadequate. It bases that finding on the fact that there were breaches of the Code during the sales process and from the fact that during the audit in May 2014 there were incomplete records and a lack of information relating to training. The Panel noted that Mr S stated that the Member has recently introduced more detailed training. It is not possible to precisely gauge the level of inadequacy from the evidence before the Panel, save that it was significant enough to result in complaints from consumers about the sales process and in the various misunderstandings that occurred.

7. Were there adequate arrangements for Code compliance with third-party lead providers?

It is clear from the audit that at the material time there were inadequate arrangements with third-party lead providers. There was nothing to show that control was exerted, and in fact there was a clause in the contract between the Member and third parties that sought to exclude liability for the way in which the third-party generated sales appointments.

8. What generally was the conduct and culture of the Member in response to the audit, and
9. When did the Member take remedial steps?

The Panel has decided that these two issues go together.

The response of the Member to the 2014 audit was inadequate. The Member was sent a letter on 26 June 2014 attaching a schedule setting out the defects (42) found in the audit which took place on 12 May 2014. The Member was given until 7 August 2014 and did respond by an e-mail dated 5 August from to "monitor@recc.org.uk" sent at 23:39 addressed in the body of the e-mail to Virginia Graham. Despite expressing shock at the audit result, the Member failed to provide the information that RECC had requested. On 15 August 2014 RECC wrote to the Member and gave it a further 6 weeks to correct any outstanding issues. A response in the form of documents without a covering letter was received on 18 September 2014 and was examined by the auditor, who found 36 outstanding issues.

On 5 September 2014, RECC received an e-mail from Mr C in relation to the audit in which he suggested that the staff were not willing to abide by the Code. The Panel accepts that Mr C left the Member on 2 September 2014 and was no longer a director at the time he wrote the e-mail.

The Panel accepts that when Mr C left the company, Mr S faced a an extraordinarily difficult set of circumstances which, in Mr S 's words, meant that the Member "came very close a number of times to going into administration". The Member found its accounts frozen, its credit rating stopped, staff left and defected to Mr C 's new company and it also had problems with its MCS accreditation. However, Mr S nonetheless failed to proactively manage or sufficiently prioritise compliance with the Code, on which his MCS certification is reliant.

Mr S could have told the Regulator about his problems and requested further time to comply, rather than sending a series of documents without a covering letter or explanation of any kind. In evidence he did tell the Panel that he had reviewed the business and that that review had not taken long. He went on to say "we completely overhauled all of the practices, all of the compliance, all of the documentation almost immediately on Mr C 's termination. But obviously it took time for those documents to get into circulation". The Panel is mindful of the fact that the documents sent meanwhile on 18 September were not compliant. Mr S later went on to say that he purchased a whole MCS suite of documents and on questioning

explained that he did do this towards "the tail end of 2014" and that RECC was notified about this "on or around January 2015".

On 21 November, an e-mail was sent to info@recc.org "to whom it may concern" in the following terms "to let you know that if you *[RECC]* do received a sudden escalation in the number of complaints against our company then there is a reason for this." The e- mail went onto suggest that another company was using knowledge gained internally for "pecuniary gain" and it names the company concerned against which the Member has issued proceedings in court. Mr S had still not outlined the actual problems he was facing to the Regulator. On 27 November 2014 a member of his staff wrote to RECC, responding to complaints that had been sent to the Member from RECC. Beyond that there were no other communications from the Member to the Regulator until after the charge letter had been sent on 28 January 2015.

The Panel does accept that Mr S took some steps in response to some of the concerns in November in particular; he bought the MCS suite of documents and instituted these by, at the latest, January 2015.

However, the Panel finds that the Member's overall lack of communication and pro-activity with the Regulator reflects the culture of the Member. The Member did not think it important to respond to the Regulator in a timely or detailed manner or ensure compliance with the Code. It lacked understanding of the importance of the Code and the serious nature of the audit failures until relatively recently. The very earliest that the Member could be said to have been trying to comply with the Code is when the MCS suite of documents were purchased in November or December 2014, some six months after the May audit, failure of which gave rise to these proceedings.

Additional Matters

In the course of the Member's closing submissions the Panel was asked to rule on three matters by the Member, one of which was the question of whether the Mystery Shopping evidence had been obtained improperly or could be relied upon. This was already considered and ruled upon as a preliminary issue at the start of the hearing, and the Panel finds that there is no basis or necessity for revisiting that preliminary decision.

Mr Barnett also suggested that the Panel needed to record that Mr S 's evidence was unchallenged. The Panel does not accept this. Mr S was not cross-examined, but his evidence was challenged in the documentary evidence placed before the Panel and by way of the Regulator's submissions.

Finally, Mr Barnett drew the Panel's attention to a section in the Regulator's reply, which labelled as "disingenuous" Mr S s evidence that no new complaints had been made in 2015. As a matter of fact, there was evidence of one such complaint before the Panel. However, the Panel does not find that Mr S was being disingenuous or in any way deliberately untruthful in his evidence, and the Regulator made clear at the outset of the hearing that it

was not relying upon the evidence of the 2015 complaint for any such purpose.

Determination on Sanction

The Panel considered the written submissions of both parties, all of the evidence and all of the findings of fact previously made. It also received and accepted the legal advice of the legal assessor in respect of which the parties made no comments.

When considering which (if any) sanction to impose, the Panel has had regard to each of the factors set out in Panel Rule 13.2. In that regard the Panel makes the following observations.

The Panel considers the number (seven) and nature of the breaches to be at the higher end of seriousness. There were a high number of breaches that occurred over a considerable period of time. There has also been consumer detriment. In the Panel's view, the breaches found, the complaints submitted in evidence and the failure to pass two audits, are all symptoms of an underlying culture that may lead to an adverse effect on consumers. At the same time, the Panel accepts that the Member dealt with a number of the complaints from consumers in an effective manner once they arose.

The nature and number of breaches in this case does bring the reputation of the industry into disrepute as reflected in particular by the admitted breach of Section 4 of the Code. The Panel finds that the Member has inevitably derived some benefit from its breaches of the Code to the detriment of consumers.

The Panel accepts that the Member has asserted it has taken steps to remedy the breaches but the Panel reminds itself that there was a lack of promptness in the remedial steps adopted (see issues 8 and 9 above). The Panel also bears in mind that some of the remedial steps asserted by the Member in evidence have yet to be assessed by the Regulator.

Finally, the Panel bears in mind that there is no evidence that the Member has been previously disciplined.

The Panel took account of the list of potential sanctions set out in Bye-Law 8.21 and reminded itself that it should consider each sanction in ascending order (i.e. starting with a consideration of whether the most minimal potential sanction would suffice, and then considering the next least serious sanction etc).

The Panel first considered whether it would be appropriate to decide not to impose any sanction in respect of the breaches. The Panel considers that the number and nature of the breaches do require a sanction and therefore this was not an option in this case.

The Panel then considered whether it would be sufficient to issue a written warning in respect of the breaches but for the reasons outlined above considers that this was also not a sufficient sanction in this case.

The Panel considered whether a sufficient sanction would be to impose Conditions on the Member. One of the legitimate purposes of imposing a

sanction is to ensure that the Member does not have the opportunity to repeat the breaches. In the particular circumstances of this case the Panel felt that it was essential that the Regulator is able to examine the processes and procedures of the Member in order that it can assure itself that consumers are properly protected. The Panel find that it is not possible to formulate Conditions that sufficiently meet this objective.

The Panel then considered Enhanced Monitoring. As stated above the Panel is concerned about the underlying culture of the Member and its attitude to the Code. The Panel heard a great deal about the new documentation and newly imposed training which, the Member said in evidence, is now in place and says is Code compliant. The Panel notes that this assertion has not yet been tested by the Regulator. It is therefore proper that the Regulator is able to examine the adequacy and effectiveness of the documentation and training now said to be in place, and more generally the new Code-compliant regime which the Member says it is implementing.

The Panel therefore finds that it is an appropriate and proportionate sanction to impose a Period of Enhanced Monitoring. In light of both the seriousness of the breaches and the fact that the Member has had to (and will have to) change its culture to be fully compliant, it is the Panel's view that the Enhanced Monitoring must be in place for a sufficient period which in this case is one year.

The Member will undergo a Period of Enhanced Monitoring in the following terms:

1. The Period of Enhanced Monitoring is for one year.

2. By 15 September 2015 the Member will undergo a full audit on a date to be notified by the Regulator to the Member giving not less than 24 hours notice and no more than 72 hours notice.

3. The Member must thereafter undergo two further spot checks at short notice which should not be less than 24 hours notice, during which the auditor will self-select and inspect all the original documentation forming at least three and no more than six recent consumer contracts.

4. The Member will inform the Regulator of the date and time of all training sessions relating to the Code to be held during the Period of Enhanced Monitoring at least 14 days prior to the date of the training.

5. The Regulator may, at its election and as many times as it considers necessary, send an observer to a training session to attend that part of the training relating to the Code, having informed the Member that the observer will be attending at short notice.

6. The observer will be provided with all training material and be able to take notes. The observer will report back to a named officer at the Regulator and the observer will at the request of the Regulator feedback any advice or comment to the Member.

7. The costs relating to Conditions 2 to 6 above will be at the Member's expense.

8. The Regulator will monitor compliance during the Period of Enhanced Monitoring and following the end of the Period of Enhanced Monitoring within 28 days:

    a. If the Regulator is satisfied that these Conditions have been fulfilled and that the Member is compliant with the Code and Bye-Laws, the Regulator will write to the Member to confirm this; or

    b. If the Regulator is not satisfied that these Conditions have been fulfilled or that the Member is compliant with the Code and, Bye-Laws, the Regulator will convene a Hearing in accordance with clause 8.26 or 8.27 of the Bye-Laws as appropriate.

The Period of Enhanced Monitoring shall commence 14 days after the date of this Determination.

For the avoidance of doubt the Panel considered whether termination of Membership was an appropriate and proportionate sanction in this case but came to the conclusion that the Member has engaged sufficiently, albeit late in the day, with the process to make such a sanction disproportionate. The Period of Enhanced Monitoring gives the Member an opportunity to show that the culture has changed.

Costs

The Panel has considered its power under Bye-law 10 to make such order for costs against the Member or the Regulator as it considers fair and reasonable in all the circumstances.

The Panel considered the written submissions of both parties, all of the evidence and all of the findings of fact previously made. It also received and accepted the legal advice from the legal assessor in respect of which the parties made no comments.

The Panel considers that, having found the Member to be in breach and having also decided the majority of the issues at the Hearing against the Member, the starting point is that the Member must pay the costs of the Regulator. It is important, as a matter of general principle that Members who have breached the Code should pay for proceedings brought in respect of such breaches, given that otherwise the costs borne by the Regulator are in effect borne by other, innocent, Members of the Code.

The Panel then considered whether the Regulator could have been said to have acted unreasonably in the conduct of these proceedings, such that a discount should be applied.

The Panel considers that the proceedings were properly brought as is evident in its findings.

The Panel considered the circumstances surrounding the adjournment of the Hearing scheduled for 25 February 2015. The Panel reminded itself of the decision of the Chairman dated 23 February 2015 allowing the adjournment. The cause of the adjournment was the submission of late evidence from the Regulator which the Chairman did not consider constituted reply evidence. However the Panel also considers that it was very likely that the Hearing would have had to be adjourned in any event because of the nature of the case and having regard to the fact that the Member had only just instructed representatives. Accordingly the submission of late evidence did not materially affect the proceedings.

The Panel has also borne in mind that the Regulator sought, as it has done in the past, to rely upon some anonymised complaint evidence and then withdrew that evidence after objections had been raised by the Member in order, the Regulator said, that the Hearing could go ahead on the date set. That evidence only formed part of the complaint evidence before the Panel and the Panel notes that the withdrawal of evidence had no impact on the admission of the breaches by the Member.

The Panel also reminds itself that the morning of the first day of the Hearing was taken up by a preliminary issue as to whether the Mystery Shopper evidence was admissible. As set out above the Panel did not consider that evidence was obtained illegally and decided that the evidence was partially admissible. The Panel does not consider that it was unreasonable for the Regulator to contest the issue of admissibility with the Member as regards this evidence.

The Panel has also considered the application by the Member for the Regulator to pay 45% of its costs. It follows from the fact that the Regulator has overall been the successful party in these proceedings that as a general principle the Member is not entitled to its costs. In any event, having regard to the principle in Baxendale-Walker v Law Society [2007] *EWCA Civ233* as subsequently applied, costs orders should not be made against a regulator acting in the public interest unless the complaint has been improperly brought or has been "a shambles from start to finish". There is no basis at all for such a finding in this case.

The Panel has assessed the schedule from the Regulator and finds that all the costs therein are reasonable. The Panel therefore orders costs in the amount of £60,510.80.

Appeal

The Member may appeal this determination within 14 days of the date of the determination under Bye Law 9.

16 June 2015