14. The Appellant responded by submitting that there must be a power to vary quantum and that the Tribunal should take a purposive approach to statutory interpretation. Further that it would make a nonsense of the statutory regime if the Tribunal could not vary the quantum of the award.

15. The Tribunal was sympathetic to the submissions of the Appellant. It is odd that a Tribunal of this type should not have the power to vary quantum and it seems inconsistent with an appeals regime. It is noted that the appeals Tribunal in the UK, as one would expect, does have this power (as do other Bermudian Appeal Tribunals). It is noted that this is a matter for the Bermuda Government and the Authority to consider further. Nevertheless section 44C(3) is clear on its face, the Tribunal does not have this power. Having said this, the position is academic in the present matter as even if the Tribunal found that it did have the power to vary, it would not have exercised such a power, having come to the conclusion that the quantum was reasonable in the circumstances of this case.

The Appellant's Previous Compliance History

16. In the Warning Notice, the Authority detailed three previous breaches by the Appellant of the Insurance Act and/or its Licence (including specifically a breach of the Dividend Condition in 2013), being:
   (i) the payment of $264,760 to the Parent in December 2007, where the Appellant failed the statutory requirement for all companies licensed as Class 3A insurers to seek the Authority's approval for payments in excess of 15% of its capital (2007 Breach);
   (ii) a reduction in capital of $317,140 in December 2008, where the Appellant failed the statutory requirement for all companies licensed as Class 3A insurers to seek the Authority's approval for payments in excess of 15% of its capital (2008 Breach); and
   (iii) a dividend payment of $3,600,000 in two payments to the Parent on 31 November 2013 and 1 December 2013, where the Appellant breached the Dividend Condition (2013 Breach) (together, the Previous Breaches).

17. The Appellant in their written submissions maintained that the Previous Breaches could be distinguished. In the opinion of the Tribunal, the Previous Breaches were all relevant, in particular the 2013 Breach, which was a similar breach of the Dividend Condition on the license, which had been the subject of detailed correspondence put before the Tribunal. The Authority was right to accept these as aggravating factors.

Grounds of Appeal: alleged error of reasons in relation to grounds 1.1 to 1.6

18. The Appellant's grounds of appeal on this aspect were as follows:

> "It is submitted that the Decision Notice of the Authority erred in the following respects:
> 1. The conclusion of the Authority that the Company had failed to take all reasonable steps and exercise all due diligence to ensure that the limitations on its licence could be complied with (and thereby that a civil penalty should be imposed), was not justified by the evidence upon which it was based in that:
> 1.1 the said conclusion was reached against the weight of the evidence presented to the Authority;
> 1.2 failed properly, or at all, to take into account the Company's submissions that it had identified the prior permission of the Authority as a relevant requirement but had reasonably placed reliance upon the expert advice of its licensed insurance manager (which advice was in error) that such permission was not in fact required;
> 1.3 failed properly, or at all, to take into account the wider lengthy compliance history of the Company and its affiliate braking company and its working relationship with the Authority;
> 1.4 failed properly, or at all, to take into account the nature of the transaction;
> 1.5 placed too great a reliance on the recent history of the Company from which, for the reasons aforesaid, the breach set out in the Decision Notice can be readily distinguished from any past conduct of the Company where the need for the Authority's permission had not been so identified;
> 1.6 the Decision Notice, at Schedule 2 (3)(a), does not set out any, or any properly reasoned, basis for reaching the aforesaid conclusion."

19. The Appellant admits that the license condition was breached, but it claims a defence to this and further disputes the decision to impose a penalty as well as the quantum of the penalty.

20. The Authority submitted that:

> "…The authorities illustrate that a duty to take all reasonable steps and exercise all due diligence to ensure compliance with a statutory obligation:
> (i) is to be assessed on the conduct of the statutory obligation holder in the circumstances of each case;
> (ii) cannot be defended on the basis of ignorance of the obligation, especially when the obligation is at least partially known;
> (iii) cannot, in the ordinary course, be delegated to a third party as this is against public policy;
> (iv) cannot be discharged by the appointment or reliance on a third party where the obligation is clear and straightforward;
> (v) cannot be discharged by the appointment or reliance on a third party in the absence of an underlying cause or in exceptional circumstances; and
> (vi) cannot be not discharged by the appointment or reliance on a third party in circumstances where prior breaches have occurred under similar circumstances (which establish, at a minimum, the partial knowledge of the obligation)."

21. The Appellant in response made clear that it was not a part of their case that a statutory duty could be delegated, but instead that reliance on another party is relevant to a 'reasonable steps defence'.

22. The Appellant submitted that the Decision Notice did not contain a properly reasoned basis for the Authority's conclusion. Further that the Authority 'has not identified any further reasonable steps which AA should have taken'.

23. The Authority rely on the decision of the House of Lords in *South Bucks District Council & another v Porter* (No 2)[2] on the standard required of an administrative body to provide reasons for its decision. The court there (quoting Lord Bride in *In re Poyser and Mills' Arbitration*[3]) held that:

> "If it was necessary to the decision to resolve an issue of law and the reasons do not disclose how the issue was resolved, that will suffice [to expose the decision to a vires challenge]. If the decision depended on a disputed issue of fact and the reasons do not show how that issue was decided, that may suffice [to expose the decision to a vires challenge]. But in the absence of any such defined issue of law or fact left unresolved and when the decision was essentially an exercise of discretion, I think that it is for the applicant to satisfy the court that the lacuna in the stated reasons is such as to raise a substantial doubt as to whether the decision was based on relevant grounds and was otherwise free from any flaw in the decision-making process which would afford a ground for quashing the decision."

24. Further it was held in *Porter* that:

[2][2004] UKHL 33
[3][1964] 2 QB 467

> "The reasons for a decision must be intelligent and the must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to substantial doubt as to whether the decision-maker erred in law, for example, by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in dispute, not to every material consideration… Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."[4]

25. The Appellant suggests that *Porter* is not of general applicability as it relates to the specific issue of planning consent. The Tribunal does not agree with that submission. The Appellant further submits that we should prefer the approach of the English Court of Appeal in *English v Emery Reimbold & Strick Ltd.*[5]. However the Appellant concedes that there is a great deal of overlap between the two approaches and that a key issue is that *"the Judge did not need to deal with every possible issue but those which were vital to the conclusions reached, and ultimately it must be clear to a party why a particular decision has been reached."* The Tribunal agrees with this last submission.

26. The Court in *Porter* dismissed the reasons challenge. In the present case, as in *Porter*, there is *"no mystery as to what moved the (Authority) to act".* The Decision Notice is clear on its face.

27. In the Decision Notice of 1 October 2015, the Authority said in Schedule 2 (inter alia) as follows:

> "Although the Company has stated that the breach was unintentional, the Authority has reached the conclusion that, given the correspondence between the Authority and the Company following previous breaches, the Company should have been aware of the requirement and sought the necessary approvals prior to making the payment.
>
> The Company submits that it took all necessary steps and exercised due diligence to ensure the condition on the license was complied with,

[4]Porter, Para 36
[5][2002] EWCA Civ 605

> attributing the breach to the unintentional oversight by the Manager. This submission is supported by the submissions of the Insurance Manager which repeat the earlier submission that all reasonable steps were taken by the Company. Again, the non-cash nature of the transaction is emphasized.
>
> The submissions on this point do not persuade the Authority from its earlier conclusion."

Further that:

> "… the Authority remains of the view that to act in direct contradiction of a <u>license condition which is expressed in such clear and unambiguous terms</u> is either negligent or reckless."

28. The condition in the license is formulated as follows:

> "The insurer shall not, without obtaining the prior written approval of the Bermuda Monetary Authority, declare and/or pay any dividends and/or make any capital contributions to the Company's parent"

29. The Appellant pointed out that they specifically asked their manager to seek approval of the Authority but then accepted the advice of the manager to the effect that it was not necessary to have the Authority's approval. The Appellant relied upon the decision of *The Clean Car Company Ltd v The Commissioners of Customs & Excise*[6] and submitted that "whether a person has a reasonable excuse is an objective test: *was what the taxpayer did, not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do?"* On this basis the Appellant submitted that it did proceed reasonably and undertook all reasonable steps to ensure compliance. In particular, that its reliance on its manager, in the precise factual circumstances here, was reasonable and excluded the Appellant from liability.

30. The *Clean Car* case is not entirely helpful to the Appellant and distinguishable in material respects. In that case a trader who carried on a car cleaning company paid the wrong amount of VAT in relation to certain building works, following receipt of an Architect's certificate. At the time of making payment his daughter had become gravely ill and was in hospital for months, leading up to a bone marrow transplant. The trader gave evidence that he was very worried and not able to devote as much time as he wanted to his car cleaning business. The Tribunal accepted his daughter's grave illness as a mitigating factor, as well as the fact that he was unfamiliar with the building industry and building contracts and the special rules that applied to those contracts which have the effect of altering the normal rule as to the calculation of tax. In these very particular

[6][1991] VATTR 234

circumstances it was held that the trader had a reasonable excuse. There are no such extenuating circumstances in the present case.

31. In response to this argument the Authority made the following submissions pointing to a series of cases dealing with the duty to take all reasonable steps to exercise due diligence and not being discharged by the appointment of or reliance of a third party, where the obligation was clear and straightforward.

   a) In *AM Rowland v HMRC*[7], the HMRC had issued a surcharge against Rowland for failing to pay the right amount of tax at the right time due to incorrect tax returns. It was accepted by all parties that the right amount of tax had not been paid at the right time. Rowland opposed the surcharge on the basis of reasonable excuse, in that she had relied on her then accountants *"who were regarded as specialist in the very complex area of tax and film finance".*

   b) The special commission held that on the facts Rowland did have a reasonable excuse, in that it was sensible and reasonable for Rowland to employ and rely upon persons whom she reasonably believed to have the relevant specialist knowledge and expertise that she did not possess personally.

   c) *Rowland* is generally cited as creating a principle that a statutory obligation holder may invoke the defence of reasonable excuse owing to the conduct of a third party. The principle in *Rowland*, however, has been distinguished and removed from general application on the basis of the highly complex tax and legal issues involved which a person of Rowland's experience could not be expected to navigate on her own[8].

   d) One such distinguishing case is that of *Huntley Solutions Limited v HMRC*[9]. On 30 May 2008, HMRC wrote to Huntley giving it notice of an enquiry into its tax returns and requesting: details of properties rent, the rentals received and the lessees; a breakdown of turnover and trade debtors; an explanation as to a difference of £50,000 between the tax computation and profit and loss account; an explanation of an inconsistency between "Net Op Expenses" shown in the profit and loss and the notes in the accounts; and an explanation of the "inter-company debtors" (collectively, the Documents). The Documents were

[7]2006 WL 2334076 (Rowland)
[8]Rowland, paras 8(o) - 8(q), 20 and 21
[9][2009] UKFTT 329 (TC) (Huntley)

   not provided to HMRC in contravention of a statutory obligation to do so, and HMRC issued penalties against Huntley in this regard.

   e) Huntley raised a reasonable excuse defence to the penalties in that it had relied on its accountants to provide the Documents, as this was something that was not within Huntley's scope of expertise. In doing this, Huntley sought to rely on the principle set down in *Rowland.* HMRC argued that the principle in *Rowland* did not apply, as on the facts *Rowland* dealt with *"extremely technical complex"* legislation whereas the information Huntley was required to provided *"was a straightforward matter that required no knowledge or considerations of legislative technicalities."*

   f) The tribunal found *"the information and documents required from [Huntley]… to be straightforward and easily understood",* and that it was not reasonable for Huntley to rely on a third party to provide these when Huntley should have been able to comply itself.

32. Further the Authority submitted that the duty to take all reasonable steps and exercise all due diligence is not discharged by the appointment of or reliance on a third party in the absence of an underlying cause or in exceptional circumstances, pointing to the authorities of *Giles Bushell v The Commissioner's for Her Majesty's Revenue and Custom*[10] *and Arnold Jeffers & others v HMRC*[11].

33. Lastly along these lines, the Authority submitted that the duty to take all reasonable steps and exercise all due diligence is to be assessed on the conduct of the statutory obligation holder including prior offences relying again on the decision in *Jeffers.*

34. The Tribunal accepted this series of authorities and the submissions based upon them. Further, the Tribunal accepted that the terms of the license are so clear and unequivocal, that no person reading this could possibly be mistaken about the meaning of the condition. When reading the Decision Notice as a whole (a 15 page document), it becomes clear that the Authority effectively told the licensee that they should have read their license more carefully, and more particularly, that the meaning of the condition should have been apparent to them from reading it and from the previous correspondence they had had with the Authority in relation to this very point. The Decision Notice (with its Schedules) provides a sufficient reasoned basis for the Authority's decision.

[10][2010] UKFTT 577 (TC) (Bushell)
[11][2010] UKFTT 22 (TC) (Jeffers)

35. There was nothing complex or highly technical about this condition, in the sense of *Rowland* and the complex area of tax law in the context of film finance. Further, there was nothing exceptional in the present case that would discharge the Appellants liability on the basis of its reliance on its agent the insurance manager. Furthermore, the fact that the Previous Breaches and the related (and recent) discussions and correspondence with the Authority on the importance of strictly abiding by the