



Withdrawal of approval to perform controlled functions pursuant to s. 63 FSMA, prohibition from performing any function in relation to regulated activity pursuant to s. 56 due to lack of integrity, breach of principles 1 and 6, imposition of financial penalty

IN THE UPPER TRIBUNAL

**Reference NoS: FS/2013/0008
FS/2013/0009**

TAX AND CHANCERY CHAMBER

FINANCIAL SERVICES

**IN THE MATTER OF THE FINANCIAL SERVICES AND MARKETS ACT
2000**

B E T W E E N: -

(1) **TIMOTHY ALAN ROBERTS**
(2) **ANDREW WILKINS** Applicants
-and-

THE FINANCIAL CONDUCT AUTHORITY

The Authority

Tribunal: Judge Terence Mowschenson QC
Sandi O'Neill
Christopher Chapman

Sitting in public on 28, 29, and 30 January 2015, 2, 3, 4, 5, 6 February 2015, 11 and 12 March 2015 and partly in private on 2 and 3 February 2015

Hodge Malek QC and Saima Hanif, counsel instructed by Withers LLP for the First Applicant
Tom Weisselberg QC, counsel instructed by Mishcon de Reya for the Second Applicant
Sharif Shivji, counsel for the Authority

ADDITIONAL REASONS FOR DETERMINATION

1. We understand that the Financial Conduct Authority (“the Authority”) considers that the Decision in this matter does not make overall findings in relation to Mr Wilkins’ competence and capability, which we will refer to compendiously as “competence.” Mr Wilkins’ representatives dispute that and consider our determination does so and is clear.
2. We have been referred to Rule 43 of the Upper Tribunal Rules which enables the Tribunal to remake a decision if we consider it just to do so and there has been a procedural irregularity (which there would have been if we had not given reasons for part of our decision) and also to the decisions in *Burns v Royal Mail Group plc* [2004] ICR 1103 and *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 dealing with appeals or possible appeals on the grounds that insufficient reasons for a determination or judgment have been given and holding that it is open to the appellate court to remit the matter for further reasons if it considers that is the appropriate route to take or that the trial judge or tribunal may provide additional reasons in order to remedy any defect. We read these decisions as enabling us to make supplementary findings if requested and we consider it appropriate to do so if that might avoid an appellate court remitting the decision for further findings.
3. Competence is referred to in paragraph 83A of the Re-Amended Statement of Case against Mr Wilkins where the Authority pleaded that for the “avoidance of doubt (and without prejudice to the Authority’s position that there is no need to plead the point formally) it is open to the Tribunal to conclude that even if Mr Wilkins’ conduct does not demonstrate a lack of integrity, he is nonetheless not fit and proper (for example on the basis of his competence and capability). For the avoidance of doubt it is the Authority’s case that the Tribunal should reach such a conclusion, even if it concludes that Mr Wilkins’ conduct does not demonstrate a lack of integrity. In reaching that conclusion, the Tribunal must act in accordance with section 133 (4) of FSMA and the Tribunal is entitled to (and for the avoidance of doubt the authority alleges that it should) take into account the factual matters pleaded in paragraphs 81 to 83 above”.
4. Paragraphs 81 to 83 set out the matters relied upon in relation to the allegations of failure to act with integrity, failure to act with due skill, care and diligence (the same matters as are alleged in relation to integrity with the addition of an allegation that Mr Wilkins failed to inform Ms Moran that ARM required a licence under Luxembourg law which allegation we rejected), and lack of fitness and propriety (the same matters as are alleged in relation to integrity and in addition various allegations in relation to financial promotions and an allegation that Mr Wilkins misled Mr Lovegrove). We rejected the allegation that Mr Wilkins misled Mr Lovegrove.
5. Our Determination has to be read as a whole. We held, in paragraph 216, that it was Mr Wilkins who raised with Ms Moran the question whether it was appropriate

to continue to promote the ARM Bonds (and receive funds from potential investors) after it was clear that the CSSF objected to the issue of bonds and it was Mr Wilkins and Ms Moran who sought the advice of BLG in relation to the question whether it was appropriate to continue to promote the ARM Bonds. BLG advised that there was no regulatory reason not to promote the bonds provided there was no reason to suspect that the CSSF might refuse the application. As we held in our Determination, Mr Wilkins' assessment of the prospect of success of the application might have been over optimistic but was influenced by what Mr Roberts reported as to the prospects. In acting as he did Mr Wilkins did not demonstrate a lack of competence.

6. Our Decision in relation to fitness and propriety is set out in paragraphs 269 to 275 which expressly refers to the allegation lack of competence which is an aspect of "fitness and propriety" and was dealt with by the Authority in that way in the Re-Amended Statement of Case. The Determination in relation to the lack of fitness and propriety refers to the matters relied upon in relation to the lack of integrity and the failure to exercise due skill and care. At paragraphs 272 and 273 we rejected the allegation that the matters relied upon in relation to fitness and propriety concerning the promotions, but not relied upon in relation to integrity and due skill, care and diligence, showed a lack of competence of such severity that Mr Wilkins was not fit and proper.
7. In paragraph 274 we rejected the submission of lack of fitness and propriety based on the matters relied upon as showing a lack of integrity (which so far as relevant in the light of our findings were the same matters as were relied upon in relation to due skill, care and diligence) and refer in particular to our reasons referred to at paragraphs 250 to 255 of the Determination. In summary, when Mr Wilkins appreciated on about 11 January 2010 that CSSF authorisation might be delayed he raised with Ms Moran whether the delay warranted a letter to pending investors, raised concerns in relation to pending investors' funds, and asked her to seek advice from BLG which was duly obtained. He ensured that when a pending investor sought the return of substantial funds they were returned without delay. He also showed his concern as to the treatment of funds received from pending investors as described in paragraph 251 of the judgment and questioned whether further funds should be raised from potential investors and showed the same concern even after he had ceased to be a director.
8. In relation to his assessment of the probability of ARM obtaining authorisation he was to a great extent dependent upon Mr Roberts' assessment of the meetings with the CSSF towards the end of 2009 and early 2010 as he was not present at any of these meetings and we do not consider he was in a position to question Mr Roberts' assessment of the meetings. So far as the December letter is concerned, as we held at paragraph 254, Mr Wilkins was entitled to take some reassurance from the considerable input of Ms Moran and Miss Curnow into the letter which dealt with matters with which he was less closely involved in the

latter half of 2009. We held he did not act recklessly in relation to that letter and in relation to the March letter. Although no allegation was raised against Mr Wilkins in relation to the March letter, which was sent after he had ceased to be a director, Mr Wilkins had attempted to ensure that the March letter contained a fuller explanation to investors and IFAs than it did in the form in which it was eventually sent out after he had ceased to be a director. Thus he inserted into the draft of the March letter that ARM awaited a decision in relation to authorisation from the CSSF and had agreed not to issue bonds until the authorisation was determined and this was deleted by Mr Roberts.

9. As noted above, the allegation of lack of competence was raised as an aspect of fitness and propriety. As we held at paragraph 274, we rejected the submission that the allegations relied upon to show a lack of integrity showed that Mr Wilkins is not fit and proper. We hold that the matters relied upon in support of the allegation of a lack of integrity and due skill care and diligence, and taking into account Mr Wilkins' admissions (including those in relation to the promotion of ARM Bonds after the 20 November letter or the defects in the December letter) and our conclusions in relation to those matters relied upon by the Authority which were adverse to Mr Wilkins (such as the defects in the December letter) , do not show that Mr Wilkins lacked competence. Our reasons include the reasons for rejecting the allegation of lack of integrity and the matters we took into account in assessing the severity of the lack of due skill and care described in paragraphs 258 of the Determination. Mr Wilkins demonstrated a serious concern for the safety of pending investors' funds as shown for example by the matters summarised at paragraph 208 (I) of the Determination. He took the initiative in ensuring that Catalyst took legal advice and there is no evidence that he failed to follow the advice.
10. We note that the Authority is asserting that the Tribunal did not make an overall finding that Mr Wilkins is fit and proper. We dismiss the allegation that Mr Wilkins is not fit and proper including the allegation of lack of competence. The burden of proof is on the authority to prove that he is not fit and proper and not competent. The Authority failed to satisfy the Tribunal in relation to that allegation.
11. We note that the Authority contend that paragraph 286 of our Determination refers to paragraph 285 alone. For the avoidance of doubt it refers to our determination as a whole and should be read as including a reference to competence.

12. It was the considerations referred to above that led the Tribunal to conclude that a penalty of £50, 000 was appropriate.

Terence Mowschenson QC

UPPER TRIBUNAL JUDGE

Release date: 8 September 2015