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

[2015] UKUT 0408 (TCC)

IN THE UPPER TRIBUNAL **Reference NoS: FS/2013/001**
FS/2013/002

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

DECISION

INTRODUCTION

1. This decision relates to references made by Timothy Alan Roberts ("Mr Roberts") and Andrew Wilkins ("Mr Wilkins") (together referred to as "the Applicants") referring to the Upper Tribunal Decision Notices issued on 14 August 20143.

2. In the case of Mr Roberts,

    a. the Decision Notice indicated that the Financial Conduct Authority had decided to withdraw Mr Roberts' approval to perform controlled functions at Catalyst Investment Group Limited ("Catalyst") pursuant to section 63 of the Financial Services and Markets Act 2000 ("the Act"), to make an order pursuant to section 56 of the Act, prohibiting Mr Roberts from performing any function in relation to any regulated activities carried on by an authorised person, exempt person or exempt professional firm and impose a financial penalty of £450,000 pursuant to section 66 of the Act (Misconduct) for breaches of Statement of Principles 1 (integrity) and 6 (due skill, care and diligence).

    b. The Principle 1 allegation relates to a period from 20 November 2009 to 26 May 2010. The essence of the allegation is that Mr Roberts permitted Catalyst to collect funds from potential investors in respect of ARM bonds that had not been issued (tranches 9 – 11), and did not prevent it from doing so, at a time when ARM Asset Backed Securities SA ("ARM") was prohibited from issuing bonds and the full regulatory position had not been properly disclosed to bondholders. In addition the Authority alleges that two letters sent in December 2009 and March 2010 to IFAs/bondholders during this period, were misleading.

    c. The Principle 6 allegation (failure to exercise due skill, care and diligence) is concerned essentially with various financial promotions issued by Catalyst which allegedly failed to make adequate disclosure of ARM's regulatory position, and the alleged failure of Mr Roberts to take reasonable steps to prevent the inaccuracies; and

    d. There is a separate allegation that Mr Roberts failed to take reasonable steps before 24 December 2009 to inform Catalyst's compliance officer, Ms Moran, that the Commission de Surveillance du Secteur Fnancier ("CSSF"), the Luxembourg regulator, was of the view that ARM required a licence.

3. In the case of Mr Wilkins,

    a. the Decision Notice indicated that the Financial Conduct Authority had decided to make an order pursuant to section 56 of the Act (due to alleged breaches of

Principle 6) relating to the collection of funds from bondholders, and the issue of a letter in December 2009 to IFAs, the failure to inform Catalyst's compliance officer that ARM considered it required authorisation from the CSSF; the same matters were relied upon to support an allegation of lack of fitness and propriety in relation to approving the issue of promotions in support of a decision prohibiting Mr Wilkins from performing any significant influence function in relation to any regulated activities carried on carried on by an authorised person, exempt person or exempt professional firm and impose a financial penalty of £100,000 pursuant to section 66 of the Act .

b. The case raised against Mr Wilkins before the Tribunal raises a Principle 1 allegation relating to a period from 20 November 2009 to 23 March 2010. The Authority alleges that Mr Wilkins is not fit and proper to perform any functions (i.e., a wider prohibition than that proposed by the Regulatory Decisions Committee ("RDC")) in relation to any regulated activities carried on by any authorised person, exempt person or exempt professional firm. The essence of the allegation is that Mr Wilkins failed to act with integrity by demonstrating a disregard for the interests of investors by permitting Catalyst to collect funds from potential investors in bonds that had not been issued (tranches 9 – 11), and not preventing it from doing so, at a time when ARM was prohibited from issuing bonds and the full regulatory position had not been properly disclosed to bondholders. In addition the Authority alleges that the December letter sent to IFAs/bondholders during this period, was misleading.

c. The Principle 6 allegation is concerned with the failure to act with due skill and care on the basis of the matters set out in relation to the Principle 1 allegation and that Mr Wilkins failed to take reasonable steps before 24 December 2009 to inform Ms Moran that the CSSF was of the view that ARM required a licence.

d. The Authority also contends that it is open to the Tribunal, if not satisfied that Mr Wilkins' conduct demonstrates a lack of integrity, to conclude he is nonetheless not fit and proper on the grounds of lack of competence and capability.

e. Further it is contended that Mr Wilkins is not fit and proper on account of his failure to act with integrity in relation to the matters set out in relation to the Principle 1 allegation, in relation to financial promotions and in providing false information to the Authority as to the shareholding in Catalyst in the course of a telephone conversation.

4. By on order made on 3 June 2014 it was ordered that the references of Mr Wilkins and Mr Roberts be heard together.

The Applicants
Mr Roberts

5. Mr Roberts was born in 1952. He initially became involved with Catalyst as a non-executive director in January 2005 and was approved to carry out CEO functions from 30 September 2005. From around 2005 onwards, Mr Roberts was the majority shareholder of Catalyst. By 2005, he was also the Chief Executive and approved by the Authority to carry out a CF1 (director) function in relation to the company.

6. Mr Roberts was the Chairman of ARM. He helped set it up and served as a director of ARM from 12 March 2007 onwards. He was the longest serving director of ARM and the only consistent presence on the board from 2007 to 2011. He helped develop the ARM bonds ("the bonds"), introduced the bonds to Catalyst and was involved with ARM's application to CSSF.

7. At the relevant time Mr Roberts appears to have been a forceful, and sometimes volatile personality, who did not easily put up with people whom he did not consider were fulfilling their role properly and on occasion wrote intemperate emails to his staff.

8. He had suffered from ill health both during the period 2007 to 2010 as well as afterwards and the person who appeared before the Tribunal was but a shadow of the man who featured in the emails, correspondence and notes of meetings which we had to examine. Albeit his doctor had said he was fit to participate in the hearing before the Tribunal, we had to allow him a break every 25 minutes. Although he was cross examined by the Authority, the cross examination was – very properly – carried out with a light touch and he was not subjected to the comprehensive cross examination to which Mr Wilkins was subjected. It was obvious he found the exercise of giving evidence difficult and his counsel had had some difficulties in obtaining instructions. We take that into account in assessing his evidence as it affected his case but also how it affected the cases of the Authority and Mr Wilkins. However Mr Roberts' ill health did not prevent him or impede his taking an active part in the affairs of Catalyst and ARM during the time when the significant matters which are the subject matter of the alleged failures occurred.

9. We are satisfied that in the period which is the subject of his reference he was physically and mentally fit enough to discharge his functions at Catalyst.

Mr Wilkins

10. Mr Wilkins was born in 1976. He graduated with a BA in social sciences and an LLB from the University of KwaZulu-Natal in South Africa. His first permanent role

in London was with a law reporting company called Law Alert Limited. He worked there from 1999 until the end of 2005 in the role of head of business development. In this role he had responsibility for a small team of colleagues. Mr Roberts was a major shareholder, and at one time had been a director and CEO of Law Alert. That was where Mr Wilkins and Mr Roberts first met.

11. When Mr Wilkins left Law Alert in 2006, Mr Roberts offered him a role in Catalyst in the corporate finance department reporting to a Mr Alberto Gil, and focussing primarily on Enterprise Investment Scheme fundraising for microcap companies. This was Mr Wilkins' first corporate finance role and to supplement his knowledge (along with other required financial services courses) he took a professional development course on bonds and bond markets. When Mr Gil left Catalyst, Mr Wilkins became the head of corporate finance. Mr Wilkins also may have held shares in Catalyst amounting to 0. 43 per cent of the equity. The evidence was unclear as to whether the shares were ever issued.

12. Mr Wilkins remained a director of Catalyst till 23 March 2010 and he ran Catalyst's business on a day to day basis when Mr Roberts was away but subject to the general supervision of Mr Roberts whom he regarded as his mentor. He was also involved with compliance issues (especially in relation to financial promotions) and worked alongside Catalyst's compliance officer, Ms Moran in this respect.

13. As Head of Corporate Finance at Catalyst Mr Wilkins was approved to carry out the following controlled functions at Catalyst:
    a. Director function, CF1, from 18 October 2007 to 23 March 2010;
    b. Corporate Finance Adviser from 11 June 2007 to 31 October 2007; and
    c. Customer function, CF30 from 1 November 2007 to 16 April 2010.

14. In addition, Mr Wilkins was involved, through his position at Catalyst, in the affairs and business of ARM. Mr Wilkins held a limited proxy to act for ARM and on occasion instructed counsel for ARM in relation to the Origination Agreement (Life Policy Traders and ARM) in November 2007. He was also authorised to send out emails for ARM. He was involved with ARM's application to the CSSF although the extent of his involvement varied from time to time. From early 2009 he was less involved albeit he kept himself informed in relation to the progress of ARM's application for authorisation from the CSSF.

15. Both applicants gave evidence. In addition we heard evidence from other witnesses called by the Authority:

    a. Mr Howard Northover, a director of E.S Walton & Co Ltd, which carries on business as an independent financial adviser ("IFA"). Mr Northover's evidence was to the effect that he had understood that ARM was licensed as a result of reading a statement to that effect in an early document entitled "Frequently

Asked Questions" which stated that ARM was a licensed "securitisation vehicle" from which he apparently inferred that ARM was authorised by the CSSF whereas the reference to licensing actually referred to the Luxembourg Register of Commerce and Companies. He made no checks as to whether ARM was authorised by the CSSF and drew no inference from the fact that the early brochures he saw expressly stated that the bonds fell outside the Act and the Financial Services Compensation Scheme would not be available. The early brochure did not advert to registration outside the UK and he also drew no inferences from that. Furthermore, when informed in 2010 that ARM had applied to the CSSF to be regulated and that the application had failed, he did not suggest that he had been misled by Catalyst as to ARM's regulatory status. He said he had not received a brochure produced in June 2009 which stated that ARM was not regulated by the Authority or any other regulator.

b. Mr Timothy Wright, a director of Crownhouse IFAs Limited which, as its name suggests, conducts business as an IFA. He had inferred that ARM was regulated after being told that it was licensed just as Mr Northover had done. He would not have advised his clients to invest had he been aware that ARM required to be authorised. He said that the collapse of Keydata had had a dramatic affect on the market for Senior Life Settlement Policies ("SLSs").

c. Matthew Hendin a Manager in the Financial Conduct Authority's Enforcement and Financial Crimes Division and the "case officer" for these proceedings. Much of his evidence was not first hand and predated his involvement with Catalyst and the Applicants. He gave evidence as to the history of the investigation into Catalyst and the Applicants and the Authority's approach to disclosure. He also gave evidence to the effect that the Authority first understood that ARM required authorisation on about 16 July 2009.

d. Ms Georgina Philippou, previously the Head of the Strategy and Operations Department of the Financial Conduct Authority's Enforcement and Financial Crime Division and currently acting director of Enforcement and Market Oversight. Ms Philippou gave evidence to the effect that prior to concerns raised by Keydata Investment Services Limited ("Keydata"), a company also involved in SLSs which worked with special purpose vehicles set up in Luxembourg, she was not aware of any major regulatory concerns in relation to that market. However the Authority decided to set up a working party to inquire into the market after concerns were raised by events at Keydata. She also stated that Catalyst came to her attention for the first time after Keydata was placed in administration on 8 June 2009 when Catalyst was one of four bidders for Keydata's business. She also became aware that ARM was applying for authorisation from the CSSF by 9 December 2009 at the latest. Ms Philippou emphasised the importance of maintaining the confidentiality of the communications between the Authority and the CSSF. The CSSF had

consented to a limited disclosure in relation to the communications referred to in her witness statement.

e. Mr Peter Lovegrove who was at all material times an Associate of the Small Firms and Contact Division (part of the Authority's supervisory division) until about August 2010 when he was promoted to Acting Manager and in August 2011 to Manager of the Financial Conduct Authority's Credit Union Supervision Team. In late 2014 he left the Authority and is now employed in the private sector. In June 2009 he was asked to conduct a review of firms which traded in SLSs and spent a large amount of his time reviewing Catalyst between June 2009 and July 2010. He read various brochures and noted that they stated that ARM was not regulated by the Authority and that, as a result, the Financial Services Compensation Scheme would not provide cover if ARM was unable to meet its liabilities. He was not particularly concerned by that as there were many investments provided by unregulated providers distributed through UK regulated companies which were viable investments. He was first aware that ARM had submitted an application for authorisation by the CSSF on about 11 December 2009.

16. We also heard evidence from Dr Michael Isaac, called on behalf of Mr Roberts. He is a consultant psychiatrist who gave evidence in relation to Mr Roberts' physical and mental health with particular emphasis on the period 9 June 2009 to 26 May 2010. His evidence and our findings in relation to that evidence are set out in a confidential annex attached to this judgment which is not to be released other than to the parties without the consent of a judge of the Tribunal.

17. In this Decision the expression "the Authority" refers to the Financial Services Authority or to the Financial Conduct Authority (as the case may be) the latter having succeeded to many of the responsibilities of the former on 1 April 2013.

Catalyst, its management structure, and advisers

18. Catalyst is a company incorporated in England and Wales. It was incorporated on 11 July 2000. From 1 December 2001 it was authorised by the Authority to undertake regulated activities. During the period in question (from 2007 to 2010), Catalyst acted as distributor of the ARM bonds and was entitled to commissions (15% up front commission with 0% trail commission for the life of the Growth Bond or 10% up front commission with 0.25% trail commission for the life of the Income Bond, plus €1.1 million of arrears of distribution costs on appointment in October 2007). Catalyst was also the arranger of the bonds and was remunerated for that role. Under the relevant agreement, Catalyst earned a monthly income of €80,000 which was subsequently amended to €140,000 per month on 1 July 2008 and on appointment in October 2007 was paid historical fees and expenses of €2 million. In addition, Catalyst had the right to call for further payment under the agreement in certain

circumstances. Catalyst had to pay commissions to the IFAs and so it did not retain a majority of the commission for itself. Between 35-70% was paid away.

19. In the relevant period in addition to Mr Roberts and Mr Wilkins, Catalyst had two non-executive directors, Lord Razzall and Major General Timothy Toyne Sewell. Mr Roberts was the senior director and below him, and subservient to him, was Mr Wilkins. Mr Wilkins did not seek to shelter behind Mr Roberts but, as he said in evidence, regarded Mr Roberts as his mentor. Mr Roberts also owned 87 per cent of Catalyst's equity and is 24 years older than Mr Wilkins. The evidence showed that Mr Roberts was the dominant person in Catalyst at the relevant time.

20. Mr Roberts was described in the course of interviews conducted by the Authority with various Catalyst personnel. Mr Rayment described him as a "very hands on" executive, "involved in the detail", and a "very, very busy man". Mr Macpherson said Mr Roberts exercised oversight over compliance issues, "nothing left Catalyst without his approval. Virtually no actions were taken without his signature which made life pretty difficult when he was in the States half the time or elsewhere" and every communication with the Authority and with the CSSF was scrutinised by Mr Roberts "from top to bottom". Ms Moran stated he had "in essence control" over Catalyst. Mr Wilkins said in his evidence that although Mr Roberts was good at delegation "he never relinquished control".

21. Mr Roberts suffered from ill health during the relevant periods and also had to deal with matrimonial issues with his former wife who lived in America. From the end of 2007 to 2008 Mr Roberts was frequently in the USA and therefore delegated many matters to employees of Catalyst. Mr Wilkins was delegated to carry out many of Mr Roberts' day to day functions in relation to the application for ARM's authorisation from the CSSF. However, at all times, Mr Roberts was in contact by email or telephone and the ultimate responsibility for the application remained with him. In an email exchange dated 29 September 2009 between Mr Roberts and Wilkins, Mr Wilkins reminded Mr Roberts that Mr Roberts had directed that he should concentrate on "creating deals" and leave Richard Whitehall to deal with "process" which from the context, referred to (amongst other matters), the application to the CSSF. Mr Wilkins in his email of that date emphasised his involvement in Catalyst's new venture in Belgium. The picture painted by the email exchanges over the period shows close attention being paid to the application by Mr Roberts who was fully involved toward the latter half of 2009 and early 2010. Thus Mr Roberts and not Mr Wilkins attended the important meetings with the CSSF on 16 December 2009 and 4 February 2010.

22. Below Messrs Roberts and Wilkins in the management hierarchy were the other personnel employed by Catalyst. At one time it employed as many as 20 people. In addition to its executive directors, the Applicants, there were a number of senior

employees including:

a. Alison Moran ("Ms Moran"); Ms Moran was recruited as the Head of Compliance in August 2006. She had been called to the Bar. Her job description provided that her primary responsibility was to "…ensure that all compliance issues relating to the Company are interpreted and implemented in an efficient and timely manner…" Ms Moran was approved by the Authority to perform the CF10 and CF11 controlled functions from 3 August 2006. Over time, the compliance department was expanded such that by mid-2009, in addition to support from the legal team, Ms Moran had an assistant, Rebecca Bennett. Ms Moran was a key contact with the Authority; Along with the Applicants, Ms Moran was the third person at Catalyst that the Authority took action against. On 30 September 2013 the Authority imposed on Ms Moran a financial penalty of £20,000 pursuant to section 66 of the Act for breaches of Statement of Principle 6.

b. Moray Macpherson ("Mr Macpherson"): Mr Macpherson joined Catalyst as a consultant on legal matters in 2006. He took a full time position at Catalyst in September 2007, again dealing with legal matters, and was Head of Legal from May 2008 onwards. He had trained as a solicitor but had been removed from the Roll of Solicitors in 2007 in circumstances not relevant to the matters before the Tribunal.

c. Steven Blair ("Mr Blair"): Head of Internal Risk – Legal;

d. Richard Whitehall ("Mr Whitehall"): part of the Corporate Finance team and assisted Mr Wilkins;

e. Brian Rayment ("Mr Rayment"): Chief Operating Officer;

f. Martyn Knight ("Mr Knight"): Financial Controller;

g. Angela Spinks ("Ms Spinks"): Administration; and

h. James Haupt ("Mr Haupt"): Head of Sales.

23. In addition Mr Roberts ensured that Catalyst personnel had access to external advice whenever they wanted. Amongst the external advisers who appeared to have been consulted from time to time as and when required were:

a. Ian Mason, a partner at Barlow Lyde and Gilbert ("BLG") and Head of BLG's Financial Services Regulatory practice. Mr Mason was formerly a Head of

Department in the Authority's Enforcement Division. Ms Moran had regular contact with Mr Mason;

b. Chris Brennan, a senior associate at BLG solicitors. Mr Brennan had worked with Mr Mason in the Authority's Enforcement Division. Mr Brennan is now a partner at Addleshaws' Financial Services Regulatory practice, having been Lloyds Bank's Head of Regulation;

c. Richard Peat: a barrister in private practice who had also worked in the Authority's Enforcement Division. Mr Peat attended the offices of Catalyst to assist and advise Catalyst on regulatory and compliance matters (including the upgrading of Catalyst's systems and controls in relation to financial promotion);

d. Stephenson Harwood: they were instructed in respect of tax issues relating to the ARM Bonds. They also provided advice to ARM in respect of the ARM Information Memorandum, and in particular the drafting of the risk warnings.

24. Catalyst also had access to expert compliance advice, initially from Momenta Ltd, and subsequently other compliance advisors, such as Bovill Ltd.

25. With regard to the position in Luxembourg, at various points during the relevant period, the following law firms provided legal advice:

a. Loyens and Loeff ("Loyens") : Loyens handled the application to the CSSF from November 2007 to approximately April 2009;

b. Arendt & Medernach ("Arendt"): a leading Luxembourg law firm who were recommended to ARM by Equity Trust and were appointed in April 2009. The Partner in charge of the case, Mr Dupont had good links to the CSSF;

c. Nauta Dutilh ("Nauta"): Nauta provided advice on the CSSF's approach to authorisation applications, including the likelihood of liquidation, from January 2010.

26. In relation to the relocation of ARM to Ireland, advice was sought from A & L Goodbody, a leading Irish law firm, and from leading counsel.

ARM and the bonds.

27. In around 2005 (and before Mr Wilkins joined Catalyst), Mr Roberts (and Mr Martin Raine) began to develop a securitised product to enable retail investors to participate in the traded life insurance market.

28. The project involved the issuing of bonds by ARM. The assets purchased and contained within the bonds were life assurance policies (also known as ("SLS") policies) held by a US-based trust. The first bonds were issued on 30 November 2006**.** In the relevant period, investors had the choice of an Income Bond (which gave a quarterly 2.5% return) or a Capital Growth Bond (in which the returns were rolled up and paid at the end of the term of the bond). There were bonds with varying maturity periods (5, 7 or 10 years) and in varying currencies (GBP, USD and EUR). The Bond Programme was registered with the Irish Stock Exchange and traded on its regulated market.

29. The bonds were made available by ARM in "tranches" with each tranche being issued every three months on the usual quarter days, i.e., the first day of January, April, July and October. Tranches 1 to 8 were issued between about October 2007 and October 2009. As part of its application for authorisation ARM reported to the CSSF that bonds had been issued to 1481 retail investors for a total of £43.74 million, USD 3.91 million and €12.57 million as at 30 June 2009. Only 35% of investors were based in the UK.

30. When an investor decided to purchase a bond (directly or often through a wrapper such as a SIPP), his money would be transferred to UK Receiving Agents engaged by ARM and the money would then be held until the "closure" by ARM of the relevant tranche for further investment (one month before the pre-set issue date). Thus the monies for each of the tranches would in the ordinary course of events be raised in the last month of the previous quarter and the first two months of the current quarter. Once the tranche was closed, funds (net of the commissions drawn down monthly) were then transferred to ARM's bank accounts at ING in Luxembourg.

31. ARM was owned by a Dutch foundation (called a stichting) and controlled by a board of directors (which included, at all material times, Mr Roberts).

32. Prior to June 2009, there were two other non-executive directors of ARM, Martinus Weijermans and Franciscus (Frank) Welman of Equity Trust Luxembourg ("Equity Trust"). Both were lawyers, Mr Weijermans being the Head of Legal at Equity Trust, and senior directors of Equity Trust. Equity Trust was ARM's Luxembourg administrator and Bond registrar, but in reality much of the work associated with ARM's bond issues was conducted by Catalyst. Mr Weijermans and Mr Welman acted as directors of ARM as part of a corporate service that Equity Trust provided to

Catalyst. By Spring 2009, the group risk committee of Equity Trust had become concerned about the provision by Equity Trust of personal directorship services to securitisation vehicles like ARM involved in SLS, and this led to the resignation of Mr Weijermans and Mr Welman as directors and their replacement by Timmo (Tim) Mol ("Mr Mol") of Carlisle Management, and Serge Bijnens ("Mr Bijnens"), although Equity Trust continued as ARM's Luxembourg administrator. Mr Mol was appointed as a director of ARM on or around 17 June 2009 and Mr Bijnens was appointed on or around 10 July 2009.

The relationship between ARM and Catalyst.

33. Catalyst acted as distributor of the bonds and did not during the relevant period distribute directly to investors but did so through IFAs. IFAs recommended those bonds to a client for whom they considered the bonds would be suitable. Catalyst also provided arranging services to ARM. In return Catalyst earned commissions and a fee described above. Out of this income Catalyst had to discharge substantial expenditure including paying commission to IFAs. ARM was a special purpose vehicle. It had no office of its own and no employees and relied on Catalyst to conduct its business. In the year ended 31 December 2009 Catalyst had an average of 23 employees.

Approach to the evidence

34. Our approach to the evidence will be that summarised by Mr Justice Leggatt in Gestmin SGPS S.A. v Credit Suisse [2013] EWHC 3560. A similar and shorter summary of the appropriate approach to assessing evidence is to be found in the dissenting speech of Lord Pearce in the House of Lords in Onassis Calogeropoulos v Vergottis [1968] 2 Lloyds Rep 403 at p 431:

> "'Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance

more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part."

35. In relation to certain aspects of the case, we have heard some evidence of legal advice given to parties who have waived part of the privilege. We draw no adverse inference against any party who might have been able to procure the waiver of privilege but has not managed to do so. However, insofar as we heard evidence of legal advice which had been given, we take into account in assessing that advice, that we do not necessarily have the full picture as to how the advice came to be given, as we may not have heard evidence as to the instructions which had been given.

36. We bear in mind the dangers of hindsight, which include analysing each conversation or note line by line, and attributing greater significance to such matters in the light of subsequent events, instead of considering matters as participants saw them as they occurred, or assuming that what happened subsequently was bound to happen.

37. Finally the Authority sought to rely on two letters dated 2 June 2014 and 2 July 2014 from the CSSF replying to various questions from the Authority made pursuant to the CESR Multilateral Memorandum of Understanding on the Exchange of Information and Surveillance of Securities Activities to which the CSSF and the Authority are signatories. Under the memorandum, communications between the Authority and the CSSF are to be kept confidential save to the extent that they are released from confidentiality by consent. The letters were intended to supply evidence, which was in the possession of the CSSF, to assist the Tribunal; for example, as to what transpired at a meeting between ARM and the CSSF on 16 December 2009. The CSSF indicated it was not prepared for any of its officers to give oral evidence or evidence as to relevant regulatory law in Luxembourg. We appreciate the difficulties for the Authority raised by this stance. The letters were signed by persons who had no first-hand knowledge of certain of the matters described therein and without any evidence as to the inquiries made (and by or of whom) to obtain the information. In addition certain questions put to the CSSF tended to be leading questions. The Applicants were not afforded the opportunity to cross examine the signatories of the letters (four directors of the CSSF). In the light of those factors we will not rely upon the content of the letters as evidence against the Applicants.

Fit and Proper and Misconduct.

38. The Authority has, pursuant to its rule making power under section 138 of FSMA (as it applied at the time), made rules governing:

a. whether a person is fit and proper, contained in the part of the Authority's handbook entitled "FIT";
b. whether a person is guilty of misconduct, contained in the part of the Authority's handbook entitled "APER";
c. the conduct of business by firms, contained in the part of the Authority's handbook entitled "COBS".

39. In relation to whether a person is fit and proper the matters to which the Authority will have regard are set out in FIT and include the person's integrity. Reckless behaviour can demonstrate a lack of integrity. In determining integrity the Authority will have regard to whether, in the past, the person has been candid and truthful in all his dealings with any regulatory body and whether the person demonstrates a readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards (FIT 2.1.3G(13)).

40. In relation to the question of whether a person is guilty of misconduct, the part of APER entitled "Statements of Principle and Code of Practice for Approved Persons", sets out the standards required of a person by the Authority as a series of Statements of Principle, and descriptions of conduct which do not comply with each Statement of Principle and are therefore regarded as misconduct.

41. The Statements of Principle applicable at the relevant time were:
    a. Statement of Principle 1, which provides that an approved person must act with integrity in carrying out his controlled function; and
    b. Statement of Principle 6, which provides that an approved person performing a significant influence function must exercise due skill, care and diligence in managing the business of the firm for which he is responsible in his controlled function.

42. APER is not an exhaustive code of the kind of conduct that may contravene the Statements of Principle (APER 3.1.6G). However it sets out examples of conduct which do not comply with the Statements of Principle (APER 4.1).

43. In relation to Statement of Principle 1, these include:
    a. misleading (or attempting to mislead) a client, by act or omission (APER 4.1.3E);
    b. misleading a client about the risks of an investment (APER 4.1.4E(2));
    c. providing false or inaccurate information to the Authority (APER 4.1.4E(11)); and
    d. failing to inform, without reasonable cause, a customer of the fact that their understanding of a material issue is incorrect, despite being aware of their misunderstanding (APER 4.1.6E).

44. Reckless behaviour can give rise to a breach of Statement of Principle 1.

45. In relation to the Conduct of Business Sourcebook, during the relevant period, Catalyst was required to ensure that a communication or a financial promotion was fair, clear and not misleading (COBS 4.2.1R). This rule applied to Catalyst's promotions and had to be complied with in a way that was appropriate and proportionate taking into account the means of communication and the information the communication was intended to convey. A communication addressed to a professional client may not need to include the same information, or be presented in the same way, as a communication addressed to a retail client (COBS 4.2.2G).

46. COBS also provided that:

    a. in communicating with retail clients, a firm must ensure that information is accurate and in particular does not emphasise any potential benefits without also giving a fair and prominent indication of any relevant risks (COBS 4.5.2R). A firm must ensure that it does not disguise, diminish or obscure important items, statements or warnings (COBS 4.5.2R(4));

    b. when communicating information, a firm should consider whether omission of any relevant fact will result in information being insufficient, unclear, unfair or misleading (COBS 4.5.5G);

    c. if, at any time after a firm has issued a compliant financial promotion, it becomes aware that the financial promotion no longer complies with the financial promotion rules, it must withdraw its approval for the financial promotion and notify any person that it knows to be relying on its approval as soon as reasonably practicable (COBS 4.10.2R(2)); and

    d. if a firm continues to communicate a financial promotion when the financial promotion no longer complies with the rules, it will breach those rules (COBS 4.10.8G).

47. The meaning of the expression "integrity" is elusive. The Authority relied upon a number of decisions including Hoodless and Blackwell v FSA (2003), The Tribunal considered the meaning of integrity and reached the following conclusions: "In our view "integrity" connotes moral soundness, rectitude and steady adherence to an ethical code. A person lacks integrity if unable to appreciate the distinction between what is honest or dishonest by ordinary standards. (This presupposes, of course, circumstances where ordinary standards are clear. Where there are genuinely grey areas, a finding of lack of integrity would not be appropriate.)" (para 19). However that exposition is not comprehensive. The expression is not confined to a lack of honesty. One can act with a lack of integrity without being dishonest: Vyukelic v

FSA at para 16. Reckless behaviour may suffice: see Rayner & Townend v FSA at para 101.

48. So far as the concept of recklessness is concerned we were referred to R v G [2004] 1 AC 1034 where Lord Bingham said at §41:

> "A person acts recklessly …with respect to - (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk."

In that case, Lord Bingham further observed (at §32):

> "The most obviously culpable state of mind is no doubt an intention to cause the injurious result, but knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily accepted as culpable also. It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if…one genuinely does not perceive the risk."

The alleged failings

Failure to act with integrity

49. As against Mr Roberts the Amended Statement of Case pleads that Mr Roberts failed to act with integrity at Catalyst by demonstrating disregard for the interests of investors (contrary to Principle 1) in the period 20 November 2009 to 26 May 2010 and failed to exercise due skill, care and diligence (Principle 6) in managing Catalyst's business in the period 19 November 2007 to 26 May 2010.

    a. In relation to integrity the Authority relied upon the following matters:

        i. Mr Roberts was personally involved in and bears responsibility for Catalyst's decision to continue promoting ARM Bonds and arranging for ARM to receive investor funds from 20 November 2009 when the CSSF requested that ARM should suspend the issue of bonds, until May 2010, when the Authority issued its first Supervisory Notice, without ARM's regulatory position being properly disclosed to investors whilst Mr Roberts had formed the view by 19 November 2007, as a director of ARM, that ARM was required to be licensed by the CSSF.

        ii. Mr Roberts was aware that sales were continuing on this basis and took insufficient steps to prevent funds from being collected from investors although ARM had ceased issuing bonds at the CSSF's instigation and Mr Roberts should have ensured that Catalyst stopped promoting ARM bonds after 20 November 2009 and arranging for the acceptance

of funds in relation to tranches 9, 10 and 11 when investors had not been made fully aware of the risks. That conduct exhibited a disregard for the interest of investors and Mr Roberts also ignored concerns expressed by other members of Catalyst's management as to the appropriateness of continuing to sell ARM bonds after November 2009;

iii. Mr Roberts approved the December 2009 letter ("the December letter") to IFAs and allowed it to be sent out with his electronic signature. The December letter did not give a clear, fair and not misleading picture in that it:
    1. Did not state that, in ARM's view, ARM was required under Luxembourg law to be licensed in order to issue bonds;
    2. Failed to mention that ARM was in breach of Luxembourg law by not having a licence;
    3. Implied that authorisation from the CSSF was voluntary rather than mandatory;
    4. Implied that it was certain that the bonds would be issued, and that such issuance would take place in the very near future despite Mr Roberts being aware that the bonds could not be issued till the regulatory position was satisfied, and that regularisation was not only uncertain but might take some time;
    5. Omitted to mention that investors' funds might be at risk if bonds were not issued because the funds were not segregated and there was a risk that ownership of the funds might be disputed once remitted to ARM;
    6. Omitted to disclose the risk faced by applicants for new tranches of the bonds ("the Pending Investors") of an early liquidation of ARM if the licence was not obtained and, in the event of liquidation, investors' funds might be at risk if they formed part of ARM's funds available to all its creditors (and not merely those of new investors):

iv. Mr Roberts approved the March 2010 letter ("the March letter") which was misleading in similar respects to those set out in the first three respects of the December letter. Further, in addition the March letter was misleading in
    1. Not referring to the consequences of ARM's application for authorisation being unsuccessful;
    2. Giving the impression that the alternative of a transfer to Ireland was bound to succeed and that either the CSSF authorisation or a transfer to Ireland would be speedily achieved. In fact a transfer was complex and included bond holder consent in order for it to take place and these omissions

demonstrated a disregard by Mr Roberts of the interests of investors.

50. As against Mr Wilkins the Amended Statement of Case pleads

> In the period 20 November 2009 to 23 March 2010 a failure to act with integrity in breach of Principle 1. The matters pleaded in relation to lack of integrity are similar to those pleaded against Mr Roberts in relation to integrity (described above) save that
>
> i. it is pleaded that Mr Wilkins bears responsibility for promoting the bonds until 23 March 2010 when he resigned as a director of Catalyst;
> ii. it is not pleaded that he ignored the concerns of others at Catalyst as to the appropriateness of continuing to accept funds in relation to tranches 9, 10 and 11 after CSSF had asked ARM to stop issuing bonds;
> iii. it is pleaded that Mr Wilkins approved (rather than signed) the December letter ;
> iv. There is no allegation in relation to the March letter against Mr Wilkins as that was sent to investors after he had resigned.

Alleged failure to act with due skill, care and diligence in managing Catalyst's business in breach of Principle 6

51. In relation to the failure to act with due skill, care and diligence in managing Catalyst's business as against Mr Roberts the Authority relied upon the following matters:

> i. Mr Roberts should have recognised that Catalyst's financial promotions and communications with investors needed to reflect ARM's regulatory position so that investors were aware of the potential risks. He was responsible, as director and Chief Executive of Catalyst, for taking reasonable steps to ensure that Catalyst's financial promotions were clear, fair and not misleading. Mr Roberts carried, along with Mr Wilkins, responsibility for approving Catalyst's financial promotions.
>
> ii. Mr Roberts did not, at any time from 19 November 2007 (by which point he had already formed the view that ARM required a licence from the CSSF), withdraw the financial promotions that Catalyst had approved on behalf of ARM which were in use by IFAs or amend them to reflect ARM's regulatory position. Further, he did not withdraw or amend the financial promotions after 20 November 2009,

following the CSSF's request to ARM to cease issuing bonds, or after 16 December 2009, by which date at the latest he had become aware that one potential consequence, if ARM did not obtain a CSSF License, was the liquidation of ARM

iii. Financial promotions were produced with the following approval dates (on occasions, several promotions were approved on the same date): 22 November 2007, 6 December 2007, 7 December 2007, 7 June 2008, 2 July 2008, 19 August 2008, 20 August 2008, 25 September 2008, 15 October 2008, 10 November 2008, 26 January 2009, 5 May 2009, 9 June 2009, 12 June 2009, 8 July 2009, 6 August 2009, 19 August 2009, 1 October 2009, 5 November 2009, 11 November 2009, 30 November 2009, 9 December 2009, 20 January 2010 and 17 February 2010.

iv. Mr Roberts failed to take reasonable steps over the relevant period when considering and approving the financial promotions distributed by Catalyst in relation to the bonds to ensure that these presented a clear, fair and not misleading picture of ARM's regulatory position and of the regulatory risk associated with ARM and the bonds. In particular, he failed to take reasonable steps to ensure the financial promotions disclosed appropriately:

1. (from 19 November 2007) the view of ARM and Catalyst that ARM required a licence from the CSSF to issue bonds;
2. (from 20 November 2009) that ARM would market but could not issue bonds pending authorisation; and
3. (from at the latest 16 December 2009) that one potential consequence for ARM of failing to obtain a licence was liquidation and that there might be difficulties for pending investors in recovering any funds transferred for a contemplated bond issue by ARM which in fact never took place.

v. The investors should have been warned about the risks referred to above so as to enable them to make an informed decision.

b. Mr Roberts failed to take reasonable steps prior to 24 December 2009 to inform Catalyst's compliance officer, Ms Moran, that ARM took the view it was required to have a licence under Luxembourg law.

52. As against Mr Wilkins, in relation to alleged failure to exercise due skill, care and diligence in breach of Principle 6 the Authority relied on the matters pleaded against him by the Authority as amounting to a lack of integrity as being such failures; and that Mr Wilkins failed to take reasonable steps prior to 24 December 2009 to inform Catalyst's compliance officer, Ms Moran, that ARM took the view it was required to have a licence under Luxembourg law.

Fitness and Propriety

53. In relation to an allegation of lack of fitness and propriety as against Mr Wilkins the Authority relies upon the matters pleaded as showing a lack of integrity by Mr Wilkins, and in addition relies upon similar matters as are pleaded against Mr Roberts in relation to the alleged failures to exercise due skill, care (i.e., the alleged deficiencies in the promotions) with the addition of an allegation that Mr Wilkins provided inaccurate information to Mr Lovegrove in a telephone call on 24 December 2009 (in not revealing his shareholding in Catalyst).

54. In addition the Authority pleads against Mr Wilkins that it is open to the Tribunal to conclude that even if Mr Wilkins' conduct does not demonstrate a lack of integrity, he is nevertheless not fit and proper for example on the basis of competence and capability.

55. As noted above, a lack of integrity (contrary to Statement of Principle 1) had not been relied on in the Decision Notice issued to Mr Wilkins but it was accepted that the Tribunal could consider the issue in the light of the authorities. The position as to the jurisdiction of the Tribunal was reserved in case there was an appeal.

56. Although the position of Messrs Roberts and Wilkins in their Amended Defences differs in certain respects, there are many common issues, and we shall, insofar as possible, deal with them together.

57. We shall deal with the alleged failings in turn. However to do so it is first necessary to describe the chronology of the events forming the subject matter of the allegations because one of the important issues in the reference was the evolving perception of the Applicants as to the prospect of success of ARM's application for authorisation.

Application for authorisation in Luxembourg

58. The history of ARM's application for authorisation by the CSSF is relevant as both Applicants contend that they held the reasonable belief that ARM would obtain a

licence and that the licence would be obtained prior to the date (1 January 2010) that the next bond issue (tranche 9) was due to take place. It is also relevant when considering the alleged omissions in the promotions.

59. In its opening submissions, the Authority divided the relevant period under consideration into three and we have adopted the same approach.
    a. 19 November 2007 to end-July 2009, after the application for authorisation by the CSSF was submitted on 23 July.
    b. August to end-November 2009, after the CSSF requested that ARM cease issuing bonds on 20 November
    c. December 2009 to 26 May 2010, the end of the relevant period in respect of the case against Mr Roberts.

19 November 2007 to end-July 2009

60. In 2007 ARM took the decision to obtain authorisation in Luxembourg under the Luxembourg Law of 22 March 2004 on Securitisation ("the 2004 Law") which provides:

> Article 19. Securitisation undertakings which issue securities to the public on a continuous basis . . . must be authorised by the [CSSF] to exercise their activities.

Once authorised a securitisation undertaking is entered on a list of securitisation undertakings (Article 21 (1)) but this is not to be taken as an endorsement by the CSSF of the securities issued by it: Article 21 (3).

61. An application for authorisation had a sting in the tail which appears not to have been adverted to by ARM, Catalyst or its legal advisers, until about December 2009, when the CSSF itself raised it either at a meeting with Catalyst representatives on 16 December 2009 (according to the Authority) or it was raised by Mr Lovegrove with Mr Wilkins in a conversation on 24 December 2009 (according to the Applicants). Article 39 (1) of the 2004 Law provides:

> "The district court dealing with commercial matters shall upon request from the public prosecutor, acting ex officio or at the request of the CSSF, pronounce the dissolution and order the liquidation of authorised securitisation undertakings whose entry on the list provided for in Article 21 has been definitely refused or withdrawn".

62. Mr Roberts' evidence was that ARM had been in discussion for some time (since 2006) as to whether or not to make an application to the CSSF for authorisation under the 2004 Law.

63. There appears to have been some uncertainty as to what the expression "continuous basis" means in Article 19 and whether the CSSF had changed its opinion as to the construction of Article 19. Mr Roberts and Mr Wilkins both gave evidence to the effect that Catalyst understood that ARM could make four issues of ARM bonds in a year without authorisation and that was what MeesPierson, subsequently Fortis Intertrust, (which had formed ARM) advised in 2006 but that CSSF changed its position in later 2007 or early 2008 from one under which four issues per year did not amount to issuing on a continuous basis to one where four issues did amount to a continuous basis.

64. In its 2005 Annual Report published on 25 April 2006 the CSSF stated that that a continuous basis was deemed satisfied if the undertaking issued four bond issues in a year. In its 2006 Annual Report issued on 24 April 2007, the CSSF indicated that it "is generally assumed" that any entity conducting more than three issues per year was issuing securities on a continuous basis. That statement might have amounted to a statement of practice and might not have been codified in law but it gave a clear indication of the view of the CSSF. In 2007 ARM issued four tranches of ARM Bonds and accordingly fell within the CSSF's stated view that an entity making four issues of bonds in one year required authorisation.

65. We note that in a letter dated 28 April 2010 to the Authority, Catalyst stated that Fortis Intertrust (Luxembourg) advised ARM, after liaising with the CSSF, that under the 2004 Law ARM could issue securities four times without being regarded as issuing on a continuous basis. As noted above, ARM in addition to Mr Roberts, had two other directors who were Luxembourg lawyers and senior directors of Equity Trust. If there was any uncertainty it appears that the two Luxembourg directors, Equity Trust, and Loyens the firm referred to below, all missed the statement in the 2005 Annual Report. If such advice was given it must have been given when ARM was considering starting up its business in 2005 and probably before the publication of the CSSF 2005 Annual Report in April 2006, However we do accept that Messrs Roberts and Wilkins received the advice they say they received at an early stage and the uncertain nature of the law may not have been communicated to them. One reason for our conclusion is that the two Luxembourg directors must have shared the mistaken impression or they could be expected to have insisted on early authorisation but there is no evidence that they considered authorisation as an immediate and urgent requirement.

66. However, at a board meeting of ARM on 23 April 2007, attended by Mr Roberts, the directors resolved to issue a further tranche of bonds. The minutes, signed by Mr Roberts, recorded: "The Board notes that by issuing additional Tranches and / or series of bonds the Company is running the risk of having to register with the [CSSF]". From that time Mr Roberts was clearly aware that ARM might be required to be authorised in the light of its programme of bond issues.

67. On 19 November 2007 (by which time ARM had made seven issues), Loyens were instructed by Equity Trust, on behalf of ARM, to make an application for approval to the CSSF. On 19 November 2007 Mr Zanev, a lawyer at Loyens, advised Equity Trust that if an entity made more than three issues in a year it was assumed to be issuing continuously. On 22 November 2007, he contacted the CSSF "to check the temperature" and described, on a no-names basis, ARM's circumstances; he was under a misapprehension as to the face value of the bonds issued as he thought the face value of the issues which had been made were more than €125, 000 (which would not require authorisation) but that ARM wished to issue bonds with a nominal value of less than €125, 000 (which would require authorisation). Mr Zanev was advised by the CSSF to submit an application letter and certain other documents in order to request regulatory approval. The CSSF did not then suggest that all ARM's activities (albeit ARM was not identified to the CSSF at that stage) should cease – rather it suggested that an application should be made for ARM's activities to be authorised. By 28 November 2007 (at the latest) Mr Wilkins was aware that ARM would seek authorisation.

68. On 4 February 2008 Mr Zanev asked personnel at Equity Trust for a brief description of the securities which had been issued and that should have clarified his understanding as to the face value of the bonds. He was also receiving instructions from ARM's board upon which sat two local directors who one might expect would have communicated the correct position to Loyens.

69. Loyens did not progress the application quickly. Mr Wilkins chased for an update on the application on 5 February 2008 and noted that Loyens had been slow to deal with other requests such as signing documents and supplying them to ING Luxembourg ("ING") who were to act as ARM's international custodian and who also wanted a copy of ARM's license under the 2004 Act before taking on this role. The delay was addressed at a meeting of ARM's board on 5 March 2008 attended by Mr Roberts as a director and Mr Wilkins representing Catalyst by invitation. At the meeting, the board noted that the Global Note programme which was addressed to retail investors would issue new tranches each quarter. The board requested Equity Trust to contact Loyens and ascertain when the licence would be obtained.

70. On 7 May 2008, Mr Zanev emailed Equity Trust with the subject line "ARM Asset Backed Securities SA – Regulatory Approval". The email (which has been redacted) identified a list of outstanding items that were required for the CSSF application. On the same day Mr Roberts responded to the email saying that "They are taking a good look" and Mr Wilkins responded "No major issues I can see though, so probably a good thing".

71. By 23 May 2008, Mr Wilkins had asked Catalyst's Head of Legal, Mr Macpherson, to chase up Loyens. Mr Macpherson appears to have delayed acting but notes of a Catalyst management meeting of 16 June 2008 record Mr Macpherson as stating that he had been busy on the Eneco matter, litigation which Catalyst and ARM were involved in, but that he would turn his attention to the matter in the following week.

72. On 10 July 2008 Mr Wilkins emailed Mr Macpherson about a number of matters he wanted dealt with whilst he was away. Amongst them, the most important, he emphasised, was the CSSF approval.

73. The delay in progressing the application continued. Mr Wilkins communicated with Loyens and Equity Trust trying to progress the matter. On 9 September 2008 Mr Zanev told Mr Wilkins that CSSF wanted to see audited accounts for the purpose of regulatory approval. On 12 September 2008 Mr Wilkins asked whether the CSSF required audited accounts for the year ended 30 June 2008 or whether unaudited accounts would suffice. Mr Zanev replied on 16 September 2008 that unaudited accounts would suffice but that he anticipated that the CSSF might require additional documentation including a CD containing all the issuance of the bonds and various other information. He asked for details of information in a Cypriot subsidiary of ARM called Angelrose Ltd which held non insurance assets for ARM. He also provided comments on certain issues raised by Mr Wilkins. If all the information and documentation was supplied he thought he could submit an application on 23 September 2008.

74. On 19 September 2008, Mr Wilkins replied to Mr Zanev's email with a list of responses on his request for further information. In relation to a number of items, Mr Wilkins asked others to provide them.

75. Issues raised by ARM having an interest in assets other than SLSs, through Angelrose Ltd, led to further delays in the submission of ARM's application for authorisation.

76. On 26 September 2008 Mr Wilkins sought an explanation for the lack of progress stating that unless he was mistaken "CSSF approval is critical for ARM and long overdue" The potential application continued to be discussed by Loyens with the CSSF and by 1 October 2008 Mr Zanev reported to ARM and Messrs Wilkins and Roberts that the CSSF had requested the entire "corporate, finance, transaction and issuance of [ARM] (past and existing)" and that that information would be supplied by ARM to the CSSF directly.

77. On 4 November 2008 Mr Zanev reported that the CSSF had indicated that unaudited accounts for the year ended 30 June 2008 would be acceptable.

78. On 20 November 2008, Mr Welman emailed Mr Roberts and Mr Macpherson referring to the CSSF application as follows: "Please note that ARM requires approval

from the CSSF on its activities since it is evident that the company is offering bonds to the public on a continuous basis. Both these elements are distinctive (sic) for requiring CSSF approval on its activities".

79. On 10 December 2008 Mr Welman emailed Messrs Wilkins and Roberts about a recent meeting and a telephone conversation with the CSSF. He had not gained the impression that the CSSF were keen on ARM investing in assets other than SLSs which were "non-core higher risk" assets and the CSSF wanted securitisation vehicles like ARM (apparently still not identified) to be kept as " straightforward and simple as possible". He added that the Eneco litigation would have to be explained to the regulator and that it was difficult to predict what CSSF's response to the application would be. He concluded by stating that approval might be subject to certain conditions. Mr Roberts responded to that email on 11 December 2008 pointing out that the investment programme was clearly described in the prospectus. Mr Roberts' comment appears to be a reference to the fact that, as a securitisation vehicle, ARM was obliged to have its prospectuses approved by the CSSF, irrespective of whether it required a licence and thus ARM had, in the past, sent the CSSF copies of its prospectuses. Mr Welman agreed but noted "times have changed so could very well have their policy. I merely wanted to warn you that a positive outcome is not 100% sure. Time will tell."

80. On 12 December 2008 Mr Welman sought certain documentation which Loyens required for the application including Mr Robert's curriculum vitae ("CV") and a copy of his submission to the Authority for authorisation. These were apparently the last documents (other than the share certificates referred to below) awaited in order to submit the application. Mr Welman sent the CV (and Ms Moran sent the Authority material) to Mr Zanev on 17 December 2008 noting that all the documents required by Loyens had been supplied except copies of the transfers of two subsidiaries to Angelrose Ltd. These were obtained by Equity Trust by 16 January 2009.

81. At this stage we do not consider that Messrs Roberts and Wilkins should have concluded that there was a real risk that ARM's application to the CSSF would be unsuccessful. Mr Welman's reference to times changing may well have been an allusion to issues that were to confront both the Authority and CSSF in 2009 involving Keydata Investment Services Limited ("Keydata") which purchased bonds issued by special purpose vehicles incorporated in Luxembourg, SLS Capital SA and Lifemark SA ("Lifemark"). Keydata had also been involved in SLSs and, as transpired in 2009, had been subjected to a substantial fraud. Mr Roberts said in evidence that towards the end of 2008 Mr Welman had mentioned to him that there was a company carrying on a business involving SLSs which might be in difficulties. The Authority had started an enforcement investigation into Keydata as early as 2007. However Mr Welman was an experienced lawyer who had experience of the CSSF and, although he had expressed some caution over the prospects by indicating that it was not 100 per cent certain that ARM's application would be successful, his

communications to the end of 2008 did not suggest that there was a substantial risk that ARM's application would not succeed. However the issues raised by the Keydata affair were to have far reaching implications on the attitude of the Authority and the CSSF to companies dealing in SLSs.

82. In early 2009, Mr Wilkins' day-to-day role at Catalyst altered. Catalyst incorporated another entity (Catalyst Investment Group Europe SA ("**CIGE**")), in order to acquire Kobelco, which was at the time the largest broker network in Belgium. Mr Wilkins became director and interim-CEO of the new entity and was charged by Mr Roberts with heading up that acquisition. This was a major transaction and took his focus away from Catalyst towards CIGE and Kobelco. He was physically out of the office, in Belgium each week and sometimes as much as 2 to 3 days per week. This lasted until October 2009, although he kept his eye on developments at Catalyst during that period often following the email traffic on his Blackberry.

83. As a result, Mr MacPherson and Mr Whitehall took more of a role in dealing with the CSSF application.

84. On 16 January 2009, Mr Damste of Equity Trust reported back to Mr Wilkins. The email (which is partially redacted) appeared to identify two outstanding issues which were preventing the application from being submitted; one appeared to relate to the transfer of ARM's equity participations (i.e., non-insurance assets) into Angelrose Ltd and the other related to the financial statements. Mr Damste explained that although his colleagues were working on the financial statements they were waiting for information from ARM to complete them.

85. It appears that the preparation of those accounting statements took some time. On 12 February 2009, Mr Wilkins emailed Mr Stellini of MFSP Financial Management Ltd saying that he had been very disappointed with the service surrounding the audit and explained that following CSSF approval, ARM's accounts would need to be reported every 6 months. However, before the accounts were finalised, and the application submitted, a problem arose at Equity Trust which led to further delay in the application.

86. On 16 February 2009 Mr Welman informed Mr Roberts that Equity Trust was reviewing whether to continue the provision of its personnel as directors as the CSSF had been asking "very critical questions" in connection with companies dealing with SLS policies managed by Equity Trust. Equity Trust was further concerned as its personnel acting as directors had been sued in Holland in instances where the securitisation companies had defaulted. Mr Roberts replied to that email on the same date indicating that that was a matter of great concern as it implied that there was something wrong with ARM which, he wrote, was not the case.

87. Mr Wilkins on 17 February 2009 followed matters up by speaking to a Mr Colm Smith, formerly of the predecessor to Equity Trust, who stated that ARM should not be concerned about the stance taken by Equity Trust as Equity Trust was nervous as a result of Keydata and two companies which had defaulted in Holland. He added that Mr Zanev had indicated that CSSF now wanted audited accounts which was apparently standard practice and not a cause for alarm.

88. ARM lost patience with Loyens who appeared to be dragging their heels in progressing the application. A file note of a telephone call between Mr Roberts, the other ARM directors and Mr Whitehall on 18 February 2009 records Mr Roberts indicating his irritation with Loyens over the time it had taken to submit the application and his concern that Equity Trust might withdraw the services of Messrs Welman and Weijermans..

89. On about 21 or 22 April 2009, Equity Trust arranged for Loyens to be replaced by Arendt & Medernach ("Arendt"). In an email from Mr Welman of Equity Trust dated 21 April 2009 to Messrs Roberts and Wilkins about the change in lawyers Mr Welman wrote "we all know that [the application] has become of the utmost importance since ARM at the moment is acting in conflict with the securitisation law now that it is clearly offering to the public on a continuous basis". The email also identified potential replacement directors for ARM's board.

90. Arendt made enquiries of the CSSF and sent an email to Mr Roberts and Mr Wilkins on 28 May 2009:

> "We have contacted on an informal basis the Luxembourg regulatory authority…They confirmed the absence of a precedent to our situation (i.e. a securitisation SPV already issuing to the public on a continuous basis requesting to be regulated), and that regularisation of the situation was possible. They also confirmed that at first sight the procedure for such a situation should not differ from the normal procedure. They finally said that they would check the question of potential sanctions on such securitisation company [sic], which should however be groundless."

The email also listed outstanding information required by Arendt before an application could be submitted including a large amount of data relating to all the securities issued. It is clear that by May 2009 at the latest, the Applicants knew (if the CSSF did not know already) that the CSSF was aware that Arendt's (unnamed) client was issuing bonds "on a continuous basis"; and that ARM's lawyers considered that any sanction for issuing bonds prior to authorisation was likely to be minimal.

91. Keydata was placed in administration on 8 June 2009 at the instance of the Authority and PricewaterhouseCoopers ("PwC") was appointed administrator. Shortly after its appointment PwC raised concerns that assets underlying the SLS Bonds might have been misappropriated. PwC informed the Authority that four offers to acquire Keydata's business had been received, one of them from Catalyst. The Authority, as

Ms Philippou said in her evidence, *was* interested in potential purchasers because of the ongoing enforcement investigation into Keydata's conduct and because of the Authority's wider concerns about the risks for investors in SLS bonds. Identifying a suitable purchaser might save investors from concern about the security of their investment. The Authority also instigated a review of firms that sold or distributed traded SLSs.

92. On 16 June 2009 Equity Trust chased Messrs Roberts, Macpherson and Wilkins for outstanding information required for the application and to appoint new board members as the CSSF required a securitisation company to have at least three directors, and at that time ARM had only one director, Mr Roberts. Mr Wilkins then chased personnel within Catalyst to supply the information. Thereafter there was discussion between Messrs Wilkins, Roberts and Whitehall as to various matters affecting ARM and the presentation of its application in relation to certain issues which were perceived to be sensitive such as Angelrose Ltd and the holding of the equity participations.

93. On or around 17 June 2009, Mr Mol was appointed as a director of ARM, increasing the number of directors to two. Mr Welman and Mr Weijermans of Equity Trust had resigned as directors on 12 June 2009.

94. The impact of the equity participations held through Angelrose Ltd on ARM's application continued to concern Catalyst and ARM. On 24 June 2009, Mr Wilkins emailed Mr Whitehall (copied to Mr Roberts) in relation to them and said that Arendt's advice was required. He explained that the participations were currently held in Angelrose Ltd (on the advice of Equity Trust). He noted that he knew that Equity Trust was concerned that the CSSF might not be happy with the arrangement and then suggested that the equities be transferred to a single cell of a protected cell company ("PCC") in Guernsey. That "cell could be dedicated to ARM and only hold these investments. ARM would therefore only have to show a set amount of shares in the PCC in its accounts. That would also make the onus of valuing the shares (and underlying investments) fall on someone else, leaving ARM at least a couple of steps removed".

95. On 29 June 2009 the Authority asked the CSSF if they had any concerns about ARM. On the following day the CSSF said they were not aware that ARM had applied for a licence and would contact ARM to find out how many offers to the public it had made in each year and indicated that if ARM issued more than three times per year then it required authorisation. On the same day Mr Lovegrove contacted Ms Moran to investigate any connection between Keydata and Catalyst – there was none – and also to find out about Catalyst's business. He asked for a copy of Key Features Documents and followed up with an email of the same date summarising his conversation. He copied that email to Mark Warren of the Authority's supervision department and to Ms Philippou (amongst others). Ms Moran replied on 1st July

confirming the information she had given to Mr Lovegrove and supplying the documentation requested. She also supplied a copy of ARM's audited accounts to 30 June 2008 and its half yearly accounts to 31 December 2008. There was a further conversation between Mr Lovegrove and Ms Moran on 2 July 2009.

96. A Note for Record prepared by Mr Lovegrove on 8 July 2009 notes under the heading "Promotional Literature" that the risk of non-qualification for compensation under the Financial Service Compensation Scheme ("FSCS") was disclosed by a statement that ARM was not regulated by the Authority or any other regulator and that compensation would not be available under the FSCS in the event ARM could not meet its liability. Mr Lovegrove also recorded that "PwC stated the firm's [ARM's] operations were 'in accordance with the Luxembourg legal and regulatory requirements' " in the audited accounts.

97. On 9 July 2009, the Authority informed Ms Moran that it would undertake a supervisory visit of Catalyst on 14 July 2009. The focus of the Authority's visit was directed towards establishing how Catalyst distributed SLS products and controlled the "associated risks". The Authority asked for particular documents to be made available to it including board and management meeting minutes, a list of all the products supplied by Catalyst, and a copy of all marketing materials. The email explained that two members of the supervision team, Mr Warren and Ms Buglass would accompany Mr Lovegrove.

98. Also on 9 July 2009 the CSSF wrote to ARM referring to Article 19 of the 2004 Law and asking to be provided with a breakdown of the number and frequency of issues of securities done to date by ARM and information as to the nature of distribution to confirm that an issue to the public had taken place.

99. On 10 July 2009 Mr Welman emailed Messrs Roberts and Macpherson and Mr Weijermans stressing the importance of ARM submitting its application. He had been visited by the CSSF and informed them that ARM was active in the "SLS business", that it was about to submit an application, and had been involved in informal talks with the CSSF through its lawyers.

100. The Authority's supervisory visit took place on 14 July 2009. During that visit, the Authority was informed that new tranches of the bonds were issued every quarter in dollar, Euro and Sterling across the Growth and Income Plans and with a variety of terms namely (5 year, 7 year and 10 years). The Authority did not raise the status of ARM with Catalyst during the visit or mention that it was in correspondence with the CSSF.

101. On the day after the visit, 15 July 2009, Mr Wilkins required Catalyst staff to review ARM's marketing material in the light of comments from the Authority, and

asked Mr Whitehall to get ARM's application to the CSSF submitted, ordering him to "chase every hour till it is".

102. Thereafter, Catalyst provided a considerable volume of material to the Authority (including in relation to Catalyst's financial promotions) and immediately following the visit Ms Moran, by email dated 15 July 2009**,** expressly reassured the Authority that Catalyst was already starting to look at immediate changes that could be made to Catalyst's sales distribution side. The Authority, by letter dated 5 August 2009, provided its own detailed feedback noting that Catalyst's compliance regime governing the distribution of products was weak and requiring specific actions to be taken within three months. The letter expressly stated that "we are concerned that the financial promotions that the firm has issued may not adequately convey the risks of the ARM products to financial advisers and their clients." The Authority would review the promotional material provided and revert back to Catalyst at a later date with its findings. There was no reference in this letter or by the Authority's representatives to the lack of authorisation of ARM.

103. On 16 July 2009 ARM replied to the CSSF's letter of 9 July 2009 stating:

> "In this respect, please be aware that we believe that our activities need to be authorised, as we are currently issuing bonds to the public on a continuous basis. We have appointed the law firm [Arendt] in order to assist us with this matter and [Arendt] have been in contact with your services on an informal basis a few week ago, in order to discuss the practicalities of our submission to the supervision of the CSSF."

and also stating that ARM hoped to submit its application the following week.

104. On about 20 July 2009 Catalyst issued a statement to its IFAs reassuring them of ARM's position. The statement emphasised that ARM was not regulated by the Authority or any other regulator and therefore no compensation would be available from the FSCS. When reviewing a draft statement to be issued by ARM in order to reassure investors following the collapse of Keydata, Mr Wilkins suggested that it "might be worth mentioning that ARM is currently seeking" CSSF approval. His suggestion was not included in the statement.

105. On 21 July 2009 the CSSF wrote to ARM complaining that the information requested in the letter of 9 July 2009 had not been supplied. The CSSF noted that ARM had informed it that ARM was currently issuing bonds to the public on a continuous basis. It requested ARM to supply the information without delay. The CSSF did not, at that time, request or instruct ARM to refrain from issuing bonds till its application had been submitted or approved.

106. ARM's application was submitted to the CSSF on 23 July 2009. On that day a copy of the submission letter from ARM to the CSSF was sent to Messrs Roberts, Wilkins, Macpherson and Ms Moran amongst others. The covering letter to the CSSF made it clear that ARM understood it required to be authorised. It referred to ARM's letter dated 16 July 2009 and referred to the fact that that letter stated that ARM needed to be authorised as it was issuing ARM Bonds on a continuous basis.

August to end-November 2009

107. On 12 August 2009 Mr Roberts attended a meeting with the Authority. The Authority took time to review the promotional material that had been supplied to it by Catalyst and provided detailed feedback to Catalyst following the completion of that review by letter dated 3 December 2009. The Authority concluded that Catalyst's promotional material was broadly compliant. However, it also said that more could be done "to proactively explain the inherent complexities and risks of its products to the IFAs that distribute them and the consumers who purchase them". It had a particular concern about sales to execution-only clients and required Catalyst to send an FSA-approved letter to those clients asking them to confirm that they had understood the nature and risks of the investment. At the hearing, the Authority argued that the comment was made before it was aware of ARM's regulatory position. The FSA and the CSSF were in contact in mid-2009 and the Tribunal believes that enquiries could have been made while the review was in progress

108. Thereafter ARM engaged with the CSSF in the provision of information relating to its application. Mr Wilkins is recorded as stating in a management meeting held on 31 August 2009 that the approval might take 3 months. In fact the CSSF considered it for two years before rejecting it on 29 August 2011.

109. On 1 September 2009, ARM opened its tranche 9 bonds for investment. The tranche was marketed by IFAs in the same manner as the previous tranches.

110. The CSSF sought further information on 2 September 2009 from Arendt. On 8 September 2009 Arendt sent the CSSF some of the further information requested including a copy of the bond register to 30 June 2009 (which showed ARM Bonds issued in April 2009) and a draft set of ARM accounts for the year ending 30 June 2009. However it could not supply the CSSF with an actuarial report or information relating to the Eneco litigation. On 14 September 2009 the CSSF chased again and required the additional information by 25 September 2009. On 17 September 2009 Mr Taillandier of Arendt emailed Messrs Roberts and Wilkins (amongst others) to report that he had had a phone call from the CSSF expressing concern at the delay in

ARM supplying information and emphasising the deadline of 25 September 2009. Mr Wilkins chased up the litigation summary at a Catalyst management meeting held on 21 September 2009 and on the following day chased for an actuarial report as an "absolute priority" by email to Mr Ranson, an actuary at Catalyst. On 25 September 2009 Mr Roberts expressed his intense dismay about a draft report on the Eneco litigation prepared by Mr Macpherson in strong terms and stressed the importance of ARM making a credible submission. He noted that "CSSF would shut us down if a substandard [application] is made". The email was followed by various strongly worded email exchanges between Mr Roberts and Mr Wilkins. On 25 September 2009 Arendt supplied the further information to the CSSF.

111. On 1 October 2009 ARM issued ARM Bonds on the usual quarter day. That issue was tranche 8. The last of the investors' funds applied to that issue would have been received at the end of August. Funds received in September, October and November, would, in the normal course, be applied to tranche 9, to be issued on 1 January 2010.

112. On 22 October 2009 ARM issued a letter to Catalyst recording an increase in its fees, which according to the letter took effect from July 2008.

113. On 4 November the CSSF reverted to Arendt seeking further information in relation to the Eneco litigation, the actuarial report, and raising questions in relation to Catalyst's monthly fee from ARM which was €140,000 per month, increased from €80,000 in the Arranger Agreement made on 1 October 2007, and the identity of the beneficial owner of ARM.

114. On 19 November 2009 Mr Roberts emailed the ARM directors, personnel at Equity Trust and Mr Wilkins about the future administration of ARM as it edged toward authorisation. Amongst other matters he referred to was the reclassification of an entry in the books of a loan to CIGE relating to the acquisition of Kobelco (Belgian brokers) as a pre-drawn commission.

115. On 20 November 2009 the CSSF telephoned Mr Taillandier of Arendt to say that ARM was acting in breach of Article 19 by issuing securities without authorisation. The call was followed up by a letter of the same date referring to the CSSF's letter dated 4 November 2009 (in error referred to as dated 20 October 2009) and asking for a response by 27 November 2009. The letter went on to record that ARM was currently in breach of the 2004 Law as ARM satisfied Article 19 and was issuing securities and was unauthorised. The letter ended "in this context, the CSSF asks you to put the issuance of securities on hold until regularisation of ARM". Mr Roberts immediately requested Mr Taillandier to express ARM's concern to the CSSF and to assure it that ARM would take urgent steps to deal with the matter.

116. On the same date Mr Mol emailed Mr Roberts to the effect that as Carlisle Management Company ("Carlisle") was regulated by the CSSF and he was also a director of Carlisle he could not afford any problems with the CSSF. He wanted the matter dealt with swiftly and he would not agree to the issue of new bonds till the matter was resolved. After a response from Mr Roberts which incorrectly suggested that ARM had applied for authorisation in November 2007 Mr Mol replied by email on 23 November 2009 that service providers would suggest that approval took three months but that was wishful thinking. Times had changed and it currently took much longer.

117. On 24 November 2009 Arendt wrote to the CSSF apologising for the unintended breach of Article 19 of the 2004 law and explaining that "this resulted from a complete misunderstanding by ARM which had received advice that it was permissible to continue to issue whilst an application for authorisation by the CSSF was pending". ARM wrote on the same day to the same effect.

December 2009 to 26 May 2010

118. On 1 December 2009 ARM opened tranche 10 for investment notwithstanding the request to cease the issue of bonds. The funds were paid to the receiving agents in the usual way.

119. On 2 December 2009 Ms Curnow emailed Messrs Macpherson, Roberts, Wilkins and Whitehall amongst others to the effect that the case worker at the CSSF had informed Mr Taillandier that he had made ARM's application a priority. At a meeting between ARM's directors and accountants and various personnel from Catalyst, Mr Taillandier stated that the case worker had indicated that he was not certain that ARM would receive its authorisation by early January and Mr Roberts indicated that he would look into whether it was possible to postpone tranche 9 which was due to be issued on 1 January 2010.

120. Also on 2 December 2009 Mr Roberts by email authorised Square Mile to make a number of transfers to "close down" tranche 9. Part of the monies raised in respect of tranche 9 were paid to ARM and part to Catalyst to satisfy its entitlement to commissions and also to pay interest due on some of the issued bonds. The email was copied to Mr Wilkins.

121. On 9 December 2009 the CSSF wrote to the Authority to report that ARM had confirmed in its letter dated 16 July 2009 that its activities "need to be authorised by the CSSF as ARM is issuing bonds to the public on a continuous basis" and that ARM had applied to it for authorisation on 23 July 2009.

122. On 9 December 2009 Mr Roberts worked with an employee at Catalyst, Mr Knight, over a further update to the CSSF. Mr Knight emailed Mr Roberts asking whether the draft was available for review and expressing concern that "what we say in this letter will create more queries than the queries it resolves so needs careful review". Mr Roberts responded: that he had "the same concerns and am in the process of rewriting…".

123. On 16 December 2009 ARM (represented by Messrs Roberts and Mol) and Mr Taillandier attended a meeting with the CSSF represented by amongst others Mr Buchholtz and Ms Campill (the Head of Securitisation). There is a dispute as to the tenor of the meeting. The Authority contends the general tenor was adverse to authorisation. Mr Roberts' view was that authorisation was still very much on the cards and he informed Mr Wilkins and Mr Knight after the meeting that he thought ARM would "get there" and summarised what he perceived to be the surmountable obstacles which was whether ARM qualified as a securitisation company and had sufficient liquidity. The file note prepared by Mr Taillandier records the CSSF as saying that they had serious concerns with ARM's application, referring to the delay in the application being made from 2007 to 2009 whilst bonds were issued and stating it should have been clear that authorisation was required. Amongst other concerns raised were the level of fees, the fact that ARM had built a distribution network and used investors' funds to do so, the non SLS investments (i.e., the non-core investments held in Angelrose Limited) and the lack of disclosure of the level of fees to investors. The Authority contends that the possibility of liquidation of ARM in the event of a rejection of the application was raised at the meeting albeit it was not recorded in the note of the meeting.

124. On 18 December 2009 the CSSF wrote to Arendt seeking clarification of certain matters raised at the meeting (including the assertion that ARM's counsel had contacted the CSSF long before the submission of the application) and seeking a substantial amount of further information. The letter asked for a response by 28 December 2009 "at the latest".

125. On the same date Ms Moran circulated a first draft of the December letter, which forms the subject matter of criticism against the Applicants, that was to be sent to IFAs and invited comments. She circulated the draft to Messrs Roberts, Wilkins, Macpherson and others. She then handed control of the letter to Ms Curnow who recirculated it with some amendments later on the same date. On 21 December 2009 Ms Moran emailed internally to the effect that she was content with the draft letter.

126. On 24 December 2009 Mr Lovegrove telephoned Mr Wilkins who was at home. The CSSF had been in contact with the Authority by email dated 23 December 2009 and indicated that they had no objection to the Authority contacting Catalyst to discuss ARM's application for authorisation. There must have been some discussion

between the CSSF and the Authority because the CSSF had mentioned the meeting of 16 December 2009 in Luxembourg to the Authority. In the course of that conversation Mr Wilkins described the history of the application. Mr Lovegrove asked Mr Wilkins if there had been any issues of bonds since the Authority's visit in July 2009 and Mr Wilkins informed him that there had been a further issue on 1 October 2009 but that there would be no further issues until the conclusion of the application process. He did not state that bonds were still being promoted and funds received by the receiving agents. Mr Lovegrove told Mr Wilkins that the CSSF had informed him that the decision of the CSSF was a stark one; either ARM's application would be granted, and past regulatory breaches would be wiped clean, or the application would be unsuccessful and the CSSF would bring proceedings to wind up ARM. Mr Wilkins indicated that he was unaware of the possibility of winding up and that Catalyst had not drawn up a plan for that eventuality but that one option might be for ARM to issue less than four issues of bonds per year.

127. Mr Lovegrove's note prepared on 28 December 2009 records that he then asked Mr Wilkins to "give him an idea" of the ownership of ARM and Catalyst. In relation to Catalyst Mr Wilkins informed Mr Lovegrove that Mr Roberts held 87 per cent of the equity and that the remaining 13 per cent was owned by a group controlled by a Mr Kinner. This answer forms the basis of an alleged failure by Mr Wilkins to inform the Authority of his own shareholding in Catalyst. He had apparently been gifted about 0.43 per cent of the shares in Catalyst (albeit he had not received a shares certificate or received a dividend from Catalyst, or been given the opportunity to vote his shares). Mr Lovegrove indicated at the end of the conversation that the Authority might contact Catalyst to obtain the latest figures on investors, the amount invested, and how many clients were invested.

128. On 28 December 2009 Mr Wilkins emailed Messrs Roberts and Macpherson in relation to a letter that was being sent to the CSSF later that day stating that he thought "we should be confident and bullish about the decision/ strategies taken . . . significant consequences if they pull the plug". That comment was echoed in a letter to the CSSF dated 28 December 2009 stating that it would be a disservice to investors if ARM was liquidated as retail investors had for the first time access to an investment which was uncorrelated to the stock market and had low volatility. Attached to the letter to CSSF was a schedule of bonds issued. The schedule showed issues from 30 November 2006 to 1 January 2010, the latter being tranche 9. Tranche 9 had not been issued but was described as a pending issue. The schedule showed the substantial amount raised in respect of tranche 9. The period for raising monies for tranche 9 would have closed at the end of November 2009. Monies received in December 2009 would have been in respect of tranche 10.

129. On 30 December 2009, Mr Wilkins was concerned that no update had been sent to investors. He emailed others at Catalyst to ensure that the December letter was

reworked to reflect that it was being sent after Christmas. Mr Wilkins confirmed that the letter would be sent from Mr Roberts and that he would obtain Mr Roberts' authorisation to use his e-signature.

130. Mr Roberts' approval was obtained and the December letter was sent on 30 December 2009 with Mr Roberts' signature. The letter was sent to all IFAs who had sold the ARM bonds to customers. The letter stated that: "We are pleased to advise you that in order to offer investors further reassurance in this current climate, ARM has made the decision to apply for authorisation from the...CSSF... Luxembourg's equivalent to the FSA in the UK ... This process is in its final stages... The next issue date will be sometime before the 31st March 2010 although it is expected to be 1st February 2010."

131. As noted above the December letter forms the basis of alleged failings by both Messrs Roberts and Wilkins.

132. The issue of tranche 9 was delayed until the end of January 2010.

133. On 7 January 2010 there was an offsite Catalyst management meeting at which alternative plans for Catalyst were discussed in the event that ARM's application failed. Ms Moran is recorded as expressing the view that the Authority would require Catalyst to have a disaster recovery plan and that a paper needed to be prepared on Catalyst's options should ARM be placed in liquidation.

134. On 8 January 2010 Ms Moran forwarded a copy of ARM's letter dated 28 December 2010 to the CSSF with enclosures to Mr Lovegrove.

135. The possibility of liquidation was discussed at a Catalyst management meeting on 11 January 2010. At that meeting, Mr Blair is recorded as expressing strong concerns that Catalyst was not ready should the worst case scenario with the CSSF prevail and said that Catalyst needed to be "proactive not reactive". Mr Rayment suggested that Mr Blair meet with Mr Roberts and Mr Wilkins (the latter had attended that management meeting) to voice those concerns.

136. On 11 January 2010 Mr Wilkins wrote to Mr Roberts making an offer to acquire his interest in Catalyst. The letter was a considered and substantial offer and proposed a good faith payment of £200,000 immediately upon a valuation being agreed.

137. Mr Macpherson accompanied by Ms Curnow took advice from lawyers in Luxembourg, Nauta Dutilh ("Nauta") as to the risk of ARM being wound up by the

CSSF. The advice as reported by Mr MacPherson and sent to senior management of Catalyst including Messrs Roberts and Wilkins was very positive. Nauta were firmly of the view that CSSF would only liquidate ARM if ARM were not responding to the CSSF and were ignoring them, taking the position that ARM did not need to be regulated. Furthermore it was not the practice in the financial services community to take deadlines set by the CSSF seriously. Mr Macpherson indicated he would ensure ARM kept its "foot on the gas" and ask Arendt to contact the CSSF. Alternatively Mr Roberts or Mr Mol could contact the CSSF directly.

138. On 13 January 2010 the CSSF wrote to ARM referring to the meeting on 16 December 2009 and noting that at that meeting the alternatives of authorisation or liquidation had been raised. It is noteworthy that there is no reference to liquidation in the notes of the meeting of 16 December 2009 which do not record the author but were probably prepared by Mr Mol or Mr Tallandier. After the possibility of liquidation was mentioned by Mr Lovegrove on 24 December 2009 in the course of his telephone conversation with Mr Wilkins the effect and consequences of liquidation were considered by Catalyst management immediately on their return from the Christmas break. Mr Roberts denies that there was any such reference at the 16 December 2009 meeting and we accept that. The letter went on to seek clarification on a substantial number of issues, asking some very searching questions including a justification of the fee structure, on exchange risk hedging, the extent of reserves, the absence of a liquidity provider, the acquisition of Kobelco by CIGE, its impact on ARM and the rationale of ARM lending €7.8 million to Kobelco. In addition CSSF wanted a valuation of the bond portfolio by an independent expert which it named. The CSSF requested a reply by 20 January 2010.

139. Mr Roberts emailed Messrs Wilkins and Macpherson, Mr Welman and others on 14 January 2010 stressing the importance of a proper response to CSSF.

140. On the same day Mr Wilkins emailed Ms Moran asking whether Catalyst needed to send another letter to IFAs or an offer to investors to have their money returned in the light of the delay. He sought her advice on this issue and whether Catalyst could continue to market the ARM Bonds.

141. By this time, Ms Moran understood that the CSSF knew that ARM was accepting applications and had received all the monies for the next (delayed) tranche and that the CSSF had also requested that ARM should not in fact issue the bonds for that tranche as she said in her interview with the Authority. She sought advice from BLG. They had experience of the bonds having been involved in advising Catalyst since the Authority's supervisory visit on 14 July 2009.

142. Ms Moran forwarded Mr Wilkins' email to Ian Mason of BLG and also sent

him the letter from the CSSF dated 13 January 2010 from which concerns about further delay had arisen.

143. Ms Moran and Mr Wilkins then had a telephone conference with Mr Mason. During the conversation, Mr Wilkins explained the position that ARM had reached with the CSSF. Mr Mason advised that provided the CSSF was aware that bonds were being promoted and monies raised and that there was no reason to believe that the CSSF was likely to refuse authorisation then it was a commercial decision, as distinguished from a regulatory issue, whether to continue promoting bonds.

144. Ms Moran reported to Mr Roberts on the advice that had been given by BLG and Catalyst then decided that it would cease actively to promote the bonds but would still accept applications as some IFAs were in the course of promoting bonds to their clients. Mr Moran subsequently recorded the advice that had been given (and the decisions that were reached) in an email that she sent to Catalyst's insurers on 7 December 2010.

145. On 17 January 2010 Mr Roberts emailed Messrs Macpherson and Wilkins to the effect that he thought "they (i.e., the CSSF) simply want to stuff us about so they don't make a decision and the whole thing folds". He indicated he was going to Luxembourg to sit in the lawyers' offices.

146. On the same day Mr Roberts emailed Mr Blair to ask him who was dealing with the issue of judicial liquidation and alternative jurisdictions. Mr Blair replied that he had received advice on the possibility of judicial liquidation from Arendt and that he and Mr Wilkins were considering alternative jurisdictions.

147. On 18 January 2010 Mr Roberts emailed Messrs Macpherson and Wilkins to the effect that the immediate objective was to ensure ARM could issue in January and that Arendt and Nauta were to be instructed that ARM needed their complete and undivided attention. He also added that a move to another jurisdiction would not work without the blessing of the CSSF as the "ill will" of the CSSF would follow ARM as it would have to disclose the reason for a move to a new regulator.

148. On 19 and 20 January 2010 there was an exchange of emails between Mr Wilkins and Ms Moran regarding a presentation which had been scheduled with IFAs. Mr Wilkins sought advice in relation to the compliance perspective of what the IFAs should be told. Mr Wilkins suggested to Ms Moran that full disclosure should be made to the IFAs and they should be told there was no fixed issue date. Ms Moran agreed with that course of action until advice had been received from the lawyers.

149. On 21 January 2010 ARM wrote to the CSSF in reply to the CSSF's letter dated 13 January 2010. ARM sought permission to issue the bonds, which should have been issued on 1 January 2010, at the end of January. The letter voiced the concern that if the issue did not go ahead, investors might lose confidence and seek to redeem the bonds in large numbers. The letter dealt with a number of other matters raised by CSSF. The letter also referred to ongoing fund raising activity including fundraising and liquidity management in the context of the findings of the Deloitte report which had been submitted to the CSSF. Attached to the letter as Appendix 6 was a schedule showing that funds had been raised in relation to tranche 9 (still referred to as having an issue date of 1 January 2010).

150. On 22 January 2010 Mr Watson of Catalyst sent an email to Mr Roberts regarding accounts that Mr Watson was working on for Catalyst which were to be submitted to the CSSF. The email was marked strictly confidential marked "Hotmail to Net" which appears to be a reference to the fact that it was sent from Mr Watson's Hotmail account, rather than his Catalyst email account. In his email, Mr Watson expressed concern about the fact that ARM had forgiven a debt owed by Catalyst to ARM in the sum of £2 million. Mr Watson noted that the transaction would show up as a related party transaction in Catalyst's audited accounts and said that "this is very awkward as the CSSF will see this in due course and may wonder why ARM would loan money to [Catalyst], which presumably spent it on various activities, and then forgive it". Mr Watson noted that he had previously said that that money was used to fund the Eneco litigation and that spending £2 million to protect the Eneco investment of €336,000 "seems unattractive". He was also concerned that ARM's letter to the CSSF of 21 January 2010 was misleading in suggesting that Catalyst's expenses had been financed out of the fees that Catalyst had charged ARM and not investors' money. Mr Roberts forwarded Mr Watson's email to Mr Wilkins.

151. On 25 January 2010 at a Catalyst management meeting Mr Blair reported that lawyers had been instructed in Ireland to set up a section 110 company there. That would allow the ARM business to move to Ireland. He is recorded as stating that that was the only commercial and viable option for ARM. A move would involve substantial work and legal fees but could be done in weeks rather than months.

152. On 25 January 2010, Mr Wilkins passed on to Equity Trust a request by certain pending investors in tranche 9 for a return of their monies. This appears to have led to an analysis of what funds ARM had raised in respect of tranche 9 and how they were being dealt with.

153. On 27 January 2010 Ms Spinks emailed Mr Wilkins supplying him with information about the funds raised in relation to tranche 9 which amounted to about $19 million (in different currencies). Ms Spinks added that approximately half the funds had been spent. Mr Wilkins forwarded the email to Mr Roberts and wrote that

they needed to discuss the issue of the spent funds. Mr Wilkins then wrote to Ms Spinks saying that post-approval by the CSSF, they would need to ensure that funds received and not yet invested were segregated.

154. On the 27 January 2010 the Authority wrote to Ms Moran in relation to the ARM application raising a large number of searching questions in order to assess the implication of the outcome of ARM's application on Catalyst as Catalyst's business was dependent on ARM and in particular what the impact would be on Catalyst if ARM was placed in liquidation. The letter also raised the question as to how client monies were held when invested in a "Catalyst product backed by ARM securities" and what the role was of Square Mile Registrars as receiving agents. This information request was made pursuant to Section 165(1) of the Act.

155. On 29 January 2010, Mr Wilkins reverted to Mr Ranson copied to Ms Spinks in relation to the tranche 9 funds asking him to provide Mr Roberts with details as soon as possible on why half the amount required for tranche 9 had been spent and what the plan was to recoup those funds if the issue did not go ahead, so that he could update ARM's Board. He concluded "This could be a real problem so please give it priority".

156. On the same date, Mr Wilkins emailed Ms Moran and Mr Roberts with the subject line "ARM sales". By this stage, Mr Wilkins appears to have become concerned there might be a problem for ARM to continue receiving investors' money. He wrote: "As discussed there are still sales coming in despite no fixed issue date. I don't think we should be taking new funds in but I know you are waiting on advice from the Lux lawyers as to possible outcome with the CSSF before clarifying this point with the FSA". In response, Ms Moran sent a further chaser to Mr Macpherson to ask whether Arendt had advised about the continuing promotion and sale of ARM Bonds whilst the CSSF enquiries were being made. Mr Roberts responded saying that he had spoken to Mr Dupont of Arendt and they had left any decision or discussion until they had spoken to the CSSF later that day.

157. Later on the 29 January 2010, Mr Ranson emailed Mr Roberts, copied to Mr Wilkins, with an explanation of how the tranche 9 monies had been spent and suggesting that the shortfall could be made good by taking the money out of the general investors' fund. ARM had $9.5 million in cash in ING bank accounts and close to $19 million of unissued tranche 9 bonds. The shortfall could be repaid out of policy monies and policy loans. Mr Wilkins said in his evidence that he obtained some reassurance from this email.

158. On 1 February 2010 Mr Buchholz of the CSSF rang Mr Roberts directly and said the CSSF would not allow a further issue whilst they considered ARM's application and informed Mr Roberts that the CSSF wanted to meet with ARM shortly.

159. A meeting was held with the CSSF in Luxembourg on 4 February 2010. The meeting was long and divided into two parts. The first focused on the business and actuarial issues that the CSSF wished to explore. Mr Roberts had invited representatives of PwC, Maple Life (a US SLS provider) and Catalyst's actuary and head of investment to assist him, Mr Mol, Mr Macpherson and Messrs Dupont and Taillandier of Arendt in this part. The meeting reconvened to discuss other aspects of the authorisation. The CSSF recorded the two parts separately. Ms Campill opened the meeting by stating that it was an exploratory meeting and no decisions would be taken. A note of the meeting (prepared on behalf of Catalyst) records Ms Campill stating that the CSSF was keen to authorise ARM but various issues raised at the meeting had to be addressed urgently. The CSSF's meeting notes record that Ms Campill outlined some of the difficulties with the application including the mismatch between assets and liabilities. Ms Campill believed that ARM should have a permanent cash reserve and not rely on new issues to provide liquidity. She addressed the exchange risk and lack of hedging. Also the CSSF were concerned at ARM's monies being used to finance Catalyst and the lack of transparency on fees charged to investors. The CSSF was informed that the transaction under which monies were paid by ARM to finance the acquisition of Kobelco had been redesignated as a pre-payment of commissions as it was agreed that it was not acceptable under the securitisation law for the monies to be treated as a loan. Ms Campill also referred to the use of ARM's funds to finance the Eneco litigation albeit it was explained that ARM was also involved in the litigation. The CSSF note of the first part of the meeting concludes that the CSSF would consider the application as soon as possible. However, the CSSF note of the reconvened and smaller meeting records that "a lot of information is missing and it's very difficult for the CSSF to make a decision".

160. On 5 February 2010 Mr Roberts emailed Messrs Wilkins and Macpherson to the effect that ARM no longer faced liquidation if not authorised.

161. On 8 February 2010 Catalyst wrote to the Authority that the CSSF had stated that it would either grant ARM's application or it would suspend any application to place ARM in liquidation to give it an opportunity to move to another jurisdiction. Attached to the letter were a number of appendices setting out the answers to questions raised by the Authority and supplying information requested. An earlier draft of this letter dated 5 February 2010 contained a paragraph referring to monies raised in relation to pending tranches 9 and 10 (in relation to tranche 10 described as monies received after 2 December 2009). When the letter was sent on 8 February 2010 the paragraph with that reference had been deleted. The draft was copied to the Applicants. The amended draft omitting the reference was not copied to Mr Wilkins.

162. On 9 February 2010 Mr Wilkins resigned from Catalyst with effect from 30 April 2010 but as he was owed some holiday; his last day in the office was to be 16 April 2010. In fact he brought his resignation forward to 23 March 2010.

163. Mr Wilkins informed one of the large IFAs, Rockingham, on 8 February 2010 that a decision from the CSSF should be received shortly. That was consistent with evidence given by Mr MacPherson to the Authority that Mr Roberts had told him that Arendt had suggested a likely timescale of two weeks following the meeting on 4 February 2010**.** Mr Wilkins in an email dated 15 February to Messrs Forster and Hunt stated that the CSSF were expected to determine the application by the end of that week, and in an email sent 17 February 2010 expressed the hope that ARM would hear the outcome by 19 February 2010.

164. On the 17 February 2010 Mr Roberts (and Ms Moran) called Mr Lovegrove to update him on developments with the CSSF and the meeting of 4 February 2010. Mr Roberts expressed the view that having expected a somewhat hostile reaction from the CSSF in relation to SLS as an asset class he had found the CSSF to be open, frank and not in any way "closed minded to SLS as an asset class" and the meeting had been "the opposite of what we had expected". He also updated Mr Lovegrove on the practicality of a move to Ireland but stated that he thought the possibility had receded somewhat in the light of the positive meeting on 4 February.

165. On 19 February 2010 the Authority wrote to Catalyst following up the conversation on the 17 February 2010 and referring to the possibility of ARM being permitted to move to another jurisdiction in the event the application for authorisation failed. The Authority asked for a large amount of information in relation to such a move and clarification of certain points from Catalyst's replies to questions the Authority had raised in its Section 165(1) letter of 27 January 2010. It also sought an explanation for Mr Roberts' opinion expressed in the conversation that authorisation was more likely than not.

166. On 19 February 2010 Mr Macpherson emailed Mr Taillandier (copied to Messrs Roberts and Wilkins, and Ms Moran) in relation to the marketing of the bonds. He stated that so far as he was aware, the CSSF had stopped the issuance of ARM Bonds but had not said anything about "our continuing to sell the Bonds".

167. On 22 February 2010 Ms Moran emailed Messrs Wilkins and Roberts (amongst others) that Arendt were going to discuss the continued marketing of the bonds with the CSSF that morning. That day Mr Taillandier emailed Mr Macpherson, Messrs Roberts and Wilkins and Ms Moran to the effect that he had spoken to Miss Campill in relation to ongoing marketing and her response was to the effect that

"Catalyst should take its responsibilities and appreciate how far it can go in promoting ARM's product knowing that ARM is prohibited of [sic] making new issues until further notice... She wanted to discuss it internally and told [sic] that she will come back to me should anything requires [sic] to be added on the above".

There is no evidence that Miss Campill did revert on this issue.

168. On 24 February 2010 Mr Peter Smith, Head of Investments Policy of the Authority made a speech in which he said that the Authority had a particular, but not mainstream, interest in Traded Life Policy Investments including SLS and had as at February 2010 found significant problems with them. The speech described the main risks to investors and briefly outlined the Authority's expectations of providers and IFAs who promoted the products.

169. IFAs were making regular contact to see whether or not ARM had been approved and Mr Wilkins therefore decided that it would be appropriate to send another letter to IFAs with an update as to the current position with the CSSF. In an email dated 4 March 2010, Mr Wilkins said to Ms Spinks "We have to get Tim to make a decision on this [an IFA update]. I think we need to be communicating again with distributors. We can't keep waiting for the CSSF."

170. Mr Wilkins followed this up with a further email to Mr Roberts on the same day:

> We are fast approaching the next scheduled issue date meaning that we will soon have two tranches unissued, 9 and 10.
>
> As per Alison's recommendation we have only sent the one letter so far but I think we can't wait much longer to get in touch again to update where we are / aren't. I think we should also be contacting the investors as well as the IFAs.

171. Mr Roberts forwarded Mr Wilkins' email to Arendt on 4 March 2010, who then spoke to the CSSF and reported back on their conversation to Mr Roberts, Ms Moran and Mr MacPherson (but not Mr Wilkins) on 5 March 2010. According to Arendt, the CSSF were still looking at the documents that had been submitted by ARM and were likely to want another meeting with ARM to discuss the application. Arendt reported that the CSSF considered it was too early to form a view but that Miss Campill had indicated that if approval were to be granted, it would be conditional including requiring ARM to have a facility to ensure liquidity.

172. On 4 March 2010 Ms Moran sent a letter to Mr Lovegrove replying to the questions the Authority had raised in its Section 165(1) letter of 19 February 2010.

173. On 5 March 2010 Catalyst sent out a letter signed by Mr Macpherson updating IFAs on the position. The letter stated that any funds which have been invested in the "last few months" since the last issue in October 2009 remain with the receiving agents pending the next issue. The letter stated "we recommend that the ARM bonds should not be actively promoted until authorisation. Nevertheless, ARM continues to accept funds should your clients wish to continue in the interim." and "we are optimistic that ARM will be able to issue by the end of March"

174. On 10 March 2010 Mr Lovegrove telephoned Ms Moran to confirm the situation in relation to "new policy investments" (i.e., new bonds). Ms Moran told him that investors' monies for pending investments (which we assume must be funds received after 31 August 2009) were being held by Catalyst's receiving agents and had not yet been invested in bonds pending the CSSF's decision. That conflicted with the information supplied to Mr Wilkins on 27 January 2010 and was incorrect. Half of the tranche 9 monies had been applied in payment of interest, to ARM and to Catalyst in respect of fees and commission.

175. The CSSF wrote to ARM again on 10 March 2010 asking for information about the unissued tranches as it had become aware that an IFA in Malta was telling the public that Tranches 9 and 10 had successfully closed and the CSSF were concerned lest ARM had acted in breach of the request to stop issuing bonds made on 20 November 2009. ARM replied on the same day to the effect that no ARM Bonds had been issued after 1 October 2009. The letter enclosed a copy of the December letter and the 5 March 2010 letter. The CSSF did not react to the statement in the 5 March 2010 letter that monies had been received in respect of the pending issues.

176. Ms Moran wrote to the Authority on 12 March 2010 providing another update as to the changes and improvements Catalyst had made with respect to its distribution arrangements. Ms Moran provided feedback from the IFAs on the actions it had taken (and been required to take) following the Authority's review of the financial promotions. The Authority did not respond to the letter to indicate that the promotions should be withdrawn or otherwise amended to include further information about ARM's regulatory position.

177. On the 15 March 2010 there was a Catalyst management meeting attended by Messrs Roberts, Wilkins and Macpherson amongst others. The minutes of the meeting records Mr Roberts as saying that ARM expected to hear from the CSSF within a week. If the decision was positive it would be conditional. In case the application failed, the Irish structure should be put in place.

178. In the latter half of March 2010 Catalyst was finalising its annual accounts.

On 19 March Mr Knight emailed Mr Roberts about the accounts noting that the lack of response from the CSSF to ARM would be referred to in the auditor's report ". . . so this is now likely bad news for Catalyst". Mr Roberts replied on the same day that the auditors needed to understand that Catalyst did not need a response from CSSF to continue its business. As soon as ARM was registered in Ireland it would issue.

179. As noted above Mr Wilkins ceased to be a director of Catalyst on 23 March 2010.

180. On 24 March 2010 Mr Warren of the Authority emailed Ms Moran regarding the fact that Catalyst was accepting new investments via intermediaries which the Authority considered raised a number of issues. He wanted Catalyst to consider "whether it was appropriate to continue accepting these funds and whether uninvested monies should be returned to investors". He also wanted Catalyst to consider whether a variation of permission, currently submitted to the Authority, to consider new products which were connected to the SLS market was appropriate. The meeting requested in that e mail was subsequently arranged for 31 March 2010.

181. The March letter updating the Income Plan Pending Investors in tranches 9 and 10 was sent by Catalyst on 26 March 2010. The letter was principally drafted by Ms Spinks and Ms Moran, although it is clear from Ms Spinks' email of that date that Mr Roberts had significant input into the draft and that Mr Wilkins' suggested text had been deleted. The letter was categorised as Level 2 and in accordance with the procedure devised by Ms Moran did not require formal approval from a director. Mr Rayment was the signatory on the letter. The March letter stated "ARM is in the process of making some changes to its corporate structure which ARM believes will be in the best interests of the bondholders. As you are aware, the ARM Programme is listed on the Irish Stock Exchange and we are instructed that the ARM Board believes that it is advantageous for ARM to be either regulated in Luxembourg or have the issuer domiciled in Ireland, under the same organisation. ARM will initiate its next issue once these changes have been completed. We have been advised by ARM that it anticipates that this will take place shortly". The letter also explained that for the pending tranche 9 and 10 investors, whilst the bonds had not been issued, interest (equivalent to the coupon that would have been paid on the bond if issued) would be paid into their account for the preceding quarter.

182. The March letter forms the basis of an allegation against Mr Roberts alone.

183. On 26 March 2010 Catalyst's auditor emailed Mr Roberts. He was concerned that Catalyst's accounts could only be signed off whilst the "licence remained

suspended" if the going concern paragraphs were included. For these paragraphs not to be included the auditors would require documentary evidence from the relevant authorities that the "suspension" had been lifted. Mr Roberts replied that there "was no suspension whatsoever". The auditors replied that they had been informed that no bonds had been issued since "Jan 10" and the switch to Ireland was being considered to resolve the position. Mr Roberts replied reiterating that there was no suspension and that lawyers had previously advised that ARM could continue issuing whilst the application was pending but the CSSF has asked ARM not to issue pending authorisation. He added that "he chose to regulate ARM as a sales gimic" and ARM did not require to be regulated.

184. On 29 March 2010, Mr Lovegrove contacted Ms Moran by email to confirm the meeting on 31 March 2010. The email indicated that the Authority (in addition to other matters) was concerned to discuss the position of IFA clients who had invested since 1 October 2009 and how their monies were being held. The meeting was held on 31 March 2010 and attended by Mr Roberts, Ms Moran and Mr Ling and Mr Mason (and a representative from Maple Life for part) on behalf of Catalyst. The agenda was primarily around the Authority's concerns about the structure and inherent risks within ARM's portfolio including liquidity, currency exchange risk and mortality risks but also included the marketing and distribution of the bonds and ARM's regularisation in Luxembourg. Mr Roberts indicated that a permanent credit risk and currency hedging would reduce the return to investors. As agreed at the meeting, after the meeting Ms Moran sent the Authority a spreadsheet showing the total amount of pending investment in tranches 9 – 11, albeit no bonds had been issued since tranche 8. The amounts were substantial totalling £14.23 million, €13.91 million and US$1.60 million. There was no recorded expression of concern in the Authority's note of the meeting about the fact that Catalyst was still accepting funds.

185. On 2 April 2010 the CSSF wrote to ARM stating that a decision on the application was under consideration and in the meantime neither the registered office nor its assets could be transferred to another jurisdiction.

186. On 9 April 2010 the Authority wrote to Catalyst requesting it to consider a Voluntary Variation of Permission to discontinue any further sales of ARM products pending the CSSF's decision and a satisfactory response to a request for further information in the letter. The letter raised a number of concerns in relation to Catalyst and noted that the March letter appeared to be misleading in a number of respects including implying that authorisation in Luxembourg was a formality and was voluntary as opposed to being a requirement, and the reference to a change to Ireland implied that ARM was ready to move its business there which the Authority did not believe to be the case. The letter expressed the Authority's concern that Catalyst had not been frank with investors since the end of September 2009 in relation to the reasons for the application

187. On 13 April 2010 Mr Wilkins (who had left Catalyst) emailed Mr Macpherson and Mr Roberts asking "has someone checked to ensure that there is sufficient cash to cover these fees [ARM Board paper proposal] without touching tranche 9/10 funds that have been invested but not yet had bonds issued in return? Obviously those funds must remain intact in case they need to be returned".

188. On 15 April 2010 Mr Bijnens who had been a director of ARM had resigned and was replaced by Niall Liambert. At the ARM Board meeting of that date it was resolved that all funds received from Tranche 9 investors should be returned and ARM would add the amount of commission deducted in relation to those investments (10 per cent) and paid to Catalyst and would pay the receiving agents "as soon as reasonably practical" the commission deducted in respect of investors' monies raised for tranches 10 and 11. It was noted that IFAs representing investors amounting to 60 per cent of monies raised in respect of Tranche 9 had indicated that the investors did not want their monies returned but wanted their monies invested.

189. On 28 April 2010 Catalyst wrote to the Authority to the effect that a voluntary variation of its permission was neither necessary nor appropriate and sought to answer the request for information in the Authority's letter of 9 April 2010. The letter emphasises that at no time prior to 20 November 2009 had it been suggested that ARM was required to cease issuing bonds pending authorisation.

190. The Authority emailed Ms Moran on 6 May 2010 asking how Catalyst proposed to fund itself under two of the business scenarios it had been modelling which showed a cash shortfall of between £200,000 and £750,000. Ms Moran replied on 12 May that some of the funds would come from a costs order (which might produce £160,000 to £200,000 in about three months) obtained by Catalyst in the Eneco litigation and Mr Roberts was trying to mortgage his house which would raise additional funds of £300,000. This response – predictably – did not inspire confidence in Catalyst on the part of the Authority.

191. On 18 May 2010, ARM plc was incorporated in Ireland; accordingly, ostensibly, certain steps were in place to effect a change of jurisdiction

192. In response to Catalyst's letter of the 28 April 2010, Mr Lovegrove wrote on 1 June 2010 to Ms Moran seeking further information in relation to ARM's finances and promotional material.

193. On 26 May 2010 the Authority issued its First Supervisory Notice which (amongst other matters) required Catalyst to cease any business linked to the bonds. The grounds for the issue of the Notice were a perceived risk to consumers. The

Authority required the Notice to be kept confidential as publication might prejudice consumers as it would probably precipitate redemptions.

194. There were a number of interchanges between Catalyst and the Authority in relation to the First Supervisory Notice and its scope. On 4 June 2010, Ms Moran wrote to the Authority setting out the concerns with the restriction on publicity. Attached to the letter was a draft of two letters which Catalyst intended to send to the pending investors and key IFAs*, and* the Authority's comments were sought on these drafts. In addition, an update was provided to the Authority as regards the position with Ireland; in particular, attached to the letter was the advice that had been received on 2 June 2010 from the Irish lawyers, A&L Goodbody, which stated that "…merely issuing bonds of the type contemplated by ARM PLC is not 'regulated' by the Irish Financial Regulator…" According to the legal advice, relocating to Ireland appeared to be a straightforward exercise, with no regulatory impediment.

195. On 9 June 2010, nearly a year after the application was made the CSSF informed ARM that it was minded to refuse the application for authorisation; the reason related to the fact that ARM did not have a permanent facility providing liquidity. However it confirmed that the CSSF would allow a window of opportunity for relocation to the Republic of Ireland. Ms Moran informed the Authority of the CSSF's position on 9 June 2010. The Authority replied on 10 June 2010; it provided suggested amendments to the draft letters to be sent to IFAs/bondholders. As for the specific concerns raised by Catalyst in respect of the non-disclosure restriction, the Authority stated:

> "…our initial supervisory view is that the purpose of including the non-disclosure restriction in the First Supervisory Notice was to minimise the possibility of a redemption run…"

The letter also took issue with the legal advice received from the Irish lawyers, on the basis that it did not contain "a suitably thorough analysis of what ARM's intentions are and whether or not any activities carried out in the Republic of Ireland would require regulatory authorisation…" Consequently a more detailed advice was obtained on 13 August 2010, a copy of which was given to the Authority. No criticism was made of that advice. However, the Authority's letter of 10 June had reminded Ms Moran that while the First Supervisory Notice did not prevent Catalyst exploring with ARM the setting up of a Section 110 listed company in the Republic of Ireland and for ARM to move its operations there, the Notice did prohibit Catalyst from undertaking any regulated activity involved in new business or products related to investments issued by ARM even if ARM became a different entity in the Republic of Ireland.

196. On 14 June 2010, ARM and Catalyst had a meeting with the CSSF. At this meeting the CSSF confirmed that the CSSF had not made a determination on the

application but considered that they would allow ARM to move to an alternative jurisdiction and would so inform the Authority and the Irish regulator.

197. Ms Moran wrote again to the Authority on 16 June 2010 providing yet more information in relation to the activities of ARM, and providing the information requested by the Authority in relation to pending investor funds.

198. On 29 June 2010, Catalyst made written representations to the RDC against the Notice. The written representations of Catalyst make clear that, as at that date, Catalyst believed that the CSSF was content with ARM moving to an alternative jurisdiction.

199. In July 2010, Catalyst confirmed that it was unable to procure the return of money to Pending Investors as that was a matter for ARM to consider with the receiving agents. By that point, Catalyst had arranged or effected the remittance of £17.1 million of UK investors' funds for pending tranches 9 to 11 of the ARM bonds. Those funds had been received into receiving agents' accounts controlled by ARM. From those funds, ARM paid interest (equivalent to the coupon on the bonds if they had been issued) to Pending Investors of tranches 9 and 10 and commissions to Catalyst. Catalyst, in turn, paid commissions to various intermediaries.

200. On 13 August 2010, ARM obtained a detailed opinion from A&L Goodbody in relation to the ability of ARM to relocate to Ireland. This opinion was disclosed to the RDC the same day. In addition the RDC was also provided with a draft letter to be sent to pending investors and a further advice from A&L Goodbody as regards ARM plc replacing ARM SA as an issuer.

201. On 17 August 2010, an RDC hearing took place to consider the Authority's supervisory notice of 26 May 2010. At that hearing the Authority agreed to amend the notice to give Catalyst further time to relocate to Ireland. The Authority did not require Catalyst to write to existing bondholders to give them further information. The notice was not published until some 13 months later in September 2011. The reason given by the Authority was that:

> "…In August 2010, the FSA took the decision that publication of information about the matter to which this supervisory notice relates would have been prejudicial to the interests of consumers since it was likely that publication of the notice would have precipitated redemptions which would have a detrimental effect on the value of the portfolio, and consequently on the returns available to bondholders as a whole. As such, the notice was not published…".

202. Catalyst co-operated with the Authority to draft a letter for pending investors. The letter sent in September 2010 offered pending investors in tranches 9 – 11 a full refund if they so desired; of a possible 640 pending investors very few took up the offer. It is contended by Mr Roberts that this is significant and that it demonstrated

that contrary to the Authority's position, pending investors did not feel that they had been misled by Catalyst or ARM by the letters of 30 December 2009 and 26 March 2010 notwithstanding the disclosure of the regulatory risks required by the Authority. Further to the extent that these pending investors might suffer a loss in future, blame for that cannot be laid at the foot of Catalyst's door, given that Catalyst had provided them with two opportunities for claiming a refund.

203. Throughout August 2010, the efforts to relocate to Ireland intensified. The Irish Stock Exchange had approved the prospectus. Despite the Irish Stock Exchange approval, the Central Bank of Ireland ('CBI'), without any prior warning, then queried the content of the prospectus. The CBI had previously approved ARM's base prospectuses dated 3 August 2007, 11 September 2008 and 18 November 2009, without objection. Ms Moran stated, even in August 2010, the CBI was giving verbal assurances that it would approve the new prospectus once it was updated to include information on communications with the CSSF and the Authority. In light of this positive indication Ms Moran and others worked over the August bank holiday weekend to get the contents of the prospectus approved.

204. On 5 November 2010, the CBI wrote to ARM explaining that it was treating ARM as a bank, and thereby removing the exemption that would otherwise have applied. Mr MacPherson confirmed in his compelled interview that Catalyst had obtained a legal opinion from Brian Murray QC in Dublin, which stated that the approach of the CBI was unlawful. In 2011, discussions between ARM and the CBI continued, however given that the CBI was treating ARM as if it were a bank, it was not possible to broker a compromise.

205. Eventually on about 9 October 2013 ARM was placed in provisional liquidation by CSSF.

206. As a result of the release of the funds paid in respect of tranche 9 monies in excess of £17 million was placed in jeopardy as ARM contends that these funds belong to ARM (to the extent that the monies have not been spent). Monies paid in respect of tranches 10 and 11 (retained by the receiving agents) are claimed by ARM's liquidator on the basis that ARM contends that bonds were issued. To the extent that funds were repaid to pending investors in tranche 9 the funds appear to have been repaid out of other investors' monies held by ARM.

The promotion of ARM bonds from 20 November 2009 to 26 May 2010 (in the case of Mr Roberts) and to 23 March 2010 (in the case of Mr Wilkins) and the receipt of investors' funds

Lack of Integrity

207. The Authority's allegation against Mr Roberts and Mr Wilkins in relation to lack of integrity does not relate to the issue of the bonds whilst ARM was not regulated but to allowing (in disregard to investors' interests) the continuing promotion of bonds after 20 November 2009 (when the CSSF requested ARM not to issue bonds pending consideration of its application), arranging for ARM to receive investors' funds in relation to pending tranches without ARM's regulatory position being properly disclosed to investors, and taking insufficient steps to prevent funds from being raised in relation to pending tranches. This is alleged to have been reckless.

208. Mr Roberts' and Mr Wilkins' response to this allegation can (broadly) be summarised as follows:

a. In the case of Mr Roberts (but not Mr Wilkins) ARM did not consider that the application was required; the decision to make the application was a commercial decision to make the bonds easier to market;

b. At the time the letter dated 20 November 2009 was received from the CSSF, both were under the reasonable belief that ARM would obtain a licence and that the licence would be obtained prior to the date (1 January 2010) that the next bond issue (tranche 9) was due to take place;

c. The CSSF letter asked ARM to put further bond issues "on hold" and was silent as to the raising of further funds in relation to pending or future issues and, on the assumption that regularisation was probable, the CSSF was content for ARM bonds to be promoted and funds to be raised from investors;

d. As matters developed they considered a licence would not be required if ARM reduced its issues of bonds to three per year or relocated to Ireland where authorisation was not required; a move to Ireland would also avoid the risk of liquidation, i.e., bonds would be issued in any event, whether or not ARM obtained authorisation from the CSSF; furthermore, the application could be withdrawn;

e. The reason for the temporary suspension in the issue of the bonds was explained to certain of the IFAs including two of the IFAs who introduced most of the investors;

f. In the case of Mr Wilkins, when he appreciated that authorisation might be delayed, he took steps to try and safeguard funds received in respect of tranches 9 and following;

g. Mr Roberts and Mr Wilkins believed that the CSSF was aware that Catalyst continued to promote funds and therefore continued to receive funds;

h. The December letter relating to tranche 9 bonds sent to the IFAs included details of ARM's regulatory position. The purpose of the letter was to explain why the tranche 9 issue of the bonds was delayed;

i. Catalyst took advice from BLG as to the receipt of funds pending authorisation and were advised that whether or not it continued to promote the bonds and received funds was a commercial decision as distinguished from a regulatory decision. Accordingly, in relying upon the advice, both Messrs Roberts and Wilkins acted reasonably.

j. Subsequently Mr Wilkins pursued the issue whether funds should continue to be received from pending investors with Ms Moran;

k. Catalyst stopped promoting ARM bonds in January 2010 albeit IFAs continued to promote the bonds and send investors' monies to the receiving agents;

l. Mr Wilkins also demonstrated his concern for the interests of investors in other respects:

(a) In July 2009, Mr Wilkins suggested to Ms Moran (when the IFA promotional material was being amended, amongst other matters to state that ARM was not CSSF licensed) that the document should specifically state that ARM had made an application for a licence (although his suggestion was not taken up);

(b) Mr Wilkins pressed to get information to IFAs in the delayed tranche before its scheduled issue date so that they would know the position;

(c) In an email to Ms Moran dated 14 January 2010, Mr Wilkins specifically raised the issue whether or not Catalyst should continue to promote ARM in the light of continuing licence delays. This resulted in legal advice being taken to which Mr Wilkins was party;

(d) On 20 January 2010, he urged Ms Moran to chase for legal advice as to what they should say to investors;

(e) Before presentations were made to IFAs in January 2010, he checked with Ms Moran whether it was acceptable to proceed on

the basis of providing full disclosure of ARM's licence application with the CSSF, making it clear that there was no fixed date for the licence to be approved;

(f) When a particular IFA asked for the return of the funds that were held pending investment in tranche 9 as a result of the delay with the CSSF authorisation, Mr Wilkins processed that request without demur;

(g) On 27 January 2010 and 29 January 2010, he took steps to seek to ensure that investors' funds were properly segregated in ARM's accounts. Mr Wilkins remained concerned about this issue even after his resignation and chased others within Catalyst to ensure that the point was not lost;

(h) On 29 January 2010, he chased Ms Moran for legal input on whether ARM should still be accepting funds in the absence of a fixed issue date emphasising its urgency;

(i) On 4 March 2010, he suggested by email to Mr Roberts, Ms Moran, Mr MacPherson and Ms Spinks that investors and IFAs needed to be provided with an update regarding ARM's current situation.

209. Mr Wilkins in relation to the alleged misconduct also relies upon a defence that the allegation is barred by section 66 of the Act which imports a period of limitations.

210. We note that Mr Wilkins accepts that from 28 November 2007 he understood that the CSSF would consider that ARM required authorisation. Mr Roberts' position is different. He adverted to earlier advice given to ARM at about the time of its formation to the effect that the CSSF would not consider that it was issuing on a "continuous basis". His evidence was to the effect that the initiative for authorisation was ARM's and flowed from commercial considerations. The ARM bonds would be easier to market if they were regulated. Be that as it may, it is clear that by 23 April 2007 the ARM board understood that by issuing additional tranches of ARM bonds ARM ran the risk of being under an obligation to obtain authorisation and by 19 November 2007 Mr Zanev of Loyens had advised that by issuing more than three issues per year an entity was assumed to be issuing on a continuous basis. In the light of that advice we do not consider that Mr Roberts could reasonably have believed that the CSSF would not consider that ARM required authorisation. If he did not believe that the CSSF would consider that ARM required authorisation he was

closing his eyes to the obvious and ignoring the advice of ARM's legal adviser without any grounds for doing so. In the course of cross examination he accepted that he appreciated that ARM understood it required authorisation if it issued four times per year. He was also referred to an ARM company announcement of 2 November 2010 which stated that ARM became aware in 2007 that if it issued bonds more than three times per year it would require authorisation and therefore engaged Loyens to obtain an authorisation that month. Mr Roberts as the senior director of ARM would have approved that announcement.

211. Furthermore on 20 November 2008 Mr Welman emailed Mr Roberts stating unequivocally that ARM required authorisation as it was evident that ARM was offering bonds to the public on a continuous basis. On 21 April 2009 Mr Welman emailed the Applicants to the effect that ARM was acting "in conflict" with the securitisation law. Accordingly it is clear that by 20 November 2009 Mr Roberts (and Mr Wilkins who already understood that to be the position) had received an abundance of advice to the effect that authorisation was required.

212. We conclude that Mr Roberts understood by 28 November 2007 that the CSSF would consider that ARM required authorisation. Mr Roberts' protestations at certain times in his evidence that he continued to believe that authorisation would not be required through 2009 flies in the face of the comments made by Mr Welman. We do not consider that he had any basis for rejecting the advice and observations from his fellow director of ARM or ARM's lawyers. We also note that in an email of 29 September 2009 Mr Roberts wrote to Mr Wilkins in relation to various critical matters that authorisation was critical "as without it we can't sell anything".

213. Given that by 20 November 2009 it was apparent that ARM required authorisation, the issue is whether the Applicants acted with a lack of integrity in allowing Catalyst to continue to promote ARM bonds after the CSSF requested ARM not to issue bonds and whether they should have taken steps to ensure that funds were not raised through IFAs from investors without the regulatory position or the risks being properly disclosed. The contention by the Applicants was that at all times authorisation appeared probable, and at times, imminent. To the extent that authorisation appeared uncertain, ARM could either reduce the number of its issues to below three per year (as this would fall below the "continuous basis" "threshold) and withdraw its application, or it could relocate to Ireland where, during the relevant period, the legal advice was that there should be no regulatory obstacles. Accordingly, there was no lack of integrity in allowing investors' funds to be raised, as investors were not exposed to any appreciable risk. Furthermore the regulators were aware that funds were being raised and did not object, and legal advice was obtained to the effect that there was no regulatory objection to monies being raised from investors pending the issues of further tranches after authorisation was obtained.

214. It is apparent that from Arendt's email of 28 May 2009 that the CSSF had not had experience of an applicant for authorisation which was issuing securities on a continuous basis at the time of the application. However when the application was submitted the CSSF was aware that ARM was engaged in issuing bonds on a continuous basis. On 16 July 2009 ARM wrote to the CSSF stating that ARM was "currently issuing" bonds to the public on a continuous basis. The CSSF understood that position as is made clear in their letter dated 21 July 2009 in which they confirmed that Arendt had informed them that they believed that ARM required authorisation as it was currently issuing ARM bonds on a continuous basis. Arendt's covering letter to the CSSF dated 23 July 2009 sent with the application for authorisation also made the position clear. Thus Arendt knew the position, as did Mr Welman and Mr Weijermans (as noted above, both were lawyers as well as directors of ARM), and there is no evidence that ARM was advised to cease issuing ARM bonds from the persons who might have been expected to understand the positon. The conclusion we draw from that is that it was assumed that it was acceptable to continue to issue (and promote) ARM bonds pending the determination of the application unless the CSSF indicated otherwise.

215. On 20 November 2009 the CSSF telephoned Mr Taillandier and followed up the call with a letter asking ARM to refrain from issuing ARM bonds as ARM was acting in breach of Article 19 of the 2004 Law. ARM responded by agreeing to refrain from issuing ARM bonds and noted that it had acted on advice when it continued to issue pending authorisation. By 20 November 2009 a substantial sum had been raised in respect of tranche 9 which was due to be issued on 1 January 2010 – indeed the period for raising monies for tranche 9 was due to close at the end of November 2010. However the letter from the CSSF was not understood by the Applicants as asking or requesting ARM to ensure that ARM bonds were not promoted or that further investors' funds were not to be raised pending authorisation. Mr Wilkins accepted in cross examination that, after the letter of 20 November 2009, he appreciated that there was a risk that the application might be refused – albeit not a high one, at that stage.

216. However, once it was clear that the CSSF objected to the issue of bonds, the question of whether it was appropriate to continue to promote the bonds (with the attendant receipt of funds), and if so, the appropriate disclosure to IFAs and investors of ARM's position arose. The issue was raised by Mr Wilkins with Ms Moran by email on 14 January 2010; she, and Mr Wilkins, in turn sought the advice of Mr Mason of BLG in a telephone call. He advised that provided there was no reason to suspect that the CSSF might refuse the application there was no regulatory reason why ARM bonds should not continue to be promoted, and investors' funds raised, pending approval. In the light of the advice Catalyst took the decision not to actively promote the bonds but that it would continue to receive applications being dealt with by IFAs. Furthermore the question of promotion of ARM bonds was raised with the

CSSF directly on 22 February 2010 at the instigation of Mr Macpherson who raised the propriety of continuing promotion with Mr Taillandier who in turn raised the issue with Miss Campill. She informed Mr Macpherson that Catalyst should "take its responsibilities and appreciate how far it can go in promoting ARM's products knowing that ARM is prohibited of [sic] making new issues until further notice". She would discuss the matter internally and revert to Mr Taillandier if there was anything to add to her response. We have no evidence that she did so and we consider that if she intended to convey that promotion should cease she would have made that clear.

217. We note that the CSSF's letter, in requesting the cessation of issues of ARM bonds, did not expressly prohibit further funds being raised from investors. However, we do not consider CSSF was drawing a distinction between the promotion of ARM bonds and the receipt of funds as we consider the promotion of ARM bonds necessarily involved the receipt of monies to the extent that the promotion was successful. What nobody was focussing on at this stage was what the investors understood as to the regulatory position and how the pending investors' funds were to be dealt with pending the possible issue of further tranches. As noted above, the tranche 9 funds were not segregated and ring fenced and – at least some – had been applied by payments to ARM and Catalyst and in the payment of interest.

218. In December 2009 there is evidence that Mr Roberts considered that the application for authorisation was not going to be straightforward. Mr Roberts was concerned that a letter to the CSSF that was being prepared by Mr Knight with his input might raise more issues than it resolved.

219. On 16 December 2009 at the meeting with the CSSF (attended by Mr Roberts but not Mr Wilkins) there were further indications that authorisation might not be straightforward. ARM's lawyers' notes record that the meeting was opened by Ms Campill of the CSSF who said that the "CSSF has serious concerns with ARM" and identified seven such concerns, including the delay in making the application, the level of fees, the use of investors' funds to build a distribution network, the equity participations in Angelrose, the lack of disclosure of fees to investors, the manner in which certain of the proceeds were used which appeared to the CSSF not to conform with a securisation business and issues relating to the level of liquidity. In addition, at that meeting, she raised the question of whether ARM should be a securitisation company at all, asking for a "confirmation that the use of proceeds is [conform] with activities of a securitization company which the Commission at this stage thinks is not the case" (sic). The Authority contended that at this meeting the CSSF said that in the event that ARM's application was rejected, ARM would be put into liquidation. That is not reflected in the note and we do not accept that liquidation was raised at this meeting. Had it been we consider that ARM's representatives would have noted

it and there would have been a discussion in respect of the implications immediately following the meeting.

220. Following the meeting Mr Roberts reported in an email of 16 December 2009 to Mr Wilkins that he thought authorisation would be achieved but that the CSSF wanted more information, were unhappy with the non-core equity participations, the state of ARM's liquidity and whether or not it qualified as a securisation company. Certain of these issues were issues that Catalyst and ARM appreciated would be of concern to the CSSF and we consider that the discussion at the meeting should have been a cause of concern not only over the preceding two years but also a cause of concern to Mr Roberts, which he should have communicated to Mr Wilkins. Instead the somewhat laconic observation by Mr Roberts that he thought authorisation would be achieved did not convey fairly the degree of concern expressed by the CSSF as to the manner in which ARM was structured and carried on its business.

221. The meeting was followed up by the CSSF in a letter dated 18 December 2009 seeking a great deal of further information including in relation to the suggestion that ARM had been in contact with the CSSF in late 2007 through its previous legal advisers, the Kobelco loan (which ARM had been trying to restructure out of a concern that it was in breach of the 2004 Law) and asked for detailed information and supporting evidence relating to the Kobelco transaction. The letter sought a reply by 28 December 2009, i.e., within 10 days over the Christmas holidays.

222. On 24 December 2009 Mr Wilkins spoke to Mr Lovegrove over the telephone and Mr Lovegrove informed him that a consequence of a refusal of permission was that ARM might be wound up. The possibility of winding up was adverted to by Mr Roberts in a letter dated 28 December 2009 supplying information to the CSSF.

223. As noted above, we accept that there was no mention of the possibility of winding up until Mr Lovegrove mentioned it to Mr Wilkins on 24 December 2009.

224. The possibility of liquidation was discussed at Catalyst meetings on 7 and 11 January 2010, and thereafter Catalyst and ARM sought advice in relation to the possibility of liquidation and the possibility of ARM moving to another jurisdiction. The advice received was that the CSSF would not take steps to wind up ARM if authorisation was refused providing ARM was cooperating with the CSSF.

225. Mr Roberts recognised in an email dated 18 January 2010 that an adverse decision by the CSSF in respect to authorisation would not be helpful to ARM in moving to another jurisdiction. He also appears to have become pessimistic as to a speedy decision by the CSSF.

226. On 25 January 2010 Mr Blair reported to a Catalyst meeting that lawyers had been instructed to form a company in Ireland which would allow ARM's business to be moved to Ireland. That was expected to take a number of weeks. Advice was obtained from Irish lawyers (confirmed on 2 June 2010) that an Irish s.110 company issuing bonds would not be required to be regulated by the Irish Financial Regulator.

227. By the end of January 2010 it should have been even more apparent to Mr Roberts that there were serious hurdles for ARM to overcome in order to obtain authorisation. On 21 January 2010 ARM wrote to the CSSF seeking permission to issue tranche 9. That was refused on 1 February 2010 by Mr Buchholz of the CSSF who rang Mr Roberts directly. Mr Buchholz also informed Mr Roberts that the CSSF wanted another meeting with ARM. That meeting was held on 4 February 2010. It was attended by Mr Roberts (and others on behalf of ARM and Catalyst but not Mr Wilkins). It is described above and we note that the notes of the meeting prepared on behalf of Catalyst and the CSSF have a different tenor. We consider that the note of the meeting prepared by the CSSF gives cause for substantially less optimism as to the success of the application for authorisation than that prepared by a representative of Catalyst. The CSSF note records a substantial number of concerns held by the CSSF including that, even at this stage, the CSSF still considered that it lacked information on the business model and non-core activities of ARM. In effect these were the same concerns as had been expressed before and to which ARM did not appear able to provide answers or solutions which would allay the CSSF concerns.

228. We consider that at this stage anyone attending the meeting held on 4 February 2010 would have had serious concerns as to whether authorisation would eventually be obtained, and if so, when.

229. The view within Catalyst in early February 2010 was that a decision would be received fairly shortly, possibly within two weeks. Mr Roberts had passed on the views of Arendt to Mr Macpherson that a decision was likely within two weeks of the meeting with CSSF held on 4 February 2010. In early March the CSSF indicated that it might wish to have a further meeting to discuss the application and that the liquidity of ARM remained a major issue.

230. The Applicants contended that the fact that ARM had made the application was disclosed to IFAs by (amongst other matters) (i) the December letter and (ii) Mr Wilkins informing various IFAs (including Rockingham and MFSP) that ARM had made the application. Furthermore it was said that the IFAs knew from the promotional material that ARM did not have authorisation from the CSSF.

231. The December letter was drafted by Ms Moran (with the assistance of Miss Curnow) who was well aware of ARM's application and the reason for it, and signed

by Mr Roberts. The December letter was alleged not to give a clear fair and not misleading picture of the regulatory position and the risks of investing in that it:

a. did not state that in ARM's view ARM was required under Luxembourg law to be licensed to issue bonds;
b. failed to mention that ARM was in breach of the Luxembourg law by not having a licence;
c. implied that the application for authorisation from the CSSF was a voluntary act on the part of ARM as opposed to a requirement (if it was to carry on business issuing bonds as before);
d. implied that the bonds would be issued in the near future;
e. omitted to mention that if the bonds were not issued, pending investors might not get all of their monies back because some of the monies might have been applied in payment to ARM and Catalyst;
f. omitted to mention the risk faced by pending investors of ARM's liquidation if the licence was not obtained in that the investors' funds might form part of ARM's general funds available to meet the claims of all its creditors.

232. Mr Wilkins admitted that he bore responsibility for approving the December Letter and that it was defective in that (i) it did not mention that ARM's view was that it required a licence, (ii) it made no mention that the CSSF's opinion was that ARM had acted in breach of the securitisation law and had asked ARM not to make any further issues, (iii) it implied that the application was voluntary rather than mandatory and (iv) the letter was misleading in not referring to the risk of liquidation if the application was rejected. We consider that these admissions were correct and that the letter was defective in that it did not give a clear, fair and not misleading description of the position in relation to these respects. We also consider that the letter was misleading in that it did imply that authorisation was certain in that after referring to the application being at its closing stages it referred to "formal approval" and stated that the "next Issue Date . . . will be sometime before the 31st March 2010 although expected to be 1st February 2010" without referring to the possibility that the application might be refused. Furthermore, as funds were not held in a segregated account, we consider that the December letter should have referred to the possible loss of investors' funds if they were applied in payment to Catalyst and ARM and the bonds were not issued, and should have referred to the possibility of ARM's liquidation.

233. Mr Roberts denied that the December letter was misleading. He denied that it was ARM's view that it required authorisation but contended that the decision to make an application to the CSSF was essentially a commercial one. We reject that contention for the reasons set out above. It was plain that from November 2007 ARM proceeded on the basis that the CSSF would consider that it required authorisation and

that the CSSF might consider that it was in breach of the 2004 Law in not having a licence. It was plain that ARM shared that view. Furthermore there was a risk to pending investors' funds as they were not ring fenced and part of the funds were being paid away to Catalyst in respect of its commission and to ARM where they might fall within ARM's general funds and consequently might not be available to investors should the monies raised in relation to pending tranches have to be returned. As noted above, the December letter was misleading in not referring to the possibility of the liquidation of ARM in the event of a refusal of the application and the risk that posed to investors. As of 30 December 2009 no advice had been received that liquidation was unlikely. It had been mentioned as a possibility by Mr Lovegrove on 24 December 2009. No consideration appears to have been given by Mr Roberts or Mr Wilkins at this time as to safeguarding all of the pending investors' monies until such time as the bonds were issued.

234. As against Mr Roberts (but not Mr Wilkins who had by then resigned from Catalyst) the Authority also contends that the March letter sent to the Income Plan pending investors and IFAs on about 26 March 2010 was misleading. The letter was signed by Mr Rayment but approved by Mr Roberts. The letter was alleged to be misleading for the first three reasons as were relied on in the December letter and that it did not refer to the consequences which might follow if the application was unsuccessful and as to the ease with which a transfer to Ireland could be achieved. We note that Mr Wilkins had suggested that the letter should state that ARM was awaiting a decision from the CSSF in respect of its application for authorisation and that it had been asked not to issue bonds till that application had been determined. Mr Roberts disagreed with Mr Wilkins and the passages drafted by Mr Wilkins did not appear in the letter when it was sent.

235. We conclude that the March letter was misleading in relation to the first three matters referred to above, and in omitting to refer to what might happen if the application was unsuccessful and that it did give the misleading impression that a change to Ireland posed little difficulty.

236. We do not consider that it is an answer to criticisms of the letters to suggest that Catalyst was anxious to prevent a run on the bonds. The Applicants argued that at least some of the pending investors would have been investors in bond tranches already issued. However, at a time when funds were still being received it was important to be transparent with all investors making new applications and had the prospect of a run on the bonds been a real concern it would have raised the issue as to the security of funds received in respect of pending tranches. Accordingly the fact that the Authority was concerned to restrict publicity once it had prevented the raising of funds later in 2010 is not to the point. The Authority was concerned with a run on existing bonds, however it did require an Authority-approved letter to be sent to pending investors.

237. Two of the IFAs who introduced most of the investors in the bonds, MFSP and Rockingham were briefed by Mr Wilkins to the effect that there was, after 20 November 2009, a temporary restriction on the issue of bonds. We are not satisfied that they were fully briefed as to the nature of the application, that authorisation was perceived by ARM and the CSSF as a requirement, or as to the possible consequences of a failure to obtain authorisation. We do not consider that oral briefings to certain IFAs can be a substitute for accurate letters describing ARM's position fully to be sent to all brokers and pending investors.

238. The question of Messrs Roberts and Wilkins' views of the prospects of the application succeeding was explored in considerable detail in the course of the hearing on the basis that the greater the certainty of authorisation so the risk to the investors of a refusal was reduced. Either that eliminated the need to inform the investors or showed that the investors' interests were not being disregarded. We have reservations as to the weight to be attached to the degree of probability of the application succeeding unless the prospect of failure of the application could be dismissed on the grounds that such prospects were insignificant. We consider that informing an investor that an entity is unregulated (which the financial promotions did from mid 2009) is different to informing an investor that an unregulated entity is applying for authorisation because the relevant regulator considers authorisation is required. Informing investors that authorisation is required does raise the question of what might follow if authorisation is refused and an investor can then consider what to do in the light of that information. Furthermore, as early as 11 December 2008 Mr Welman had warned Mr Roberts and Mr Wilkins that times had changed due to issues raised in relation to certain other companies carrying on similar businesses to ARM and in February 2009 informed them that Equity Trust was reviewing whether to continue supplying the services of personnel to act as directors in such companies. In November 2009 Mr Mol had told Mr Roberts that approval took much longer than previously and the suggestion that an application would be dealt with within three months was wishful thinking. This should have alerted Mr Roberts and Mr Wilkins that obtaining authorisation might be more difficult.

239. Once there was a risk of ARM's application being refused that raised the question of what pending investors should be told about ARM's regulatory position and the consequences of the refusal had to be taken into account when considering whether funds should continue to be raised from investors in respect of tranches 9 to 11, and if so, how the funds should be dealt with. The risk was that pending issues of ARM bonds would not take place and the pending investors' monies would not be available to be returned to them unless the funds were kept separate from ARM's (or other investors) or Catalyst's general funds. Albeit Messrs Roberts and Wilkins were optimistic as to the prospect of success, there was, from 20 November 2009, no basis for believing that there was no real or appreciable risk that the application would fail.

ARM's application faced a number of difficulties which in part had contributed to the delay in making the application when Loyens were first instructed to do so.

240. The fact that advice was taken from BLG in early January 2010 by Ms Moran and Mr Wilkins to the effect that there was no regulatory obstacle to Catalyst continuing to raise funds pending approval provided the CSSF was aware the funds were being raised and there was no reason to suspect that the application might be refused does not provide an answer to the allegation that funds were being raised from investors who were unaware of the risks. First, there was a risk, which could not be dismissed as minimal, that authorisation might be refused. By February 2010 the application had taken approximately six months and did not appear to be progressing smoothly. Secondly, the contention that ARM might simply reduce its issues to below four per year and carry on business as usual appears fanciful. If the application was refused on the grounds that the CSSF had concerns as to the way in which ARM carried on its business there had to be a serious possibility that it would exercise its powers to procure the winding up of ARM if it tried to continue operating in Luxembourg. Thirdly the same consequences might follow if ARM simply sought to withdraw the application. Fourthly, albeit a transfer of the business to Ireland had been mooted and advice obtained by 25 January 2010 that there would no Irish regulatory hurdles, detailed advice had not been obtained as to how the transfer could be effected and whether the cooperation of the bondholders was required, and if so, how it could be obtained. Fifthly BLG were not, apparently, asked to advise how the pending investors' funds (some of which had already been dissipated) should be safeguarded in case they had to be returned.

Conclusion: Mr Roberts and the alleged lack of integrity

241. So far as Mr Roberts is concerned we are satisfied that he adopted an unrealistic view of the prospects of success of the application from November 2009 to May 2010. Upon receipt of the 20 November 2009 letter he, as Mr Wilkins did, should have appreciated that there was a risk – which could not simply be ignored - that the application might not succeed. He attended the meeting with the CSSF held on 16 December 2009 whereas Mr Wilkins did not. In our view the tenor of the meeting was such that at the very least he should have been seriously concerned as to the prospects of success of the application and communicated accurately and fully the tenor of that meeting to staff at Catalyst including Mr Wilkins. His overly optimistic assessment of the prospects of success for the application after the meeting was perhaps led by his enthusiasm for ARM's business such that it affected his judgment. Another example of this was his insistence that ARM did not consider it required authorisation but that the application was merely being made for commercial reasons despite the strong indications to the contrary set out above.

242. As noted above, on 2 December 2009 Mr Roberts had authorised Square Mile Registrars to transfer monies received in relation to tranche 9 to Catalyst and ARM.

There is no evidence that he considered – at the time - how the investors in pending tranche 9 would be reimbursed in the event that the application was refused. Nevertheless he allowed funds to continue to be raised from pending investors for tranches 10 and 11. Those funds were retained by the receiving agents and there is now a dispute between the liquidator of ARM and the investors as to who is entitled to them.

243. We consider that in acting as he did Mr Roberts lacked integrity in that he was reckless as to the interests of investors. He knew or should have appreciated that there was a risk that the application might be refused but disregarded it and closed his mind to it. He was aware that funds raised from pending investors might be at risk should the application for authorisation be refused as the funds were not ring fenced and he gave instructions in early December as to the application of part of the funds raised in relation to tranche 9. It is no answer that steps were eventually taken to repay some of the investors. Others were not reimbursed by ARM and there is a dispute as to the persons entitled to funds retained by the receiving agents.

244. So far as the December letter is concerned we consider that in allowing the December letter to be sent out Mr Roberts lacked integrity in that the letter failed to advert to the risk to pending investors' funds if the bonds were not issued or in the event of a liquidation of ARM. We also consider that in approving the March letter Mr Roberts lacked integrity for the same reasons as the December letter (insofar as the same criticisms are made in relation to the March letter) and note that by the end of March 2010 he should have had even greater concerns as to the prospect of success of the application. The March letter gave a misleading impression of the possibility of a transfer to Ireland or the grant of authorisation, as if one or other alternative was a foregone conclusion, and would be effected in the short term without having a proper basis for doing so.

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Conclusion: Mr Wilkins and the alleged lack of integrity
Limitation Defence

245. Mr Wilkins relied upon section 66 of the Act as it was in force on 28 February 2013 (the date of the Warning Notice which was issued to him) as preventing the Authority relying on the promotion of bonds or the receipt of pending investor monies as he contended that the Authority was aware of the matters constituting the alleged misconduct by 28 February 2010. Section 66 provides:

> . . .
>
> (4) The Authority [A regulator] may not take action under this section after the end of the period of [three years] beginning with the first day on which the Authority [the regulator] knew of the misconduct, unless proceedings in respect of it against the person concerned were begun before the end of that period.

(5) For the purposes of subsection (4)—

(a) The Authority [a regulator] is to be treated as knowing of misconduct if it has information from which the misconduct can reasonably be inferred; and

(b) proceedings against a person in respect of misconduct are to be treated as begun when a warning notice is given to him under section 67(1).

246. The effect of the section is that the Authority is not permitted to take action for misconduct after the end of the period of three years beginning with the first day on which it knew of the misconduct, unless the Warning Notice was issued before the end of that period and is to be treated as knowing of misconduct if it has information from which the misconduct "can reasonably be inferred" (section 66(5) (a) the Act). The matters relied upon by Mr Wilkins from which the Authority had the requisite knowledge or information from which it could reasonably be inferred that Catalyst was promoting bonds or collecting monies from investors were as follows:

a. By letter dated 9 December 2009, the Authority was informed by the CSSF that ARM had confirmed to the CSSF by letter dated 16 July 2009 that "ARM is issuing bonds to the public on a continuous basis".

b. Thereafter, according to Mr Lovegrove, the CSSF informed the Authority that the CSSF had asked ARM to stop issuing bonds and that ARM had agreed not to issue any further bonds. This information was passed to Mr Lovegrove and he was not told that ARM would not promote bonds or would not collect monies from investors. Mr Lovegrove conceded that it may have occurred to him there was a period of time in between the previous tranche ending and the agreement (not to issue bonds) when some monies would have been received in respect of anticipated future tranches.

c. On 24 December 2009, Mr Lovegrove of the Authority spoke to Mr Wilkins by telephone. When asked by Mr Lovegrove as to whether ARM was still issuing bonds, Mr Wilkins confirmed that ARM had agreed not to issue any further bonds. Mr Lovegrove did not then ask whether ARM or Catalyst would be promoting bonds or would be collecting monies from investors or what had been done with the monies raised for the next unissued tranche. Mr Wilkins did not say that ARM or Catalyst would not be promoting bonds or would not be

receiving monies from investors. Mr Wilkins said that he would have answered Mr Lovegrove if he had been asked these specific questions and we accept his evidence.

d. On or about 8 January 2010, Mr Lovegrove received (from the CSSF) copies of letters from ARM to the CSSF, one of which showed that Catalyst (a) had continued to promote ARM bonds and collect monies from investors following ARM's application to the CSSF for authorisation and (b) was holding significant sums in respect of Tranche 9 (which had been due to be issued on 1 January 2010).

e. On or about 8 February 2010, Mr Lovegrove received a letter from Catalyst with detailed schedules attached which showed that (a) it had continued to promote ARM bonds and collect monies from investors following ARM's application to the CSSF for authorisation; (b) it was holding significant sums in respect of (unissued) Tranche 9; and (c) it was making arrangements for Tranche 10 (which the documents showed would be issued on 1 April 2010).

f. Mr Lovegrove was supplied with a document prepared for the Authority illustrating Catalyst's cash flow in the light of various business scenarios ("ARM OK" "ARM STOPS" and "ARM ENDS") and from that should have deduced that funds were being received from pending investors.

247. The fact that ARM confirmed to the CSSF that it was issuing bonds on a continuous basis and then subsequently agreed that it would not issue bonds does not lead to the inference that ARM was continuing to promote bonds or raise monies from investors. The same can be said in relation to the conversation held on 24 December 2009 when Mr Wilkins confirmed to Mr Lovegrove that ARM had agreed not to issue bonds. So far as the letter sent to Mr Lovegrove on 8 January 2010 is concerned, that letter did refer to the issue of bonds after 30 June 2009, and contained a schedule which also showed monies raised in respect of tranche 9. The fundraising period of tranche 9 was due to expire on 30 November 2009 (i.e., it was almost complete by 20 November 2009) and it is not surprising that the schedule showed tranche 9 as pending and that the monies were raised for that tranche. It would have been odd if it did not. We do not accept that it was a reasonable inference from that schedule that further funds in relation to tranche 9 had been received in the last 10 days of November 2009. The letter received by Mr Lovegrove on or about 8 February 2010 referred to three scenarios in the context of stress testing the cash flow of Catalyst over the succeeding 12 months. The first was "ARM's regulatory approval is secured and ARM continues to market the ARM Bonds and Catalyst continues to receive its income under the Distribution and Arranger Agreements". This scenario was called "ARM OK". That was contrasted with "ARM's regulatory approval is rejected and

ARM is closed for new investments, but Catalyst works with the ongoing management" to assist in the realisation of the portfolio. This was called "ARM STOPS". The third scenario (called "ARM ENDS") referred to the immediate closure of ARM. The analysis of ARM OK was predicated on business as usual. The accompanying schedule recorded tranche 9 and 10 as "pending" with monies recorded as raised in relation to tranche 9. Tranche 10 (due to be issued on 1 April 2010) is not recorded in any of the schedules as at 8 February 2010 as having any funds raised in respect of it. The reference in the scenario ARM OK to ARM "continues to market" is, in the context, consistent with a hypothetical assumption and not a statement that ARM was actually continuing business as usual, i.e., collecting funds from pending investors. The fact that Mr Lovegrove accepted that monies had been raised in respect of a pending tranche before 20 November 2010 does not lead to the conclusion that he or anyone else at the Authority should have understood that bonds were being promoted and funds received after 20 November 2010.

248. Accordingly we do not consider that the matters relied on show that the Authority had the requisite knowledge or information from which it could reasonably be inferred that Catalyst was promoting bonds or collecting monies from investors after 20 November 2009.

249. It follows that we reject the defence based on limitation and we have to consider the allegation of lack of integrity on its merits.

250. As noted above Mr Roberts' email dated 2 December 2009 authorising the receiving agent to disburse the funds was copied to Mr Wilkins. In cross examination Mr Wilkins stated he could not recall whether he had had any concerns at the time about the use of funds in respect of pending tranches (albeit funds in relation to pending tranches 10 and 11 remained with the receiving agents) but thought that his view was that ARM's application would succeed. On about 13 January 2010 on hearing that the determination of the application might be delayed he raised with Ms Moran whether the delay warranted a letter to pending investors or the return of their funds and asked her to seek advice. Advice was taken from BLG who advised in the manner described above. When an investor sought the return of substantial funds (approximately €1.7 million) in late January 2010 Mr Wilkins arranged for the return of those funds without delay.

251. On 27 January 2010 Mr Wilkins was provided by Ms Spinks with information as to the cash position relating to the pending issues which showed that half of the monies raised in relation to tranche 9 had been dispersed of which some had been paid to Catalyst in respect of its commission and the balance to ARM which

had set about purchasing traded life policies. He immediately expressed his concern and wrote that "post approval please ensure that systems are in place to ensure that funds received and not yet invested are segregated" and that the position was "not good". He also emailed Mr Roberts to the effect that they needed to discuss the email from Ms Spinks. He was still under the impression that approval would be given fairly shortly. Furthermore in an email sent on 29 January 2009 to Mr Ransom (an actuary working for Catalyst) he asked what the plan was to recoup the funds were the issue not to go ahead and asked that his request be treated as one of priority. Also on that date he emailed Ms Moran to say that he did not consider that further funds should be raised. He received some assurance from Mr Ransom as to Catalyst's ability to repay the pending investors. After his resignation by an email of 13 April 2010 he emphasised that Catalyst's fees should not be paid out of monies raised in respect of pending tranches.

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252. Mr Wilkins might not have acted to attempt to prevent the transfer of the pending tranche 9 funds when he saw Mr Roberts' email of 2nd December 2009 because he incorrectly discounted the risk of the application not succeeding. There was no evidence that any intervention by him would have succeeded. There is no evidence as to when he saw Mr Roberts' email. However by his actions in 2010 in trying to ensure that there was a means of restoring the tranche 9 funds and warning against the use of further funds in relation to pending tranches to finance business expenses he was seeking to protect pending investors' interests.

253. Insofar as his understanding of the probability of the application being successful is concerned, we note that Mr Wilkins, albeit copied in on much of the correspondence relating to the application, did not attend any of the meetings with the CSSF, particularly the meetings on 16 December 2009 and 4 February 2010 and was influenced by Mr Roberts' description of what impression to form of the CSSF's attitude to the application. Mr Wilkins had an overly optimistic view of the prospects of success of the application but perhaps with a little more justification than Mr Roberts as he had no opportunity to assess the attitude of the CSSF at meetings but had to draw inferences from the correspondence.

254. In the light of Mr Wilkins' assumption that pending investors' funds in relation to tranche 9 insofar as they had been used, would be restored, and were not going to be further applied, but would be retained by the receiving agents pending the outcome of the application, we determine that although Mr Wilkins did not immediately react so as to attempt to prevent Mr Roberts' email of 2 December 2009 being implemented (if he had the opportunity to do so) or respond to it once he became aware of it, he did not act with a lack of integrity in allowing Catalyst to promote bonds and arrange for funds to be collected.

255. Furthermore, in the light of the fact that Ms Moran and Miss Curnow had considerable input into the December letter (and Mr Wilkins was entitled to take some reassurance from that) and that in the latter half of 2009 Mr Wilkins had far less involvement in the application albeit he was copied into many of the emails, we do not consider that it would be right to conclude that Mr Wilkins acted with a lack of integrity in relation to December letter. He did not close his mind to the obvious and we do not consider he acted recklessly. In early March 2010 he also attempted to ensure that the March letter to pending investors contained a fuller explanation to IFAs than it actually did. Thus he had inserted into a draft of the letter that ARM awaited a decision from the CSSF in relation its application for authorisation and that ARM had agreed with the CSSF not to issue bonds until the application was determined. These matters were deleted by Mr Roberts. The letter, of course, was sent after Mr Wilkins had ceased to be a director of Catalyst.

Allegation of lack of due skill, care and diligence – Mr Wilkins

256. The same matters (for the same period) as are relied upon by the Authority as showing a lack of integrity are relied upon as showing a lack of due skill and diligence together with the allegation that Mr Wilkins failed to take reasonable steps prior to 24 December 2009 to inform Ms Moran that ARM took the view that it was required to be authorised.

257. So far as the same matters relating to integrity are relied upon, Mr Wilkins relied upon section 66 of the Act (limitations). For the same reasons as are set out above we do not consider that the matters complained of fall within section 66 of the act.

258. Mr Wilkins accepts that he failed to act with the appropriate degree of due skill, care and diligence in relation to

a. the fact that Catalyst continued to promote ARM bonds and received funds from pending investors after receipt of the 20 November 2009 letter from the CSSF in circumstances where the financial promotions did not record that ARM did not have a licence but considered it required one and that ARM could not issue bonds until the application for authorisation had been successfully determined. However any assessment of the degree of .Mr Wilkins' lack of due skill, care and diligence must be made in the light of the matters described in paragraphs 250 to 254 above;
b. the first three of the matters alleged in relation to the December letter and also in not referring to the possibility of liquidation, but not in referring to the possible loss of funds. He also admits that the financial promotions (issued

between 20 November 2009 and 23 March 2010) should have stated that ARM was not authorised but considered it required authorisation and that ARM could not issue bonds till authorisation was obtained. As we have concluded above, the December letter was also misleading in the impression it gave as to the degree of certainty that authorisation would be given,, and its failure to advert to the risk to the funds if the bonds were not issued, and in those respects he also failed to act with the appropriate degree of due skill, care and diligence.

259. In addition to the above matters in relation to the lack of due skill, care and diligence the Authority relies upon an allegation that Mr Wilkins failed to take reasonable steps prior to 24 December 2009 to inform Ms Moran that ARM took the view that it was required to be authorised. We reject that allegation. It is quite clear that Ms Moran was well aware that ARM took the view that it was required to be authorised and hence there was no need for Mr Wilkins to inform her of a matter with which she was familiar. She attended Catalyst board meetings held on 23 May 2008, 16 June 2008, and 18 September 2008 when the application was discussed. She was also copied in on emails dated 15 and 16 July dealing with a description of ARM's business and an email dated 23 July 2009 which attached a draft of the letter enclosing the application, which in turn referred to and described the contents of ARM's letter dated 16 July 2009 to the CSSF, which made it clear that ARM considered it needed to be authorised. Further, she was also copied into an email from Arendt sent on 20 November 2009 which stated that "….We had a call from the CSSF earlier this afternoon which learned that ARM was continuing in breach of the law, to make further issues of notes despite not being regulated yet..." Mr Roberts replied to this email copying Ms Moran into his reply which attached the email from Arendt. Mr Wilkins, who relied upon Ms Moran for advice on compliance matters, gave evidence to the effect that he discussed the application with her as he was relying upon her to advise upon the appropriate disclosure to make to investors. The application was often the subject of conversations between Mr Roberts, Mr Macpherson who was actively involved in ARM's application, and Mr Wilkins in Catalyst's small office and she would have overheard those conversations.

260. We have no hesitation in rejecting the allegation in relation to communication with Ms Moran.

Failure to exercise due skill, care and diligence in managing Catalyst's business – Mr Roberts (November 2007 – May 2010)

261. The nub of this allegation against Mr Roberts is that Catalyst's financial promotions did not reflect ARM's regulatory position so that investors were aware of the risks and that:

a. From 19 November 2007, the view of ARM and Catalyst that ARM required a licence from the CSSF to issue bonds;

b. From 20 November 2009 that ARM would and could not issue bonds pending authorisation; and
c. From 16 December 2009 that one potential consequence for ARM of failing to obtain a licence was liquidation and that there might be difficulties for pending investors in recovering any funds transferred for a contemplated bond issue by ARM which in fact never took place;

and financial promotions which did not reflect the above matters should have been withdrawn.

262. Mr Roberts relies upon the fact that the direct responsibility for the promotions lay with Ms Moran who was assisted by Mr Macpherson and external legal advice (Stephenson Harwood and from mid-2009 BLG) when drafting and reviewing the promotions. He also relies upon the fact that the Authority examined the promotions in late 2009 and on 3 December 2009 Mr Lovegrove indicated after reviewing the promotions that they were "broadly compliant". Furthermore promotions were sent to the CSSF under cover of a letter dated 14 February 2010 and the CSSF expressed no concern.

263. Mr Roberts had, at all times, a close involvement in matters affecting ARM's regulatory position and even when absent from Catalyst's office was copied into all important emails relating to the application. His special interest in this issue meant that he was in a position to ensure that the promotions gave a fair picture to the investors which in the respects identified by the Authority they did not (and which they should have done). We do not consider that Mr Roberts can absolve himself of responsibility for the deficiencies by referring to the fact that Ms Moran (with access to external legal advice) drafted and reviewed the promotions. To anyone familiar with matters relating to ARM's regulatory status the omission to make proper disclosure to the investors is obvious. The fact that Mr Roberts – to the extent that Ms Moran was aware of the full picture relating to ARM's regulatory status – can rely upon the fact that professionals were involved does not in the circumstances of this matter, excuse him from responsibility, albeit it may be relevant to sanction. There is no evidence that he ever suggested that investors should receive more information in the promotional material than was contained in it during the relevant period.

264. We also do not consider that the fact that an explanation was given to certain IFAs is an answer to the allegation. One would expect investors, themselves, to look to the promotional material as providing a definitive description of ARM's regulatory position.

265. Furthermore, we consider that the fact that the Authority did not advert to the matter in Mr Lovegrove's letter of 3 December 2009, or earlier, is not a defence in the circumstances of this case albeit it appears that the Authority were informed by the

CSSF by letter on 30 June 2009 that it considered that ARM required a licence if it was making more than three issues per year. That information was probably passed onto Supervision or the working party inquiring into SLSs, but Mr Lovegrove appears not to have noted it. In his evidence he could not recall seeing the letter at the time. On or about 10 July 2009, ARM supplied the Authority (at the request of Mr Lovegrove) with three sets of Catalyst board or senior management minutes which made it apparent that ARM was applying for authorisation. First it was Mr Roberts' ultimate responsibility (as against the Authority's) as a director of Catalyst to ensure the promotional material was appropriate. Secondly the Authority, through Mr Lovegrove, would have been examining the promotional material in the latter half of 2009 primarily to ascertain whether there were any similarities in the way Catalyst and ARM carried on business to the way in which Keydata had operated. Mr Lovegrove said in his evidence that he was not actually aware that ARM was making an application for authorisation till about 9 December 2009 and at the same time learned that it had agreed not to issue any further bonds (which he assumed also meant market any bonds); that was the reason he did not then revert to Catalyst to inform it that he considered the promotions needed to be amended to reflect a reference to the application for authorisation. Whether the Authority should or should not have noticed the lack of a full explanation in the brochure is not in point. We do not consider that Mr Roberts can rely upon a mistaken view of the Authority in relation to promotions issued before its view that ARMs promotions were "broadly compliant" was expressed in its letter of 3 December 2009. In the case of the few promotions issued after it expressed its view one would have to be satisfied that the Authority was in possession of the full picture and that it was appropriate for Mr Roberts to rely upon, and was seeking, its advice. That was not the case. Catalyst was relying upon its own advice in relation to the content of the brochures. We accept the Authority's argument that the statement was made by Mr Lovegrove when he had not been fully aware of ARM's regulatory position. No doubt it was reassuring, on its face, that Mr Lovegrove indicated that the Authority did not discern fundamental errors in the promotional material but it was not appropriate for Catalyst simply to rely upon that statement.

266. We note that after 9 June 2009 the promotional literature stated that ARM was not authorised by the Authority "or any other regulator". That is not the same thing as stating that ARM and the CSSF considered that ARM required authorisation.

Conclusion

267. Accordingly we determine that Mr Roberts failed to exercise due skill, care and diligence in the respects alleged in relation to the promotions.

268. So far as the complaint that Mr Roberts failed to inform Ms Moran that ARM took the view it was required to be authorised is concerned, we dismiss that allegation for the same reasons as are set out above in relation to the same complaint made against Mr Wilkins.

Conclusion: Fitness and Propriety - Mr Wilkins (28 November 2007 – 23 March 2010)

269. The Authority contends that Mr Wilkins is not fit and proper on account of his failure to act with integrity on the basis of the matters set out above (which we have dismissed) and in addition relies on similar matters in respect of the promotions as are set out against Mr Roberts in relation to the allegation of failure to exercise due skill, care and diligence as matters showing a lack of integrity. Further the Authority contends that it is open to the Tribunal to conclude that Mr Wilkins is not fit and proper, for example on the basis of his competence and capability.

270. The Authority also relies upon alleged misleading information as to the shareholding of Catalyst given by Mr Wilkins to Mr Lovegrove on 24 December 2009.

271. Mr Wilkins makes limited admissions in respect of the alleged defects in the promotions. He accepts that after 20 November 2009 the promotions should have stated that ARM was not authorised but believed that it was required to be authorised and that ARM could not issue bonds till its application had been successfully determined. He also admits that promotions issued after 24 December 2009 should have referred to the possibility of liquidation if authorisation was not granted. Accordingly he admits that the promotions did not comply with COBS 4.2.1R (2) and potentially 4.10 2R (2). However he denies that he should have withdrawn promotions issued between 28 November 2007 and 20 November 2009. He also admits he should have sought to withdraw or amend the promotions after 20 November 2009 and after 24 December 2009) so that they reflected the fact that ARM could not issue bonds and faced possible liquidation in the event that authorisation was refused.

272. We conclude that the promotions should have included the information as contended by the Authority. The application was never so certain that the fact that ARM and Catalyst considered it was required did not need to be disclosed. Furthermore the potential difficulties in investors recovering monies in relation to pending issues 9, 10 and 11 in the event ARM was placed in liquidation should have been disclosed.

273. However, as noted in respect of Mr Roberts, Mr Wilkins was relying on Ms Moran (and Mr Macpherson) who in turn relied upon external advisers such as Momenta. We do not consider that the failure to recognise that the promotions were defective amounted to a lack of integrity and hence demonstrated a lack of fitness and propriety on the part of Mr Wilkins. We were invited in the alternative to conclude that Mr Wilkins' conduct in relation to the promotions showed a lack of competence

and fitness of such severity so as to show that he is not fit and proper. We do not consider his failures in relation to the promotions to be such that they justify a finding that Mr Wilkins was not fit and proper.

274. So far as the submission that we should conclude that Mr Wilkins is not fit and proper as a result of the matters relied upon to found the allegation of a lack of integrity is concerned, we reject the submission. We consider that Mr Wilkins' fitness and propriety is to be assessed in the round and in our assessment of the matters relied upon by the Authority to found the allegation of lack of integrity. We refer in particular to the matters set out in paragraphs 250 to 254 above and note that from the latter half of 2009 Mr Wilkins was to a large extent dependent upon Mr Roberts in assessing the prospect of success of the application.

275. The final allegation is that Mr Wilkins misled Mr Lovegrove in the course of a conversation on 24 December 2009 as the shareholding of Catalyst. We reject that complaint. Mr Lovegrove asked for an "idea" of the ownership of Catalyst in order to know who controlled it. Mr Wilkins had 0.43 per cent of the shares of Catalyst – albeit in evidence he was uncertain whether he had been entered on Catalyst's register of shareholders and said he had never received a share certificate. Mr Lovegrove in evidence accepted that Mr Wilkins' shareholding was insignificant. It certainly was insignificant and immaterial if Mr Lovegrove was concerned as to who controlled Catalyst and merely sought an idea of the ownership of Catalyst. We have no hesitation in dismissing this allegation. Mr Wilkins' failure to disclose his small shareholding was not misleading in the context of the conversation and cannot found an allegation of lack of fitness or impropriety.

Determination and directions

276. In the light of the above matters the Tribunal has to determine what (if any) is the appropriate action for the Authority to take in relation to the references.

277. In relation to a prohibition imposed by the RDC under section 56, the Tribunal must either (a) dismiss it; or (b) remit the matter to the Authority with a direction to reconsider and reach a decision in accordance with the findings of the Tribunal (section 133(6) of the Act).

278. A prohibition order is a draconian penalty which obviously affects the ability of the person upon whom it is imposed to earn a living in the financial services sector. It is plainly not a penalty to be imposed lightly and it is likely to be more appropriate in a case where a lack of integrity is shown than a failure of competence or skill. In the case of lack of competence, a prohibition order would be rare other than in cases where the lack of competence demonstrated was such that that the person is likely to represent a risk to the public in the future.

279. In relation to the financial penalty imposed by the RDC under section 66, this is a "disciplinary reference" under section 133(7A) of the Act (as amended). As a result, the Tribunal (a) must determine what (if any) is the appropriate action for the decision-maker to take in relation to the matter; and (b) on determining the reference, must remit the matter to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination: section 133(5) of the Act.

As against Mr Roberts

280. We consider the degree to which Mr Roberts acted with a lack of integrity to be serious. He closed his mind to the reality that both ARM and the CSSF considered that ARM required authorisation, closed his mind to the difficulties in ARM's application and as a result gave misleading reports to personnel at Catalyst as to the tenor of meetings he attended with the CSSF. He also failed to consider the interests of investors in pending tranche 9 when he authorised the receiving agents to pay over part of the funds held by them to Catalyst and ARM. Even when the Authority brought its concerns to his attention in April 2010 and asked it to cease allowing the promotion of the bonds, with the consequent receipt of income, he resisted that request.

281. In the light of the above we consider that Mr Roberts' reference in relation to the prohibition and the withdrawal of authorisation should be dismissed.

282. So far as the imposition of penalties is concerned we take into account the Authorities' approach to penalties as set out in DEPP as it stood on 5 March 2010 as most of the conduct complained of took place before that date. Thus we must have regard to all the relevant circumstances (DEPP 6.5. 2G (1)), the nature seriousness and impact of the breach in question (DEPP 6.5. 2G (2)), the extent to which the breach was deliberate or reckless (DEPP 6.5.2G (3)), the fact that Mr Roberts is an individual, the financial resources of Mr Roberts (as to which see below) (DEPP 6.5. 2G (5)), the amount of benefit gained or loss avoided (DEPP 6.5. 2G (6)), and conduct following the breach (DEPP 6.5. 2G (8)).

283. The evidence as to the extent to which Mr Roberts benefited financially was contested. We are satisfied that he did benefit substantially from Catalyst's business. For example, in the year ended 31 December 2009 Mr Roberts' remuneration from Catalyst was £185,432 but he repaid a loan from Catalyst of £116,250 during the year. Mr Roberts declined to provide evidence in respect of his financial resources save to say that the penalty imposed by the RDC of £450,000 would bankrupt him.

284. In the circumstances we consider that we should direct the Authority to impose a financial penalty of £450,000 on Mr Roberts.

As against Mr Wilkins

285. We remit, the matter to the Authority to reconsider its decision in the light of our findings of fact and emphasise that albeit Mr Wilkins made certain errors we do not consider, just as the RDC did not, that he acted with a lack of integrity; nor do we consider that he acted with a reckless disregard to investors' interests. His suggested text in relation to the promotional material in June 2009 (as to the fact that ARM was applying for authorisation) and in the March letter to IFAs was ignored and he demonstrated a genuine concern to safeguard funds paid over by investors in respect of pending tranches and throughout acted on the advice of persons such as Ms Moran (a trained and approved compliance officer), lawyers, and compliance advisors (in relation to promotions). He was also as the Authority accepted in its case less blameworthy than Mr Roberts whom we hold was primarily responsible for dealing with the application and who should have communicated a realistic assessment of the prospects of success of the application to Mr Wilkins. In addition Ms Moran was well aware that ARM and the CSSF considered that ARM required authorisation under the 2004 Law. Mr Wilkins did not mislead Mr Lovegrove in relation to the owners of shares in Catalyst in the course of a telephone conversation on 24 December 2009. Finally we note that Mr Wilkins made various admissions before the RDC and before the Tribunal. These were well made and reflect well on him as they show that he demonstrated a genuine recognition and understanding of the respects in which his conduct fell below the appropriate standards and we believe that he has learned from his mistakes.

286. As noted above, we do not consider that Mr Wilkins is not fit and proper as alleged by the Authority and our determination related to both CFI director and CF30 customer advisor controlled functions.

287. So far as the imposition of a financial penalty is concerned, we take into account the matters in DEPP referred to above insofar as we have the requisite information.

288. In the circumstances we direct the Authority to impose a financial penalty on Mr Wilkins of £50,000.

289. This is the unanimous decision of the Tribunal.

Direction

290. Mr Roberts

i. Mr Roberts reference in respect of the withdrawal of authorisation and

prohibition is dismissed; and

ii. The appropriate action for the Authority to take is to impose a financial penalty of £450,000.

291. Mr Wilkins

i. We remit the matter to the Authority to reconsider whether it is appropriate to make any prohibition order in the light of our findings; and

ii. The appropriate action for the Authority to take is to impose a financial penalty of £50,000.

292. We reject the application by Mr Roberts for further time to put in evidence as to his means. He has had adequate time to do that. The hearing started on 28 January 2015 and was concluded on 3 February 2015. Mr Roberts could have engaged professional assistance in preparing evidence of his assets during and after the hearing but chose not to do so.

293. In the light of the application by Mr Roberts for an extended time in which to appeal this judgment, to which the Tribunal accedes, the time for both Mr Wilkins and Mr Roberts to appeal this decision is extended to 56 days from the date of this Decision. As the references by Mr Roberts and Mr Wilkins were heard together and the issues are interrelated we consider that the time for appeal should be extended in relation to both Applicants.

294. Mr Wilkins made an application that the Tribunal delay publication of this Decision until such time as the Authority reconsiders its decision on prohibition. We decline the application but note the terms of paragraph 20 of the Appendix to the decision in Bayliss & Co (Financial Services) Limited & Clive Rosier v FCA [2015] UKUT 0265 (TCC). By analogy we expect the Authority to ensure that any press release relating to this decision is fair and should reflect the fact that the matter is being remitted to the Authority with a direction to reconsider its previous decision.

TERENCE MOWSCHENSON QC
UPPER TRIBUNAL JUDGE

RELEASE DATE: 06 AUGUST 2015