[2014] UKUT 0509 (TCC)

Case number FS/2012/0024

Financial Services and Markets Act 2000 – whether misuse of position as non-executive director – whether failure to make proper disclosure of conflict of interest – whether breach of APER Statement of Principle 1 – whether applicant fit and proper

IN THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

FINANCIAL SERVICES

IN THE MATTER OF THE FINANCIAL SERVICES AND MARKETS ACT 2000

BETWEEN

ANGELA BURNS

Applicant

-and-

THE FINANCIAL CONDUCT AUTHORITY

(formerly known as the Financial Services Authority)

Respondent

Tribunal: **Andrew Bartlett QC (Judge of the Upper Tribunal)**

Catherine Farquharson

Mark White

Sitting in public in London on 29-30 September, 1-2 October 2014

Date of written decision: 15 December 2014

For the Applicant: **Guy Philipps QC (instructed by Norton Rose Fulbright LLP)**

For the Respondent: **Andrew Hunter QC (instructed by the FCA)**

DECISION

INTRODUCTION

1. By a decision notice dated 28 November 2012 the Authority imposed on Ms Burns a financial penalty of £154,800 and made a prohibition order pursuant to s56 of the Financial Services and Markets Act 2000. These sanctions were based on findings by the Authority that she had misused non-executive director positions to seek to advance her own commercial interests and failed to disclose conflicts of interest, so that she was in breach of Statement of Principle 1 (approved person must act with integrity in carrying out controlled function) and lacked fitness and propriety under the 'Fit and Proper' test for approved persons.

2. Ms Burns denies the Authority's allegations and has referred the matter to the Tribunal. Our function is to consider it afresh and to determine what, if any, action is appropriate for the Authority to take.

THE HEARING

3. By agreement between the parties the issue as to the appropriate sanctions was deferred and the hearing was limited to whether Ms Burns committed the acts of misconduct alleged, and in consequence whether she breached principle 1 and lacks integrity, such that she is not 'fit and proper'.

4. We received abundant evidence by way of contemporary documents and correspondence, together with witness statements from the following:

    a. Ms Burns herself;

    b. Thomas Rampulla, Managing Director of Vanguard Asset Management Ltd;

    c. James Norris, Managing Director of Vanguard's international operations;

    d. Chris Evans, CEO of Marine and General Mutual Life Assurance Society ("MGM") at the relevant time;

    e. Craig Fazzini-Jones, Executive Director of MGM;

f. Ian Blanchard, Finance Director of Teachers Assurance[1] ("Teachers");

g. David Furniss, CEO of Teachers;

h. Maria Gouvas, a solicitor in the Enforcement and Financial Crime Division of the FCA.[2]

5. We also received transcripts of FCA interviews with Ms Burns, Mr Rampulla, Mr Norris and Mr Fazzini-Jones. Mr Evans, Mr Fazzini-Jones, Mr Norris and Ms Burns gave oral evidence at the hearing and were cross-examined. Because of the passage of time since the occurrence of the material events we have placed relatively more weight on the contemporaneous documents than on the witnesses' attempts at recollecting events which took place some four to five years ago.

THE FACTS

6. The reference to the Tribunal concerns Ms Burns' conduct in 2009 and 2010 whilst she was employed by two UK mutual societies, MGM and Teachers, as a non-executive director ("non-exec"), holding FCA Controlled Function 2 ("CF2"). The specific failings which form the nub of the Authority's case are set out in paragraph 5.2 of the Authority's Amended Statement of Case. Having considered the evidence and the parties' submissions, we find the facts as set out below, and refer, where appropriate, to the allegations made in paragraph 5.2. To aid intelligibility, where we quote emails containing obvious minor typographical errors, we have corrected the errors rather than laboriously setting out the erroneous text and flagging the errors.

Ms Burns, Vanguard and Pearl

7. Ms Burns is an investment professional. She graduated from the LSE in 1984 with a first class degree in economics and the Bassett prize for the highest degree awarded in her year. She is able and knowledgeable, and has for many years provided a range of services in the financial sector in a number of roles, including as an employee, as a non-executive director, as a trustee, and as a consultant through her investment consulting business Aktiva Ltd. Her skills include investment analysis, fund management, and risk controls. The central focus of her work in recent years has been advising non-UK

[1] Trading name of Teachers Provident Society Ltd.

[2] In addition there was a statement of Anthony Monaghan of the FCA, which related to a dispute about the accuracy and completeness of transcripts of certain proceedings prior to the hearing; we have not found it necessary to make any findings on this dispute for the purposes of the reference.

clients on UK market entry opportunities, regulatory requirements and product development for the UK market. Her business model involves her in generating and maintaining relationships with individuals and organisations, and finding ways of keeping herself at the forefront of their minds when opportunities arise. This involves constant networking by sending regular emails and setting up meetings.

8. In 2006 Ms Burns, through Aktiva, was engaged to draft a report for Vanguard (a very large U.S. asset manager, renowned for its low fees) considering the feasibility of its proposed entry into the UK investment market. Her fee was £30,000. Having completed the report, on 11 July 2006 Ms Burns emailed Vanguard and asked for the opportunity to turn her proposal into a successful business in the UK. Mr Gately of Vanguard responded on 12 July 2006 saying that, depending on the direction Vanguard decided to take, he would be happy to discuss next steps with her. A year later Ms Burns met Mr Norris of Vanguard in London. Mr Norris stated that Vanguard planned to enter the UK market in 2008, and Ms Burns expressed interest in possible consultancy work.

9. Contacts between Ms Burns and Vanguard during 2008 led to a meeting in London on 3 September 2008 between Ms Burns and Mr Rampulla, after which she sent an email presenting a detailed consultancy proposal. She proposed that Aktiva Ltd could work with Vanguard in three principal ways: (1) consultancy, advising on market opportunities, (2) assisting with asset gathering, and (3) non-executive governance. Suggested remuneration was by way of a retainer and success fees.

10. From December 2006 Ms Burns had been employed by Pearl Group Management Services Ltd ("Pearl") to provide fund structuring advice, at a salary of £100,000 pa plus bonus. This employment ended on 17 October 2008, when she was dismissed on the ground of redundancy. This also meant, pursuant to her terms of contract, that she had to resign as a non-exec of certain Axial funds (part of the Pearl Group in Ireland). She brought an employment tribunal claim against Pearl for unfair dismissal and sex discrimination, and under the Equal Pay Act. After a contested hearing the tribunal dismissed her claim in March 2010.

11. At one point, based on something said in the employment tribunal decision, the Authority was alleging that Ms Burns failed to disclose to Pearl that she had a personal interest in a potential fund provider or investment management supplier, called WisdomTree Investments Inc. In fact Ms Burns disclosed to Pearl her business relationship with WisdomTree in an email of 20 February 2008. This reiterated a previous disclosure made in 2006. The allegation was not pursued before us.

Recruitment by MGM and events to 23 February 2009

12. In mid to late 2008 MGM was seeking to recruit a non-exec. After a competitive process, Ms Burns was notified by MGM on 9 December 2008 that it wished to appoint her as a non-exec, as the chair of its investment committee, and as a non-exec of a Dublin subsidiary. While MGM was aware, from her CV, of her directorships of several Axial companies, she did not inform MGM of her employment by Pearl, or of its termination[3]. As a condition of her engagement by MGM she required a CF2 approval, for which she and MGM applied to the FSA. By her signature on 16 December 2008 she confirmed that the information provided in the FSA's completed application form was accurate and complete to the best of her knowledge and belief. The form required disclosure of her employment history for the previous 5 years. She did not disclose her employment by Pearl. The form also asked if she had ever been dismissed from any employment. She did not disclose the dismissal by Pearl on the ground of redundancy. These are troubling matters, which we return to below in our consideration of whether it is appropriate for us to make certain findings of misconduct.

13. On 13 December 2008 Ms Burns wrote to Mr Norris and Mr Rampulla of Vanguard, telling them she had joined the Board of MGM[4], and asking them to let her know if she could be of further assistance to Vanguard either in a consulting capacity or as a non-exec. She attached a further copy of her September 2008 proposal. On 7 January 2009 she emailed Shelton Unger and Mr Norris of Vanguard, referring to her appointment, and stating:

> "Do let me know when Vanguard UK is up and running and let's see if there are opportunities for Vanguard to support the investment portfolios of MGM's pension scheme and insurance products".

14. Ms Burns was approved as a CF2 by the FSA on 19 January 2009 and took up her duties, attending her first Board meeting as a non-exec on 21 January 2009.[5] We have been shown version 6 of MGM's Approved Persons Manual issued in August 2009. This stated:

> "Approved Persons must exercise care to ensure that there is no conflict between their personal interests and those of the Society or its customers. If

[3] Ms Burns said in evidence that to the best of her recollection she told Mr Evans of MGM that she was an employee of Pearl, but this was not consistent with the contemporaneous documents provided to us for the hearing.
[4] This was not strictly true. She could not join the Board until receipt of approval from the FSA.
[5] She had attended the December meeting as a guest.

such a conflict arises, or appears likely to arise, an Approved Person should discuss the matter with an appropriate person; for example, the Chief Executive (for Society staff) or the Chairman (for Non Executive Directors)."

It is reasonable to suppose that the preceding versions contained similar wording.

15. At this period the MGM Board was considering the launch of a new asset-backed annuity product ("ABA"). Mr Fazzini-Jones gave evidence that at or around the time of the 21 January 2009 Board meeting Ms Burns raised the idea of MGM adopting a passive investment strategy for the ABA, for which Vanguard could be a potential fund manager. Ms Burns said this was not correct. We consider that Mr Fazzini-Jones's recollection is mistaken on this point. The Board minutes show that the deputy chairman raised the idea of a passive investment strategy (tracker funds), and Mr Fazzini-Jones's recollection does not sit comfortably with the terms of his own subsequent email of 11 February 2009 (below), in which the view that Vanguard's low cost index tracker funds might be suitable for the ABA came from him. By reason of this finding, we reject the allegation in paragraph 5.2(1)(b) of the FCA's Amended Statement of Case, concerning Ms Burns' conduct at the 21 January Board meeting.

16. We consider separately below the Authority's allegation that Ms Burns misled Mr Evans in a discussion on 27 January 2009, because there is a dispute over whether the conversation took place in January or in June.

17. On 2 and 6 February 2009 the Financial Times ran pieces about Vanguard's impending UK launch. This led to a conversation between Mr Fazzini-Jones and Ms Burns about Vanguard. On 11 February Mr Fazzini-Jones, having met with journalists from the FT, emailed Ms Burns about Vanguard, stating: "I wondered if you had any contacts there, as their low cost index tracker funds could be just the ticket for our asset backed annuity". She responded positively, asking if he would like her to set up a meeting. He encouraged her to do so. On 12 February Ms Burns emailed Mr Rampulla and Mr Norris, telling them that MGM was planning an ABA launch for July 2009, and asking whether Vanguard's FSA approval and product launch would be lined up in time. A meeting was arranged for 19 February, which both Ms Burns and Mr Fazzini-Jones attended.[6]

[6] Mr Fazzini-Jones confirmed in his oral evidence that the meeting with Mr Rampulla did not affect the passive fund decision; it was only later (namely, in June) that MGM got to the stage of selecting the fund manager. This is consistent with Ms Burns' description to the effect that this was very much an initial meeting that gave useful information and got Mr Fazzini-Jones introduced to Vanguard, but firmer progress would not be possible without Vanguard obtaining their UK authorisation.

18. At some time prior to the meeting Ms Burns told Mr Fazzini-Jones that she had done work in the past for Vanguard, but that Vanguard was not a current client. This was correct, as far as it went. After the meeting she emailed Mr Rampulla: "Glad to see that MGM's and Vanguard's respective timetables and fee expectations seem to converge nicely for the new product launches. I will revert to you in the coming weeks concerning our £1.5bn back book, which may provide a second opportunity set between the two companies." (The 'back-book' was a further MGM project, which would involve changes to the fund management of MGM's with-profits funds.)

19. On 23 February 2009 Ms Burns had an email conversation with Mr Evans of MGM about reducing capital strain by reducing annual management charges. As part of this she wrote:

> "Craig [Mr Fazzini-Jones] and I have been talking to Vanguard, the giant US mutual for whom I wrote their market entry strategy a couple of years back. ... ... They would be a good, high profile choice for the passive investment options for ABA and maybe also one of several low cost passive fund providers for the back book."

20. Up to this point Ms Burns had not disclosed to MGM that she was actively trying to obtain work from Vanguard. Her stated view was that she was not acting improperly and would only need to make further disclosure if Vanguard showed an interest in taking the 2008 proposal further. We agree that whether Vanguard showed an interest in taking the 2008 proposal further was a potentially relevant consideration; we do not agree that it was the sole criterion of a duty of disclosure. We consider the nature of the duty more fully below. At this point it is sufficient to note that since 13 December 2008 Ms Burns had not taken any further steps to solicit work from Vanguard[7], and since 13 December 2008 Vanguard had not shown any interest in re-engaging her[8]. Based on our findings above, we do not consider that Ms Burns was in breach of a duty of disclosure to MGM, by reason of her contacts with Vanguard, up to and including 23 February 2009. We therefore reject the allegation at paragraph 5.2(1)(d) of the FCA's Amended Statement of Case, which is based on the 23 February 2009 email.

24-26 February 2009

[7] There was some very limited material in Mr Norris's witness statement, on which he was cross-examined, which might have supported a finding to the contrary, but we found it unconvincing, particularly given the lack of any documentary support for it.

[8] We have not overlooked Mr Norris's email of 7 January 2009. In our view it does not either expressly or impliedly show interest in her September 2008 proposal.

21. On 24 February 2009 Ms Burns emailed Mr Rampulla of Vanguard on the subject "Re MGM". The email was sent from her Aktiva email address. It drew together her MGM role and her attempt to obtain remunerative work from Vanguard, and attached again her September 2008 proposal. It was a clear attempt to obtain work from Vanguard by specifically drawing attention to her non-exec position with MGM as chair of the investment committee. The first paragraph concerned MGM:

> I have in mind to have the new managers supporting our Asset Backed Annuity come along to one of our Investment Committees – probably the June one – to meet the IC [Investment Committee] prior to our planned July launch; MGM execs will co-ordinate with your team in the coming weeks.

22. The email continued with her solicitation of business on her own account or for Aktiva:

> Had you had any further thoughts on the institutional/wealth management fund-raising proposal we exchanged last September, for the UK and Swiss markets? A well placed institutional advocate 'on the ground' here could help to accelerate your AUM [Assets Under Management] gathering in the UK.
>
> One aspect which has grown in importance since the Autumn has been the FSA's renewed emphasis on the importance of having appropriately experienced non-executive directors (NEDs) on the boards of financial firms.
>
> Have you made arrangements to have one or more NEDs on the board of Vanguard Investments UK, Ltd? It's a function I carry out for MGM and could usefully provide for Vanguard's UK operations, to support your business growth and development here.

23. The Board of MGM convened the next day (25 February) to consider, among other things, the ABA project. Mr Fazzini-Jones presented a paper on it. The investment proposition contained both active and passive options. He told the Board that the passive option could be placed with Vanguard. The Board approved the business case. Ms Burns made no disclosure of her current on-going attempts to secure work from Vanguard by specifically drawing attention to her position with MGM as a non-exec and chair of the investment committee.

24. On the following day (26 February) Ms Burns repeated her attempt to solicit a non-exec position with Vanguard by making reference to the prospect of Vanguard and MGM working together, in an email from her Aktiva account to Mr Norris of Vanguard, headed "Re MGM and Vanguard". After referring to the respective product

launch dates of May and July (the first being Vanguard's and the other being MGM's), she wrote:

> It will be good to have MGM and Vanguard working together.
>
> One aspect of the proposal we discussed last year, which has grown in importance since the Autumn, has been the FSA's renewed emphasis on the requirement to have appropriately experienced non-executive directors (NEDs) on the boards of financial firms.
>
> Have you made arrangements to have one or more NEDs on the board of Vanguard, Jim? It's a function I carry out for MGM and would be pleased to provide for Vanguard's UK operations, to support your business growth and development here.

25. Given our findings, we consider that the factual bases of the allegations in paragraphs 5.2(1)(e), 5.2(2)(a) and 5.2(2)(b) of the Amended Statement of Case concerning the events of 24, 25 and 26 February 2009 are established. We consider separately below, in our assessment of the Authority's allegations, Ms Burns' evidence concerning her state of mind as to the propriety of her actions and, in the light of the parties' respective arguments, whether a finding of misconduct is appropriate.

27 February 2009 – rejection of Ms Burns' proposal to work for Vanguard

26. On 27 February 2009 Mr Norris replied to her email of the previous day:

> Angela, thanks for your offer, but for now we are using a few members of Vanguard's Senior Management team as non-Executive Directors. That may change over time, of course, so I will keep you in mind.

27. It was clear to us from Mr Norris's evidence that this reply, notwithstanding its polite and apparently qualified terms, was intended as a firm 'no' to her offer to work for Vanguard. Ms Burns gave evidence that that is how she understood it, stating that she regarded the matter as closed.

28. Mr Hunter QC argued that the email was not a brush-off of her whole proposal, but only of the specific non-exec aspect of it. Mr Philipps QC characterised that submission as a lawyer's point, bearing no relation to reality. In the context of these email exchanges, we agree with Mr Philipps.

29. Mr Hunter QC also suggested that her evidence about regarding the proposal as dead was inconsistent with answers she gave in interview. We do not agree. There was an answer where she referred to Mr Norris's 'we'll keep you in mind' response, but she was not there addressing a specific question about how she understood his response. There was another answer where she referred to the September 2008 proposal as "a live proposal", but her very next answer suggests that when she described the proposal as "live" she had in mind a period before February 2009.

30. She may well have been inconsistent or confused on this point when making her representations to the RDC. We have reservations about a number of aspects of her evidence to the Tribunal (discussed below). Even so, in our judgment the correct conclusion on the evidence is that at the material time she understood Mr Norris's email of 27 February 2009 as a rejection of her offer to work for Vanguard. This is abundantly confirmed by the fact that, while her business model involved persistently putting herself forward for possible work, and while prior to that date she had regularly reminded Vanguard of her proposal, for approximately the next eighteen months she refrained from repeating her proposal or making any similar proposal to Vanguard.

Other events in 2009 – Ms Burns, MGM and Vanguard

31. On 10 June 2009 MGM's investment committee, chaired by Ms Burns, considered a paper presented by Mr Fazzini-Jones regarding the ABA investment proposition. Among his recommendations in the paper was that Vanguard be appointed as the product provider for the constituents of the Passive fund range. The minutes of the investment committee show that he spoke to his paper and explained the recommendations. The recommendations were agreed by the committee. The minutes also state:

> Angela Burns asked whether the Vanguard fund had obtained FSA approval and Craig Fazzini-Jones replied that it had not, but that the fund manager was confident that it would be received soon. *[NB: Approval was received on 16 June]*. Ken Hogg asked about Vanguard's fees and Craig Fazzini-Jones replied that these were still under negotiation.

32. The decision went thereafter from the investment committee to the full Board for formal approval.

33. We have referred above to the dispute over an allegation that Ms Burns misled Mr Evans in a discussion on 27 January 2009. In his statement signed on 29 May 2014 Mr

Evans said he was certain that he had a conversation with Ms Burns the night before MGMI's Board meeting in Dublin, on 27 January 2009[9]. He said:

> I do not remember how it came up, but she mentioned she had helped Vanguard with their UK market entry strategy in the hope that it would lead to some further work. However, she said, this had not happened. She told me that she did not have a current commercial arrangement with, or prospect of working for, Vanguard. That was the only time I sat with Ms Burns in that eating area, in that hotel in Dublin, and had a conversation.

34. Ms Burns agrees that the conversation took place, and that it was in Dublin, where she and Mr Evans had gone in order to attend a meeting of the MGMI Board. But she contends that it was on 10 June 2009. The primary significance of this dispute is that, if the conversation was in January, the statement that she had no prospect of working for Vanguard was misleading, since Vanguard had received a proposal from her which it had not rejected.

35. There are severe difficulties with the January dating, as contrasted with the June dating:

    a. The first mention of Vanguard between Mr Fazzini-Jones and Ms Burns was in February 2009. Mr Evans stated elsewhere in his witness statement that he had not heard of Vanguard before this time. If that is correct, his conversation with Ms Burns about Vanguard cannot have occurred in January 2009. In cross-examination he accepted that his recollection of the date could be mistaken.

    b. On 27 January 2009 there was no reason for Mr Evans and Ms Burns to be discussing Vanguard, since at that date the possibility of their involvement in the ABA project had not arisen.

    c. Mr Evans agreed that on 10 June 2009 he and Ms Burns may have met again at the same hotel, in connection with another MGMI Board meeting, given that they travelled together to Dublin on that day, after a meeting of the investment committee which had taken place in London.

    d. On 10 June 2009 there was every reason for them to have talked about Vanguard, given that the investment committee, chaired by Ms Burns, had on

[9] MGMI was an Irish MGM company.

that very day recommended appointment of Vanguard for a role in respect of the ABA product.

36. Mr Hunter QC pointed to inconsistences in Ms Burns' account of the conversation, which she had originally said (in a solicitor's letter dated 20 January 2012) occurred in "early 2009", being "either 16 February 2009 or 28/29 April 2009". We accept her evidence that those dates arose from an attempt to identify the timing of the conversation, based on incomplete information. We are sure that neither Ms Burns nor Mr Evans can actually remember whether the conversation was in January or June 2009, and we would not expect them to be able to do so. As a result of inquiries about travel and accommodation arrangements, it is common ground that it must have been in either January or June. Given the matters referred to in the preceding paragraph, our finding is that the conversation was on 10 June 2009.

37. Her proposal to Vanguard had been rejected more than three months earlier, on 27 February 2009, and had not been resurrected. It follows that we reject the allegation, in paragraph 5.2(1)(c) of the Amended Statement of Case, that she told Mr Evans that she had no prospect of working for Vanguard while concurrently soliciting from Vanguard a non-exec position and consultancy work. The solicitation had ceased on 27 February 2009.

38. In oral evidence she said the conversation on 10 June 2009 was the first occasion since she had joined MGM when there was consideration of whether there was something she should declare; she felt she was taking a belt and braces approach by mentioning it to Mr Evans. Such disclosure as she made to Mr Evans on 10 June was made only after the meeting of the investment committee. The 'non-disclosure' at or prior to the meeting could only involve misconduct if, as the Authority alleges, she was concurrently soliciting from Vanguard a non-exec position and consulting work. On our findings, she was not. We therefore reject the allegation, in paragraph 5.2(1)(f) of the Amended Statement of Case, of culpable non-disclosure at the 10 June 2009 investment committee meeting. At the time there was nothing material to disclose.

39. On 25 June 2009 Ms Burns had a meeting with Vanguard, on which she reported to Mr Fazzini-Jones, Mr Evans and Mr Hogg in an email of that date. There is no suggestion that there was anything improper in this.

40. On 24 August 2009 Mr Rampulla of Vanguard contacted Ms Burns by email, saying that he would like to have a cup of coffee and touch base. She initially indicated that she would be pleased to meet him, but subsequently declined on the grounds that her diary was too full. Mr Rampulla pressed her, stating that he would like to meet before

23 September (when Vanguard was due to make a presentation to MGM's investment committee). She apologised, and stated that if he needed anything regarding the presentation, he should let her know or speak with Mr Fazzini-Jones or with the finance director. In our view, these are not the actions of a non-exec bent on using her position to advance her personal interests at that time; nor are they the actions of someone who intended to use her position at MGM to benefit Vanguard.

41. On 23 September 2009 Vanguard made its presentation to MGM's investment committee (chaired by Ms Burns), which was considering a recommendation to place its £350 million back book investment mandate with Vanguard. The investment committee approved the recommendation. Some unexceptionable emails ensued between Ms Burns and Vanguard. The Board subsequently chose to place its £350 million back book with Vanguard. For the same reasons as in relation to the June investment committee meeting, we reject the allegation, in paragraph 5.2(1)(g) of the Amended Statement of Case, of culpable non-disclosure at the September meeting.

42. We add, so that it is clear, that there is no suggestion that Vanguard was anything other than the best choice in the particular circumstances for MGM's ABA offering and for MGM's back-book.

Late 2009 to mid-June 2010: Teachers and Vanguard

43. In late 2009 Teachers instituted a recruitment process for a new non-exec. Ms Burns was the stand-out candidate in terms of her investment experience. Her Aktiva Ltd work for Vanguard was briefly mentioned on her CV. At interview she said that she had had a consultancy relationship with Vanguard, and that she had been involved in Vanguard getting a foothold in the UK. She made a presentation to the Board in January 2010, and the Board approved her recruitment. The presentation included mention of her support for low cost passive management and of her experience at Axial Systematics Strategies Fund Plc in Dublin.

44. Prior to the interview she had discussed with Mr Evans and Sir William Proby of MGM whether taking a non-exec position with Teachers would involve a conflict of interest with her duties at MGM; they concluded that it would not, given that the two mutuals operated in very different market segments. This was also discussed at the interview with Teachers.

45. On 16 February 2010 Ms Burns signed the FSA application form for CF2 approval (non-exec) at Teachers. By her signature she confirmed that the information provided in the FSA's completed application form was accurate and complete to the best of her

knowledge and belief. The form required disclosure of her employment history for the previous 5 years. As before, she did not disclose her employment by Pearl. The form also asked if she had ever been dismissed from any employment. As before, she did not disclose the dismissal by Pearl on the ground of redundancy, even though the hearing of her claim against Pearl had taken place over 9 days during January 2010 so that, as she accepted in oral evidence, it must have been at the forefront of her mind. The form was accompanied by supplementary information, including a list of her past directorships in the previous 10 years. This did not include her directorships of Axial companies. These items, and others, were missing from the CV which she provided to Teachers.

46. On 4 March 2010 Ms Burns emailed Mr Norris of Vanguard, noting that MGM's transition to passive management, using Vanguard funds, had gone well, and adding: "I am joining the board of a second UK mutual society, and Vanguard's funds may be helpful here, too". She suggested a meeting over coffee, which took place on 22 March 2010, and which she reported on to MGM. There was no impropriety in her drawing to Vanguard's attention that an association with Teachers might be to the mutual benefit of both Vanguard and Teachers.

47. On 10 June 2010 Teachers confirmed Ms Burns' appointment as a non-exec at a fee of £21,500 per annum. The letter of appointment acknowledged that she had external interests and stated that in the event she became aware of any potential conflicts of interest these should be disclosed to the Chairman and Company Secretary. She became a member of Teachers' risk audit and compliance committees. She signed a clean Declaration of Interests form.

48. Prior to this period, Teachers' existing investment manager, LGIM, had notified an intention to increase its fees. Accordingly in the spring of 2010 Teachers was considering the possibility of replacing LGIM with a different manager for its entire mandate of around £750 million, which included a £20 million Ethical Fund. The Finance Director, Ian Blanchard, was the lead person involved in this exercise. On 14 June 2010 Mr Blanchard attended an initial meeting with Vanguard to talk about the possibility of Vanguard managing Teachers' funds. This arose because after an internal meeting at Teachers on 10 June Ms Burns had suggested Vanguard, BlackRock and State Street as possible managers to consider.

49. The FCA alleges at paragraph 5.2(1)(h) of the Amended Statement of Case that Ms Burns recommended to Teachers that it include Vanguard on the tender list, but failed to disclose that she had been soliciting a non-exec position and consulting work with Vanguard. While Ms Burns suggested Vanguard for consideration, Mr Blanchard's evidence was that she was not involved in drawing up his shortlist of candidates.

Moreover, more than 15 months had passed since Ms Burns had last approached Vanguard seeking work, and her approach had been turned down. We therefore reject the allegation made in paragraph 5.2(1)(h) of the Amended Statement of Case.

From mid-June to November 2010

50. On 23 June 2010 Ms Burns emailed Vanguard, under the heading "MGM et al" suggesting a meeting with herself and Mr Fazzini-Jones, and adding:

> "I'd also like to touch base with you with regards to a second mutual society, where Vanguard may be able to assist with our investments."

51. Mr Rampulla replied:

> ... ... I assume that the second mutual society you are referencing is Teachers Assurance. I want to let you know that I met with Ian Blanchard last week. I noticed that you are a new director and was wondering if his call to Vanguard was a coincidence. We had a good meeting and while we need to work through some operational issues, I'm confident that we can provide great value to the organization. ... ... Thank you for your continued support. We greatly appreciate it! ... ...

52. The next day Ms Burns emailed Mr Blanchard, on the subject "Vanguard":

> Tom Rampulla has been in touch, and enjoyed meeting with you last week. Let me know if I can assist; I did some work for them a few years ago, which brought them into the UK market, and they are managers to both MGM and KPST.[10]

53. In July Ms Burns was provided with copies of Teachers' Conflicts Policy and Ethics Policy. These included:

> All staff have a responsibility to ensure that conflicts of interest do not arise, ... Examples ... ... During your work, recommending a supplier ... in which you have an interest. (Conflicts Policy)

[10] KPST was another institution for which Ms Burns worked.

> Avoiding Conflicts of Interest – at the earliest opportunity, staff should declare any relationship, circumstance or business interest which may be seen by others to influence or impair their judgement or objectivity. (Ethics Policy)

54. Ms Burns organised, but did not herself attend, a dinner meeting on 5 August 2010 between Vanguard and MGM. It seems she must have had some contact with Vanguard after the dinner because on 9 August she emailed Mr Fazzini-Jones and Mr Chris Evans, on the subject "Dinner Follow-Up", stating: "Vanguard are interested in my introducing them to other mutuals. Chris – any guidance from you? There's scope to leverage goodwill, but unpaid asset gathering for V [Vanguard] is not my remit."

55. Around this time two issues arose:

    a. Teachers wanted to use a single manager, but from late July, if not earlier, it was emerging that there appeared to be considerable difficulties in the way of Vanguard taking over the Teachers Ethical Fund. Ms Burns became involved in discussions over how to overcome this. At the Teachers investment committee on 23 August Mr Blanchard reported that Vanguard would not manage the Ethical Fund as it required a segregated portfolio.

    b. After the dinner with MGM, Vanguard had received a press inquiry from Pensions Week asking about successes that could be reported in securing mandates for defined contribution (DC) schemes, but Vanguard had none in the bag. Vanguard enquired of Mr Fazzini-Jones whether MGM would be interested in co-operating on a story for which Vanguard's link with MGM would be a case study. On 10 August Mr Fazzini-Jones emailed Ms Burns about this, saying: "... ... no DC schemes on the books ... ... it's not good for us if Vanguard fail in the UK, so I'd be inclined to help them succeed. The only conflict I would see would be if we introduced them to a provider looking to put their funds into an annuity wrapper!"

56. In relation to the possibility of helping Vanguard succeed, Ms Burns replied to Mr Fazzini-Jones and Mr Evans, asking "what do we want from them; what's the quid pro quo for assistance?" In reply Mr Fazzini-Jones explained that it was in MGM's interest for Vanguard to build a reputation in the market that would put them in high demand, thereby increasing demand for MGM's annuity wrapper "as we are the only ones offering Vanguard funds in an annuity wrapper (at the moment)".

57. Her reaction to this was that (still on 10 August 2010) she forwarded Mr Fazzini-Jones' email to Vanguard (Mr Rampulla, Mr Norris and Ms Halliday), stating:

> ... ... The DC market is a big prize. I think it would be productive for us to have a serious talk re your UK ambitions and my ability and willingness to help. When might you be free?

58. This was the first time Ms Burns had put out a feeler to Vanguard for the possibility of remunerated work since February 2009. Ms Burns' explanation was that she understood Mr Fazzini-Jones to be asking her to do what she could to advance the interests of Vanguard, so that MGM would benefit from some reflected glow. In other words (though she did not herself express it in precisely this form), her personal interests (as Aktiva) and MGM's interests (for whom she was acting as a non-exec) were aligned, since it was in her and MGM's interests that she should help Vanguard. She further said in oral evidence that what she was referring to in her email was finding assets for Vanguard in the defined contribution market, which neither MGM nor Teachers had any involvement with, and that she envisaged she would be paid by Vanguard for doing so; that was what she wanted to talk about, and what she understood MGM wanted her to talk about.

59. Ms Burns' approach to Vanguard on 10 August 2010 received no response.

60. On 23 August 2010 she became chair of Teachers' investment committee.

61. Matters progressed as regards Mr Blanchard's efforts to resolve who would manage Teachers' funds. Arrangements were made for Vanguard and LGIM to make presentations to Teachers' investment committee on 22 November 2010. LGIM was not willing to reduce its fees. Vanguard's rates were cheaper than those offered by BlackRock, but no solution had been found to Vanguard's unwillingness or inability to manage the Ethical Fund. BlackRock, on the other hand, was willing and able to manage the Ethical Fund in the manner required by Teachers. BlackRock was to make a presentation on a subsequent occasion.

5 November 2010

62. We come next to Ms Burns' email of 5 November 2010, which was the catalyst for the FSA's investigation and ultimately for the present proceedings.

63. On 5 November 2010 Ms Burns emailed Mr Norris, under the subject line "New monies":

> … ... Later in the month, Vanguard will present to Teachers Assurance, where I am NED and chair of the Investment Committee, with a view to taking in a

> £700m+ passive equity and bond mandate. This follows on from the £350m mandate secured from MGM Advantage, where I am also chair of the Investment Committee.
> I am delighted to help secure new institutional mandates for Vanguard UK, having played a role in introducing Vanguard to the UK market via consultancy work in 2006.
> Given that my NED positions have facilitated potentially some £1bn of new assets to your new enterprise, I feel it appropriate to reprise our earlier discussions. We had discussed previously both the prospect of my receiving 1 bps [basis point] for new monies secured, on an ad valorem basis, and my becoming a NED of your Dublin funds. The MGM Advantage mandate would amount to £35k pa, with the TA mandate taking it to £110k pa. An NED position in Dublin would add a further £20k.
> Could we progress matters with your counsel?"

64. Mr Norris was understandably very surprised to receive this email. He forwarded it to Mr Rampulla, with the comment "Yikes! Who is the we? Me?" (This was evidently a reference to the sentence about having previously discussed the prospect of remuneration for securing new monies.) Mr Rampulla responded: "Wow – seems like a huge conflict, let's discuss". They sought legal advice.

65. Meanwhile, Ms Burns continued to discuss with Mr Blanchard Teachers' strategy for negotiating with Vanguard. She also emailed Mr Norris of Vanguard on 13 November 2010, referring to progress on the Teachers mandate and asking if he was "around in London in the next weeks for coffee/catch up?" He replied on 14 November, suggesting the week of 6 December for a meeting.

66. Vanguard decided it should formally withdraw from the tender process, and did so on 18 November 2010, without explaining to Teachers its reason for doing so. While other choices were open, withdrawal was a prudent step, given the contents of Mr Rampulla's email of 23 June 2010, thanking her for her continued support, and the contents of her email of 5 November, with its reference to earlier discussions about remunerating her. On the following day Mr Norris sent a relatively anodyne reply to Ms Burns, expressing his surprise at her email of 5 November, stating that Vanguard did not pay third parties for distribution of funds, and that they were not looking for more non-execs, and apologising if there had been any misunderstanding. She replied:

> Well obviously, Jim. Hence it may help to get some advice on how we might co-operate in future. One possible area which perhaps might work is where Vanguard may be able to provide seed capital to new funds, where no competitive/conflict of interest issues arise. It's possible that I may be working on such a funding in Q1/Q2 next year ... ...

67. Mr Blanchard emailed Ms Burns on the day of Vanguard's withdrawal to ask if she had heard anything about their reasons. She replied with a theory about a conflicting deadline which they had to meet, and added:

> "I'm sure they are keen to work with us. Jim Norris, Tom Rampulla's boss, has mooted having coffee with me in London in December."

In our view this message implied that Ms Burns was hoping to meet with Mr Norris on behalf of Teachers. Ms Burns expressly confirmed in oral evidence that the word "us" was intended to refer to Teachers. This email gave no clear indication to Teachers that Ms Burns was hoping to meet with Mr Norris to explore obtaining work on her own account.

68. As a result of Vanguard's concerns about the 5 November email, the Supervision Division of the FSA took an interest in Ms Burns' activities as a non-exec at Teachers and in January 2011 referred her to the Enforcement Division. She was contacted on 3 February 2011 and a formal investigation was carried out. Ms Burns was compelled to attend for interviews. She resigned as a non-exec at MGM and Teachers with effect from 22 and 31 May 2011 respectively.

69. We make no finding in this decision on whether Vanguard, if it had not withdrawn, would or would not have taken over the Teachers mandate.

ASSESSMENT OF THE AUTHORITY'S ALLEGATIONS

The Authority's case and the relevant duties

70. Mr Hunter QC submitted that Ms Burns' duties came from four sources:

a. Her duties as an approved person, as set out in the Authority's Guidance;

b. The specific ethical rules of MGM and Teachers, which she agreed to;

c. Her general fiduciary duties, in law, as a person holding fiduciary positions;

d. Her statutory duties under the relevant Companies Act and, in the case of Teachers, under the Building Societies Act.

71. He submitted that these duties had a common source, in the classic set of duties owed by a fiduciary, and referred us to Phipps v Boardman [1967] 2 AC 46, 123:

> The relevant rule for the decision of this case is the fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict. ... ...
>
> It is an inflexible rule of a Court of Equity that a person in a fiduciary position ... ... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict.

72. Mr Hunter submitted that the Authority's case did not depend upon our making a finding that Ms Burns was offering to influence MGM's or Teachers' decision in return for a benefit from Vanguard. He contended that it was a breach of fiduciary duty for her to make explicit reference to her directorship, her role on the investment committee, and/or her role with respect to selection, and then seek a financial reward. This amounted to improperly promoting herself by use of her fiduciary position. Such a course could only be adopted if she first made disclosure to the relevant company of which she was a non-exec and received the company's consent.[11]

73. Mr Philipps QC submitted that the true duties were not as wide as Mr Hunter contended:

    a. There was no duty not to use a fiduciary position to solicit a benefit. The real issue was whether Ms Burns had sought an inducement for favouring Vanguard in the selection decision. The solicitation would only be improper if there was to be a quid pro quo.

    b. As regards disclosure, there was not a general duty on directors to disclose all relationships and dealings with third parties who had, or might come to have, dealings with the company. He accepted that if a proposal for work had been made and not turned down, that would be a disclosable interest. But disclosure of an interest was only required when a transaction was being entered into, ie, here, when the Board was making its decision, not at the investment committee, which merely made a recommendation.

[11] On the question of potential conflicts of interest Mr Hunter also referred to First Financial Advisers Ltd v FSA (FS/2010/0038) 21 June 2012 at [65]-[66]. We do not consider that the brief discussion there takes the arguments any further in the present context.

74. In support of these contentions he referred to Companies Act 2006, which provides:

> Section 175 Duty to avoid conflicts of interest
>
> (1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.
>
> (2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).
>
> (3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.
>
> (4) This duty is not infringed- (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or (b) if the matter has been authorised by the directors.
>
> (7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.
>
> Section 176 Duty not to accept benefits from third parties
>
> (1) A director of a company must not accept a benefit from a third party conferred by reason of- (a) his being a director, or (b) his doing (or not doing) anything as a director.
>
> Section 177 Duty to declare interest in proposed transaction or arrangement
>
> (1) If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors.
>
> (4) Any declaration required by this section must be made before the company enters into the transaction or arrangement.

75. Mr Philipps submitted that, in view of s175(3), the only relevant section for our consideration was s177. Mr Hunter disagreed, and argued that the exception created

by s175(3) was only relevant where the proposed transaction[12] was a transaction between the company and the director. In our view neither of these submissions is quite right. Section 175(1) states a general rule. The reason for the exception in s175(3) is that, where the director in fact has a conflicting interest in relation to a transaction with the company (which may be a transaction by the director or a transaction by a third party), the director cannot comply with s175. If this arises, one then goes to s177, which is the duty to declare the interest.

76. As regards the duties relied on by the Authority, we acknowledge that it is important not to state them too widely, and we go part of the way, but not the whole way, with Mr Philipps. In our judgment, so far as is relevant to the issues in the reference before us:

    a. Soliciting a benefit, while making reference to a fiduciary position and using it as part of the persuasion, is not necessarily improper. For example, a person may make a job application for a role with Company B and in doing so place great emphasis on her existing non-exec position with Company A. Without more, this would not be a breach of a fiduciary duty owed to Company A. It does not involve an attempt to obtain a personal benefit from the exploitation of something that belongs to Company A, nor does it involve any express or implied offer to accept an inducement for influencing Company A in the interests of Company B. What would prima facie make it improper would be that the solicitation creates a situation where the director (in the words of s175(1)) has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of Company A.

    b. Seeking an inducement for favouring a third party in a proposed transaction is by no means the only way in which a director may be in breach of fiduciary duty. Irrespective of any inducement, if solicitation would create a situation where the director has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of Company A, the only way to save such solicitation from being improper is to make prior disclosure to Company A and obtain Company A's prior consent.[13]

    c. Mr Philipps' submission that disclosure of an interest is only required when a transaction is being decided upon in a final and binding manner cannot be supported. As soon as a situation arises where the director has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the

[12] or 'arrangement' – the argument is identical.
[13] This could be done either ad hoc or by an express agreement.

interests of Company A, disclosure should be made. In the context of the present case the concerns which arise about a conflict of interest when a final decision is made at Board level also apply at the earlier stage when an investment committee is deciding what to recommend to the Board, or the still earlier stage when those who are responsible for bringing a matter to the investment committee are going through the process which will lead to their recommendation to the committee.

77. For comparison, Building Societies Act 1986 s63 (applicable to Teachers) provides:

> (1) It is the duty of a director of a building society who is in any way, whether directly or indirectly, interest in a contract or proposed contract with the society to declare the nature of his interest to the board of directors of the society in accordance with this section.
>
> (2) In the case of a proposed contract, the declaration must be made- (a) at the meeting of the directors at which the question of entering into the contract is first taken into consideration ... ...

78. We accept Mr Hunter's submission that the relevant principles derive from the classic understanding of the duties of fiduciaries. While Building Societies Act 1986 s63 is not in identical terms to Companies Act 2006 s177, we do not consider that this affects the arguments. In our view s177(4) is additional to s177(1); it would be wrong to read s177(4) as if it meant: 'Notwithstanding subsection (1), a director has no duty to declare an interest until the very last moment before the company enters into the transaction'. Under both the Companies Act and the Building Societies Act the duty of disclosure relates to a "proposed" transaction or arrangement, not merely to an actual transaction or arrangement[14].

79. In our findings of fact we have indicated our rejection, on factual grounds, of six of the specific allegations of misconduct made by the Authority. Four specific allegations remain for consideration, three of which relate to 24-26 February 2009 and one of which relates to 5 November 2010:

    a. *Use of fiduciary position as non-exec to solicit a benefit for herself:* that by her email of 24 February 2009 she notified Vanguard of the potential business opportunity at MGM and in the same email reminded Vanguard of her interest

[14] Section 63(6) of the Building Societies Act applies the same rules to disclosure of transactions or arrangements as to contracts.

in obtaining a non-exec position and consulting work from Vanguard: paragraph 5.2(2)(a);

b. *Non-disclosure:* that she participated in discussions concerning Vanguard at MGM's Board meeting on 25 February 2009, but failed to disclose that she was concurrently soliciting a non-exec position and consulting work with Vanguard: paragraph 5.2(1)(e);

c. *Use of fiduciary position as non-exec to solicit a benefit for herself:* that by her email of 26 February 2009 she reminded Vanguard of the potential business opportunity at MGM and in the same email asked Vanguard to consider her for a role as a non-exec and consulting work: paragraph 5.2(2)(b);

d. *Use of fiduciary position as non-exec to solicit a benefit for herself:* that she emailed Vanguard on 5 November 2010 (a point of significant leverage, three weeks before it was due to tender for work at Teachers) to solicit from Vanguard (1) a commission arrangement as described in the email and (2) a non-exec position at Vanguard's Dublin funds at a salary of £20,000: paragraph 5.2(2)(c).

80. The Authority contends that these matters constituted failing to act with integrity, in breach of Statement of Principle 1. The Authority alleges that the breaches were "reckless". It says that she "deliberately turned a blind eye" to the conflicts, which were "obvious" for the following reasons:

a. She had 25 years' experience in the investment industry.

b. The terms of MGM's conflicts policy were clear (as set out in paragraph 14 above).

c. The terms of documentation provided by Teachers were clear, in particular the Conflicts Policy, the Ethics Policy and the Declaration of Interests form.

d. The Code of Conduct for Approved Persons (APER) 4.1.13 E identifies deliberate failure to disclose the existence of a conflict of interest in connection with dealings with a client as an example of behaviour which does not comply with Statement of Principle 1.

81. The Authority also relies on her failure to disclose her employment at Pearl, or its termination, to MGM or Teachers, or to the Authority when seeking CF2 approvals, as tending to support the Authority's case that Ms Burns lacks integrity and is not 'fit and proper'. In further support, the Authority submits that in a number of respects Ms Burns gave untruthful evidence to the Tribunal in the course of the hearing.

82. Mr Hunter QC summarised the issues under five headings:

    a. Did Ms Burns solicit work by misuse of her fiduciary positions?

    b. Was there a conflict of interest?

    c. Did she make proper disclosure?

    d. What was her state of mind – was it consistent with integrity?

    e. Was she in breach of Principle 1?

83. We have not followed this precise structure in our deliberations, but have had regard to these questions.

Ms Burns' evidence, and whether what she did amounted to misconduct

84. Ms Burns is clearly hard-working, intelligent, able and experienced, but we found her evidence unsatisfactory in a number of respects:

    a. She had no convincing explanation for the various omissions from her application forms for CF2 approvals and for the absence from her CVs of her employment by Pearl. Her vague suggestions of errors by herself or others did not explain how the omissions occurred. She can hardly have overlooked that she was employed at a salary of £100,000 per annum plus bonus, that she was dismissed on the ground of redundancy close to the time she was applying to MGM, or that the hearing of her employment claim against Pearl was in the same month as her presentation to the Board of Teachers with a view to employment as a non-exec. At one point she tried to suggest that Pearl was mentioned on the relevant documents, but had to concede that it was not. The obvious motive for the omissions was that she was in dispute with Pearl and

did not wish the dispute to affect her prospects of being engaged by MGM or by Teachers. Her denial of this motive was unconvincing.[15]

b. She said in her oral evidence (though not in her witness statement) that she disclosed to Mr Evans of MGM that she was an employee of Pearl, and that this took place in her first interview meeting. This was out of line with the contemporary documents (the employment by Pearl being omitted from the relevant CV and from the CF2 application) and was inconsistent with unchallenged evidence from Mr Evans. In our judgment her evidence on this point was not credible.

c. She said that she had not been asked to resign from the Axial directorships. She was expressly warned by Mr Hunter QC that she was on oath and that she should think about her answers. She maintained her contention that she was not asked to resign, contending that the process of termination of directorship was automatic upon termination of her employed role at Pearl. In fact she had been asked on 18 September 2008 to resign from the directorships, and she emailed on that day declining to do so ("I am being asked to stand down as a director, linked to a proposed – and challenged – redundancy. I am not much minded to do so ..."). After this was drawn to her attention, and after four attempts by Mr Hunter to elicit a straight answer, she finally admitted that she had been asked to resign.

d. Mr Hunter explored with her the juxtaposition in the 24 February 2009 email of (a) her position on the investment committee of MGM in relation to Vanguard's prospect of involvement with the ABA and (b) her proposal to work for Vanguard. He put to her that this juxtaposition was a deliberate choice, to make her proposal seem more attractive. She replied: "I expect I put them in the same email to save myself some time." We cannot regard this answer as credible or truthful.

e. She claimed repeatedly in evidence that she had disclosed to Teachers that she and Vanguard were in business discussions in the days immediately preceding Vanguard's intended presentation on 22 November 2010. She said this had been done by email. This was untrue. She made no disclosure to Teachers of

[15] She said that she wrote to the FSA on 13 November 2009 informing them that she was taking legal action against the Pearl Group and specifically making a formal complaint about the conduct of two directors. She did not produce the letter. If such a letter was sent, it did not remedy the omissions from her CVs or application forms. We should add that in our view question 5.10(a) of the application form was not clearly worded as covering redundancy, since question 5.10 as a whole appears to be directed to misconduct, but this feature is not capable of explaining her wholesale omission of any mention of her employment by Pearl.

her approach to Vanguard contained in her email of 5 November. Her email of 18 November 2010 to Teachers indicated that she was hoping to meet with Mr Norris, but gave the impression that the meeting was to be on behalf of Teachers; she did not reveal in it that she was hoping to explore obtaining work on her own account. When pressed on this by Mr Hunter QC, Ms Burns was repeatedly evasive, referring to the notification of a meeting with Mr Norris as if it were a notification of a meeting with him for her own business purposes. Mr Blanchard said in his unchallenged witness statement that he was unaware of anything that might have been ongoing between Vanguard and Ms Burns (meaning in her personal capacity or as Aktiva) while Ms Burns was a non-exec at Teachers, or any proposals for future work. Ms Burns further said that she had made disclosure at the November investment committee meeting on 22 November or at the November Board meeting on 23 November. Neither set of minutes contains any such disclosure.[16]

85. We conclude that she was not a reliably trustworthy witness on critical matters. We turn next to her further evidence on the specific allegations.

86. Ms Burns said that MGM and Teachers each knew the nature of her business when she joined them, namely that she had other business interests and that it was in the nature of her business that she made proposals to fund managers for consultancy work. Thus she would expect to inform them only if something material changed in such relationships. She considered that an interest would only have been created if Vanguard had responded with an expression of interest in her proposals. In our view this does not meet the concern that her proposals needed to be disclosed if they might be regarded as bearing upon the conduct of her non-exec duties, in circumstances where Vanguard was in discussions with MGM or Teachers regarding potentially entering into a business arrangement.

87. As regards the February 2009 emails, Ms Burns accepted that she did not tell MGM about them at the time. She said there was no engagement between MGM and Vanguard at the time, "and a very real possibility that there wouldn't be one", because she could not be confident that Vanguard would receive its UK authorisation in time to dovetail with MGM's ABA product launch. She said that in her mind Vanguard was not a live candidate at the time of the February Board meeting. This ignores the fact that as at February 2009 Vanguard's authorisation was expected to precede MGM's product launch by several months, as she herself said in evidence. Her own email of 20 February had remarked that MGM's and Vanguard's respective timetables and fee expectations seemed to converge nicely for the new product launches. It also mis-

[16] The minutes of the November Board meeting were not available at the hearing; they were supplied subsequently at the Tribunal's request.

states the proper test for whether there was a potential conflict requiring disclosure, which depended not on whether there was a real possibility that there *would not* be an engagement of Vanguard, but on whether there was a real possibility that there *would* be. The reality of that possibility was confirmed by her own indication in her email of 24 February that she was thinking in terms of Vanguard making a presentation at the June investment committee, and by Mr Fazzini-Jones' statement at the Board meeting on 25 February that the passive option could be placed with Vanguard.

88. She also said that her 24 February 2009 proposal, by referring back to the September 2008 proposal, was specific about the areas of the market in which she was offering to act as an advocate for Vanguard, and that these did not overlap with the business of MGM. This does not meet the point that an active business relationship of any kind between Ms Burns and Vanguard would call into question her objectivity in participating in the possible selection of Vanguard to work with MGM.

89. Part of her explanation of the 24 and 26 February emails was that, because of the possibility that Vanguard might come in and pitch to MGM in June, she wanted to find out in advance what Vanguard wanted to do about her September 2008 proposal – in other words, she was looking for clarity so that she would know whether there was anything to disclose. Although not clearly articulated at the time, we think there is some truth in this explanation. We suspect that if Vanguard had replied in positive terms to her proposal, she would in due course have made disclosure to MGM. However, by sending the email of 24 February 2009, in our view she had already crossed an important line. We have rejected Mr Philipps' submission that the line is only crossed at the time of final decision. In any realistic sense, Vanguard's candidacy was live. She herself expected that their UK authorisation would be received in sufficient time. In this sensitive situation, she created a conflict of interest by actively seeking work from Vanguard at the very same time and in the very same email where she was communicating with them about the possibility of coming in for a presentation to her committee in June. An independent observer would be concerned about the possibility of her personal interests influencing the judgment which she would make, and would influence others in making, on whether MGM should enter into arrangements with Vanguard. She ought to have made full disclosure to MGM, and did not.

90. For the above reasons we uphold the allegation in paragraph 5.2(1)(e) of the Amended Statement of Case, namely, that in breach of her duty she participated in discussions concerning Vanguard at MGM's Board meeting on 25 February 2009, but failed to

disclose that she was concurrently soliciting a non-exec position and consulting work with Vanguard.[17]

91. The other allegations concerning her conduct at MGM are that by sending the emails of 24 and 26 February she misused her fiduciary position as a non-exec to solicit a benefit for herself.

92. Mr Philipps submitted that what Ms Burns was offering in the 24 and 26 February emails was her experience and qualifications, including as a non-exec, which she could bring to bear in effecting introductions to institutions of which she knew, showing Vanguard opportunities and helping them to grow in the UK in return for payment. If Vanguard had offered her a remunerated post, a reason would be that she was a member of the non-exec community. It would not follow that the benefit of her post with Vanguard would have been received because of her status as a non-exec of MGM. He also emphasized that Vanguard's candidacy was not at that stage to become manager of MGM's existing assets; what was under consideration was using the Vanguard tracker fund as an element of the new ABA product; Vanguard was a good choice because of its low costs; Vanguard's authorisation was still some way in the future; the emails did not expressly or by implication offer any special favours to Vanguard; and upon receipt they were not regarded by Vanguard as any kind of corrupt solicitation.

93. In our view, these submissions do not succeed in exculpating Ms Burns. We accept that, if Vanguard had not at the time been an active potential candidate for MGM's ABA project, the emails would not have involved any impropriety; in particular, they would not have involved improper use of her non-exec position with MGM. But her solicitation sought to create a situation where she would have a personal interest which could conflict with the interests of MGM, who were entitled to her impartial advice on Vanguard's candidacy. The only way to save such solicitation from being improper was for her to make prior disclosure to MGM and obtain MGM's prior consent. Since she did not do so, we conclude that her behaviour in sending the two emails was improper, and fell below the standards expected of an approved person. On this basis and to this extent we uphold the allegations in paragraphs 5.2(2)(a) and (b) of the Amended Statement of Case. (We consider the specific issues of integrity and fitness and propriety separately below.)

[17] For clarity, our finding about what the FSA termed "discussions" is as set out in paragraph 23 above, namely, in outline, that the Board considered Mr Fazzini-Jones' paper on the ABA project, he told the Board that the passive option could be placed with Vanguard, and the Board approved the business case. We go on to consider her state of mind, and whether she lacked integrity, separately below.

94. We now consider further the email of 5 November 2010. By way of introduction to this email, Ms Burns wrote in her witness statement:

> ... ... Vanguard had come 'back on the radar' over the summer, following the August email exchanges ... ... and in view of the forthcoming Teachers Investment committee meeting at which Vanguard was due to present. In particular, it appeared to me that circumstances had changed since Mr Norris had told me in February 2009 that Vanguard had no interest in the September 2008 Proposal. The email exchanges in August suggested that Vanguard was not doing as well as it had expected in the UK. In light of that, it was quite possible that Vanguard's position had altered since February 2009: Mr Norris might now think my assistance along the lines of the 2008 Proposal could help the company. ... ...

95. In other words, as we consider is clear from the terms of the email itself, it was intended as a sales pitch. She was making another attempt to interest Vanguard in retaining her services (personally and as Aktiva Ltd).

96. The first paragraph referred to the £350m mandate secured for Vanguard from MGM, where she was chair of the investment committee, and to the forthcoming presentation by Vanguard to Teachers, where she was a non-exec and chair of the investment committee, "with a view to taking in a £700m+ passive equity and bond mandate". She said she had placed this in the email in order to be very clear about her two roles. Mr Hunter put to her that the purpose of the reminder was in order that Vanguard might look favourably on her proposal. She answered: "No. I'm making my position quite clear in order to avoid ambiguity." We do not understand that answer or accept it as truthful. There was no ambiguity which needed to be cleared up. The obvious reason for the first paragraph was as put by Mr Hunter. Highlighting the benefits which she had achieved for Vanguard by the introductions that she had made was part of her attempt at persuading Vanguard to engage her services on a remunerated basis.

97. The middle paragraph ("I am delighted to help secure new institutional mandates for Vanguard UK ...") is a bridge to the proposal in the next paragraph.

98. The first sentence of that paragraph ("Given that my NED positions have facilitated potentially some £1bn of new assets to your new enterprise, I feel it appropriate to reprise our earlier discussions") explains her boldness in reprising a commercial proposal which Vanguard had rejected in February 2009. A substantial degree of boldness was required, because Vanguard's lack of interest in remunerating her had been made clear again quite recently. The conversation which she had with someone at Vanguard between 5 and 9 August 2010 had evidently conveyed to her that Vanguard

would not be offering any payment for introducing it to other mutuals, since she made the observation to Mr Fazzini-Jones and Mr Evans in her email of 9 August that unpaid asset gathering for Vanguard was not her remit. Moreover her feeler of 10 August 2010 regarding the possibility of her helping them in the defined contribution scheme market had received no response.

99. The next sentence ("We had discussed previously both the prospect of my receiving 1 bps for new monies secured, on an ad valorem basis, and my becoming a NED of your Dublin funds") was salesperson's spin. They had only "discussed" it in the sense that she had put these two proposals forward and Vanguard had shown no interest in them.

100. Read literally, the next sentence ("The MGM Advantage mandate would amount to £35k pa, with the TA mandate taking it to £110k pa") would be shocking. Mr Norris and Mr Rampulla were shocked to read it. At first sight it appears to mean that she is asking for an annual payment for having used her non-exec position at MGM to secure the MGM mandate for Vanguard, and is asking for a further annual payment on the basis that at the forthcoming meeting she will use her non-exec position at Teachers to secure the Teachers mandate for Vanguard also. Moreover, she is indicating that this is in line with previous discussions. Read literally, this indicates that Vanguard had discussed with her the making of corrupt payments of this kind.

101. Mr Philipps conceded that it was not unreasonable of Vanguard to take this as a request for payment in respect of MGM's back-book and for a potential Teachers mandate. He submitted, however, that that cannot have been what Ms Burns intended.

102. In her evidence she explained that what she had in mind was that the two examples of MGM and Teachers showed Vanguard the value of what she could do, and she was wanting them to engage her to assist them with other introductions in the future where she was not a non-exec and could be paid for her assistance. She said the meaning would have been much clearer if she had put in an additional phrase, to the effect of "by way of example". She added:

> Mr Norris, and his colleague, Mr Rampulla, were very well aware that the introductions to Teachers and MGM were done and could only be done on a goodwill basis, and it's regrettable that the email has been misread, and I accept responsibility for not writing it sufficiently clearly to avoid it being misread."

103. Despite all our concerns about Ms Burns' evidence, we accept her evidence that she had MGM and Teachers in mind as illustrations, and did not intend to write an email proposing to Vanguard that they should make corrupt payments to her for

securing the MGM and Teachers mandates. The final request "Could we progress matters with your counsel?" shows a lack of conscious awareness on her part that her email raised any issues of propriety. Someone consciously seeking a corrupt payment would be very unlikely to ask for the matter to be placed before the company lawyer in order to be progressed. There is no suggestion that she believed Vanguard to have on tap a corrupt lawyer, who would co-operate in an unlawful scheme.

104. The terms of her subsequent reply to Mr Norris seem to show that she appreciated, as at 19 November, that her email of 5 November had raised a conflict of interest issue (albeit she denied this in her oral evidence). It is unfortunate that she did not 'come clean' to Teachers at that point.

105. As regards the propriety of the email of 5 November 2010, accepting that she was not intending to ask for corrupt payments for introducing MGM and Teachers, the relevant reasoning is similar to that applicable to the emails of 24 and 26 February 2009. The central point appears in the following exchange in the course of her cross-examination:

> Q. You knew, Ms Burns, that making any sort of financial proposal to a candidate that you would be considering for a fund manager position was wholly improper because it gave rise to blatant conflict of interest. You knew that.
>
> A. No. Again, I don't accept that. I was discussing with Vanguard the possibility of carrying out business. They were not, at the point of my doing so, as yet live in our mandate selection process. We hadn't even begun it. We had not had the conversation we were due to have with our incumbent manager, wherein we would decide whether or not we could dissuade Legal & General to [*sic*] increasing their fees, and I think it is quite clear from the e-mail traffic around the time that I was very firmly of the view that we should stay with the incumbent manager. It was my preferred end game ... ...

106. This answer was unrealistic and inappropriate. True, there were a number of uncertainties. The incumbent manager might or might not be willing to change its position as regards fees. Vanguard might or might not come up with a solution to the Ethical Fund issue. But it was clear on the facts that Vanguard was 'live' in the selection process. That was the reason why they were coming to present to her investment committee on 22 November 2010.

107. During her oral evidence the Tribunal asked Ms Burns whether as at 19 November 2010 she realised that there were conflict issues arising from her email of 5

November. She said: "Making the proposal on 5 November did not, in my mind, immediately create a conflict of interest situation, no. I was interested in discussing matters with Mr Norris." But in answer to the next question she said:

> I felt any of the work streams that we might consider should be looked at in the light of potential conflict of interest issues, and that was in my mind both on 5 November and on the 19th.

108. Her solicitation of a paid engagement by Vanguard sought to create a situation where she would have a personal interest which could conflict with the interests of Teachers, who were entitled to her impartial advice on all the candidates, including Vanguard. The only way to save such solicitation from being improper was for her to make prior disclosure to Teachers and obtain Teachers' prior consent. Since she did not do so, we conclude that her behaviour in sending the email of 5 November 2010 culpably fell below the standards expected of an approved person. On this basis and to this extent we uphold the allegation in paragraph 5.2(2)(c) of the Amended Statement of Case. We go on in the next sections to consider the specific questions of lack of integrity and whether she is fit and proper.

Lack of integrity?

109. At the material times Statement of Principle 1 (APER 1) for approved persons stated:

> An approved person must act with integrity in carrying out his controlled function.

110. As regards the meaning of 'integrity', we were reminded of what was said in Hoodless at [19], in Vukelic v FSA (FS/2009/067) at [23], in First Financial Advisers Ltd v FSA (FS/2010/0038) 21 June 2012 at [119], and in Batra v FCA [2014] UKUT 0214 (TCC) at [13]-[15], which it is not necessary for us to repeat in full.

111. Mr Philipps QC sought to qualify what was said in those cases with a submission that a finding that a person failed to act with integrity necessarily connoted a finding that that person *intended* to breach the applicable ethical standards; he said that no one could accidentally or negligently fail to act with integrity. He continued:

> "Before it can find that the Authority has made out its case against Ms Burns in any of the respects alleged, the Tribunal must be satisfied that she herself knew at the time that the conduct in question might breach ethical standards

applicable to her as a NED, and deliberately decided to proceed regardless. The necessary element of deliberation can, of course, be found in a deliberate decision to ignore a known risk: that is the meaning of 'recklessness', which is the way in which the Authority puts its case ... ...; see *R v G* [2004] 1 AC 1034; *Vukelic* at [75]; [93]; [119]; *Atlantic Law LLP and Greystoke v FSA* (FSMT, 1 March 2010) at [96].

112. Of the citations relied on, R v G is concerned with the proper approach where there is an allegation of arson committed by children, Vukelic is concerned with turning a blind eye to obvious warning signs of impropriety, and Atlantic Law provides an example of reckless conduct that lacked integrity.

113. We accept, of course, that mere negligence is not the same thing as recklessness or as lack of integrity, but we do not consider that Mr Philipps' submission is a helpful gloss on the applicable law. We do not consider it appropriate to import into the test of integrity in the present field all the nuances of the term 'recklessness' in other branches of the law. We do not consider that the Authority is required to prove that the applicant consciously intended to breach ethical standards or thought about the applicable standards and made a conscious decision to take the risk of breaching them. For example, an habitual liar would give no thought to ethical standards, but would not thereby be acting with integrity.

114. We come back to the guidance in Hoodless at [19], that 'integrity' connotes moral soundness, rectitude and steady adherence to ethical standards, to the caution in Vukelic at [23] that this is not a comprehensive test, because integrity is a concept elusive to define in a vacuum but still readily recognisable by those with specialist knowledge and/or experience in a particular market, and to the further guidance in First Financial Advisers at [119] that a person lacks integrity if they lack an ethical compass, or their ethical compass to a material extent points them in the wrong direction. This is our understanding of the law which we must apply.

115. Against this legal framework, we consider it has been established by the Authority that she failed to act with integrity on 24 February 2009. The proper test for whether there was a potential conflict requiring disclosure depended not on whether there was a real possibility that there *would not* be an engagement of Vanguard, but on whether there was a real possibility that there *would* be. While we accept that part of what was in her mind on 24 February 2009 was the need to get clarity from Vanguard concerning whether they wanted to engage her, the very reason for that need was the potential conflict of interest. Moreover, she was an experienced and knowledgeable investment professional. Sitting in the meeting of 25 February 2009, and hearing Vanguard referred to as a possible candidate, she cannot have failed to have misgivings

about the email which she had sent the previous day. In our view she must have known on 25 February 2009 that she should disclose the approach that she had made to Vanguard on her own behalf. Instead, she closed her eyes to the issue, and compounded the situation by sending a further undisclosed solicitation email on the following day. We find that she failed to act with integrity on 24-26 February 2009 in the performance of her CF2 controlled function as a non-exec of MGM.

116. Her email of 5 November 2010 was an aggressive piece of salesmanship which sought to create a situation where she would have a personal interest which could conflict with the interests of Teachers, who were entitled to her impartial advice on all the candidates, including Vanguard. On our findings, she was not conscious of actual wrongdoing. Had she been consciously aware of the impropriety, she would not have asked that matters be progressed with Vanguard's counsel. The Authority was right not to advance a case on the basis of conscious, deliberate, intentional breach of duty. But by her own admission she had in mind on 5 November that any of the work streams that Vanguard might consider with her should be looked at in the light of potential conflict of interest issues. Given that admission, and her level of knowledge and experience, we can only view her conduct on that day as involving a reckless disregard for the potential creation of conflicts of interest, at a time when she knew that Vanguard was a live candidate for the Teachers mandate. This was not a steady adherence to ethical standards. To put it another way, her ethical compass was defective. We find that on 5 November 2010 she failed to act with integrity in the performance of her CF2 function as a non-exec of Teachers.

Fit and proper?

117. As was said in Hoodless and Blackwell v FSA FSMT, 3 October 2003 at [11], fitness and propriety are not judged in the abstract but in relation to the particular controlled functions to be performed in a particular firm. FIT 1.3.1G states:

> The Authority will have regard to a number of factors when assessing the propriety and fitness of a person to perform a particular controlled function. The most important considerations will be the person's: (1) honesty, integrity and reputation; (2) competence and capability; and (3) financial soundness.

118. The question for us to decide is whether she is fit and proper for the CF2 function at firms such as MGM and Teachers.

119. In considering this question we are entitled to take into consideration our finding that she was not a trustworthy witness on some critical matters. On the latter

point we keep in mind that by the time she came to give evidence before us she had pored over the documents, interviews and arguments many times, both on her own and with lawyers. We would be expecting her to be superhuman if we were to demand of her the ability invariably to distinguish between what she actually remembered and what she would like to have been the case, or the ability always to resist, while under the pressure of cross-examination, the temptation to try to argue unrealistic points in her favour rather than concede damaging answers to questions. She was entitled to bring the matter to the Tribunal for reconsideration. Her doing so was partly justified, given that we have not upheld a number of allegations made by the Authority. An applicant should not be penalised for contesting allegations that are not well-founded. Nevertheless, some of her answers were in our view deliberately untruthful, which shows moral weakness when under pressure.[18]

120. We are also entitled, and in the public interest obliged, to take into account the circumstances of her applications for her CF2 authorisations: see FCA v Hobbs [2013] EWCA Civ 918, [32], [38]. In the event she had a fair opportunity, with the assistance of solicitors and leading counsel, to address the concerns raised by the Authority on those points. Our findings in relation to those circumstances are set out above (see paragraphs 12, 45 and 84a). See further the postscript below.

121. For us the critical point is Ms Burns' disregard of the standards to be expected of a non-exec. It is a sensitive function. Non-execs often have wide-ranging business interests. A non-exec position requires rigorous adherence to the proper standards concerning avoidance of conflicts and the making of disclosures. Her failure in this respect was compounded by her willingness, with a view to personal gain, to use materially incomplete CVs and to sign false declarations on her CF2 application forms. Our conclusion is that she is not fit and proper for the CF2 function.

122. We summarise our principal conclusions as follows:

a. We reject the allegations in paragraphs 5.2.1(b), (c), (d), (f), (g), and (h) of the Authority's Amended Statement of Case.

b. Ms Burns' evidence to us was unsatisfactory in a number of respects (see paragraphs 84-85).

c. We uphold the allegation in paragraph 5.2(1)(e) of the Amended Statement of Case, namely, that in breach of her duty she participated in the discussion, in

[18] See above, paragraph 84a last sentence, paragraph 84c, paragraph 84d, paragraph 84e, paragraph 96.

which Vanguard was referred to, at MGM's Board meeting on 25 February 2009, but failed to disclose that she was concurrently soliciting a non-exec position and consulting work with Vanguard.

d. We uphold the allegations in paragraphs 5.2(2)(a) and (b) of the Amended Statement of Case on the basis that her solicitation of an engagement by Vanguard in the emails of 24 and 26 February 2009, by reference to her non-exec position with MGM, sought to create a situation where she would have a personal interest which could conflict with the interests of MGM, who were entitled to her impartial advice on Vanguard's candidacy, and she did this without prior disclosure to or consent of MGM.

e. We uphold the allegation in paragraph 5.2(2)(c) of the Amended Statement of Case on the basis that her solicitation email of 5 November 2010 to Vanguard sought to create a situation where she would have a personal interest which could conflict with the interests of Teachers, who were entitled to her impartial advice on all the live candidates, including Vanguard, and this solicitation took place without prior disclosure to or consent of Teachers.

f. We find that Ms Burns was in breach of APER Statement of Principle 1 by failing to act with integrity on 24-26 February 2009 in the performance of her CF2 controlled function as a non-exec of MGM and on 5 November 2010 in the performance of her CF2 function as a non-exec of Teachers. On each occasion she turned a blind eye to the ethical issues which arose.

g. Having regard to the above matters, we conclude that she is not fit and proper for the CF2 function.

123. Our decision is unanimous.

POSTSCRIPT REGARDING MATTERS ARISING AFTER THE HEARING

124. On 17 November 2014, in accordance with the usual practice, we issued our decision to the parties as a confidential draft, to give them the opportunity to draw attention to any clerical mistakes or any errors arising from an accidental slip or omission. Attached to an email of 24 November 2014 Ms Burns sent the Tribunal a note of draft corrections going well beyond such mistakes or errors, seeking to re-argue certain points and place more evidence before us. Her two main themes were: (a) certain oral evidence was omitted from the transcripts of the hearing, and (b) she

was deprived of the opportunity to deal adequately with non-pleaded allegations relied on by the Authority at the hearing. She also attached a 125 page prospectus for the Axial Systemic Strategies Funds Plc (September 2007), on page 27 of which she was described as "Head of Fund Structuring of Pearl Group Services since December 2006". Additional comments sought to alter our principal findings.

125. Given that the circumstances of her applications for her CF2 authorisations and her non-disclosure of her employment by Pearl Group were directly material, but did not form part of the specific allegations of misconduct, we considered it right to take the exceptional course of giving detailed consideration to the points (going beyond clerical mistakes or any errors arising from an accidental slip or omission) which Ms Burns wished to raise upon seeing our draft decision. We also gave the FCA the opportunity to comment on her points, which, under protest, the FCA took up.[19]

126. Our experience of transcripts is that they are very close to what was actually said, but not 100% perfect. We have not found anything of significance in Ms Burns' allegations of omissions from the transcript of the hearing. In some instances, supposedly omitted material is in fact contained in the transcript.[20] For the most part, our view is that her recollection is inaccurate. Even if there is a small residual category where her recollection is correct and the transcript is imperfect, it is of no significance for our overall view of the case.

127. As regards the Pearl matter her important additional submissions were, in our view:

a. The omission of her unregulated employment by Pearl from her FCA application form was not material.

b. Being made redundant from Pearl was not a matter which implied any fault or shortcoming on her part.

c. "The FCA failed to note that Ms Burns had provided a copy of the Prospectus covering her Pearl directorships to MGM, which also contained details of her unregulated role at Pearl, or that it is the responsibility of the firm, not the individual, to confirm the accuracy and completeness of data on the Form A following their due diligence."

[19] We declined to receive from Ms Burns yet further materials on 26 November 2014, which appeared to be of peripheral relevance at most.

[20] Merely by way of example, the evidence about the "flurry" of letters (her omission number 2) is at Day 2 p89, her reporting of two Pearl Group directors to the FSA (her omission number 9) is at Day 2 p57.

d. "Teachers, incorrectly, completed Long Form A for Ms Burns, although she was already a CF2 and therefore should have been asked to supply information for Short Form A; the Short Form A would not have required a career history, given her established CF2 standing."

128. Our view on these points is as follows:

a. The materiality of the nature of her unregulated Pearl employment to her new regulated roles is not the issue. We consider that the omission of her employment by Pearl from her FCA application form was highly material to our deliberations, because she signed an untrue declaration that the information was true and complete.

b. We agree that being made redundant from Pearl was not a matter which implied any fault or shortcoming on her part. But this does not assist Ms Burns' case.

c. If Ms Burns provided a copy of the prospectus to MGM (on page 27 of which her employment by Pearl was referred to), this would only show that her omission of her Pearl employment from the information which she supplied to MGM was incompletely carried through. It does not excuse her signing of a false application form to the FSA. Her attempt to blame MGM for not spotting her false declaration does her no credit.

d. If the Short Form A would have been sufficient, this does not alter the fact that the Long Form which was submitted contained a false declaration.

129. Where appropriate, we have adjusted the wording of our decision in light of the comments submitted by the parties. Having considered all the additional points made by Ms Burns, our decision remains in substance the same as in the draft.

NEXT STEPS

130. We have invited the parties to discuss whether in the light of our findings they are able to agree upon the appropriate sanctions and, if not, to propose directions leading to a further hearing to decide the remaining issues. We received from the FCA a set of proposed draft directions on 1 December 2014. Given the passage of time, some alterations to the proposed dates will be required. If directions cannot be agreed,

Ms Burns should supply her comments on the proposed directions by no later than 6 February 2015.

Andrew Bartlett QC
Judge of the Upper Tribunal

Decision released 15 December 2014