
FINAL NOTICE

To: **Mr Andrew Joseph Powell**

Individual
Reference
Number: **AJP01254**

Date of
Birth: **29 June 1977**

Date: **16 December 2013**

ACTION

1. For the reasons given in this Notice, the Authority hereby makes an order prohibiting Mr Powell from performing any function in relation to any regulated activities carried on by any authorised person, exempt person or exempt professional firm. This order takes effect from 16 December 2013.

SUMMARY OF REASONS

2. From 11 March 2010 to 28 April 2010, whilst working as a CF30 at G&G, Mr Powell showed a lack of integrity and is therefore not fit and proper to perform any

function in relation to any activities carried on by any authorised or exempt persons, or exempt professional firm.

3. During this time, Mr Powell, as independent advisor to the corporate trustee of the Pension Schemes, CBWPF, was required to give independent advice, which took account of the requirements of SOIPs. However, he improperly allowed himself to be directed by CBWPF to give particular advice in relation to four of the Pension Schemes which comprised some 1,500 individuals. As a result, his advice of 6 April 2010 was not independent and recommended that the assets of four Pension Schemes be invested in a fund that was potentially unsuitable, in that it was high risk and illiquid. This may have affected the current value of the Pension Schemes and may impact the amounts pension scheme members are able to draw down from the Pension Schemes when they reach retirement age.
4. Accordingly the Authority has decided to impose a Prohibition Order on him.
5. Mr Powell personally received some £43,000 in commission from the financial advice he provided to CBWPF on 6 April 2010.
6. TPR removed CBWPF as trustee to the Pension Schemes in October 2010 and appointed an Independent Trustee to the six Pension Schemes. Following its appointment the Independent Trustee obtained an injunction against CBWPF, Michael Conway and others freezing all relevant assets and commenced redress and recovery proceedings on behalf of the Pension Schemes. Those proceedings were subsequently settled on terms acceptable to the Independent Trustee. Taking into account the redress measures taken by the Independent Trustee, the Authority does not believe it would be appropriate to impose a separate penalty on Mr Powell since this would diminish the level of assets potentially available to be recovered and returned to the Pension Schemes.
7. This action supports the Authority's statutory objectives of maintaining market confidence in the UK financial system and securing the appropriate degree of protection for consumers.

DEFINITIONS

8. The definitions below are used in this Warning Notice:

The "Act" means the Financial Services and Markets Act 2000;

The "Authority" means the body corporate previously known as the Financial Services Authority and renamed on 1 April 2013 as the Financial Conduct Authority;

"CBWPF" means CBW Pension Forensics Limited;

"CF1" means the Authority controlled function of Director;

"CF30" means the Authority controlled function of Customer;

"DEPP" means the Decision Procedures and Penalties Manual in the Authority Handbook;

"EG" means the Enforcement Guide in the Authority Handbook;

"Fund M" means the property investment fund into which the assets of four Pension Schemes were invested following the advice given by G&G on 6 April 2010;

The "Authority Handbook" means the Authority Handbook of rules and guidance;

"G&G" means G&G Financial Services Limited;

"IFA" means independent financial advisor;

"Independent Trustee" means the independent trustee referred to in paragraph 14;

"Independent Expert Report" means the independent expert report referred to in paragraph 18;

The "Investment Regulations" means the Occupational Pension Schemes (Investment) Regulations 2005;

"Mr Conway" means Michael Conway;

"Mr Powell" means Mr Andrew Powell;

the "Pension Schemes" means the six distressed occupational pension schemes to which CBWPF was appointed corporate trustee;

"Prohibition Order" means the order to be made pursuant to section 56 of the Act prohibiting Mr Powell from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm;

The "relevant period" means 11 March 2010 to 28 April 2010;

"SOIPs" means the Statements of Investment Principles of the Pension Schemes;

"TPR" means The Pensions Regulator; and

The "Tribunal" means the Upper Tribunal (Tax and Chancery Chamber).

FACTS AND MATTERS

G&G

9. G&G was an IFA incorporated in April 1985 and authorised to carry out regulated activities, such as advising, arranging and managing investments. In 2005, Mr Powell joined G&G as an investment advisor. In 2007, Mr Powell was registered as a director of G&G with Companies House and approved to hold the CF30 (Customer) controlled function. Mr Powell was not approved to hold the CF1 (Director) controlled function with the Authority, despite being registered as a director at Companies House.
10. G&G has ceased trading and its permission to carry on regulated activities under

Part IV of the Act was cancelled on 20 September 2012. G&G has been wound up and was dissolved on 5 July 2012.

CBWPF

11. CBWPF was incorporated on 12 June 2001. Mr Conway was the owner of CBWPF and held all of its shares. He remained as director of CBWPF until its dissolution on 10 January 2012.
12. Between June 2007 and July 2008, CBWPF was appointed as corporate trustee to the Pension Schemes. It was generally the sole trustee for the Pension Schemes until July 2010 and exercised its power of investment and disinvestment as trustee in relation to the assets of the Pension Schemes. CBWPF was able to control the assets and investments of the Pension Schemes in its capacity as corporate trustee to the Pension Schemes.
13. CBWPF was not authorised to conduct regulated activities. It therefore appointed G&G to act as an IFA in relation to the Pension Schemes. The first appointment took place in February 2008. G&G acted as the IFA to CBWPF until June 2010.
14. Mr Powell had a pre-existing relationship with Mr Conway, having worked with him at another IFA firm owned by Mr Conway.

TPR Findings

15. In July 2010, TPR received a report which raised questions about the conduct of CBWPF. An investigation by TPR followed, and, as a result, the Determinations Panel of TPR made a determination on 28 October 2010 to appoint an Independent Trustee to each of the Pension Schemes pursuant to sections 7(3)(a), (c) and (d) of the Pensions Act 1995.
16. On 28 March 2011 the Determinations Panel of TPR met to conduct a Compulsory Review of its earlier October 2010 determination in light of representations received from the parties involved. Following this meeting, the Determinations Panel of TPR issued a Final Notice on 18 April 2011 in which it upheld the determination made on 28 October 2010. References below to conclusions by TPR

refer to conclusions contained in TPR's Final Notice, with which the Authority agrees.

17. In reaching its decision, the Determinations Panel of TPR made several findings in relation to the investments made by CBWPF, on behalf of the Pension Schemes, including:
 - a) Unsuitability of investments – many and persistent failures to observe section 36 of the Pensions Act 1995, which required the trustee to obtain and consider proper advice on the question of whether the investment is satisfactory.
 - b) SOIPs – a number of failures to observe section 36 of the Pensions Act 1995, which required the trustee to have regard to the SOIPs and exercise their powers of investment with a view to giving effect to the SOIPs.
 - c) Security, quality, liquidity and profitability – breaches of regulation 4(3), 4(5) and 4(6) of the Investment Regulations, which required the trustee to: (i) exercise their powers of investment in a manner calculated to ensure security, quality, liquidity and profitability of the portfolio; (ii) ensure the assets of the Pension Scheme consist predominantly of investments admitted to trading on regulated markets; and (iii) ensure that for investments not invested on regulated markets, the assets be kept to a prudent level.
 - d) Diversification – a breach of regulation 4(7) of the Investment Regulations which required the assets of the Pension Scheme to be diversified properly so as to avoid excessive reliance on a particular asset, issuer or group of undertakings and to avoid accumulations of risk in the portfolio as a whole.
 - e) Conflicts of interest – breach of regulation 4(2)(b) of the Investment Regulations which required the trustee to exercise their powers of investment such that the assets be invested, in the case of a potential conflict of interest, in the sole interests of members and beneficiaries.

18. The Authority agrees with the findings of the Determination Panel of TPR as set out in the Final Notice of 18 April 2011. The findings have not been referred to the Tribunal or otherwise formally challenged by any party to the TPR proceedings.
19. The Independent Trustee to the Pension Schemes appointed an independent expert to advise them in relation to the Pension Schemes. The independent expert produced a preliminary report providing an initial overview of the investments made by CBWPF in relation to the Pension Schemes. This report was included in the representations of the Independent Trustee submitted to the Determinations Panel by TPR. The Determinations Panel of TPR considered this report and made reference to it in its Final Notice.

Investment advice on 6 April 2010 – lack of independence

20. Between February and September 2008 Mr Powell was appointed independent financial advisor by CBWPF in relation to the Pension Schemes.
21. During the course of his relationship with CBWPF, Mr Powell prepared investment reports recommending investments for the Pension Schemes' funds.
22. On 11 March 2010, Mr Conway in his capacity as director of CBWPF, emailed Mr Powell demanding that Mr Powell disinvest £8 million of assets of the Pension Schemes (without identifying which specific Schemes he wished the disinvestment to affect) in order that CBWPF could re-invest the sums in Fund M, a property investment fund of Mr Conway's designation. Mr Conway wrote to Mr Powell stating: "Andy, you advise us were [sic] to take the [£8 million] if you are not up to the job I will appoint someone else who can." Mr Powell responded the same day to Mr Conway by email:

"If we fully invest the [Pension Scheme] funds in the [Fund M] we will be over exposed to one speculative asset class and would be liable should the [Authority] or Pensions regulator review the case. I would be delighted to reinvest your funds but we have to make sure we do it in the right way so that neither you nor I can be open to criticism. Ultimately it's your money and you can tell us where you want it."

23. Notwithstanding his concerns, on 6 April 2010, Mr Powell prepared four almost identically worded investment reports for CBWPF. These reports, each of which advised in relation to a distinct Pension Scheme, recommended investment in Fund M, along with other investments, and were the result of Mr Powell being inappropriately influenced by Mr Conway.
24. Specifically, the four reports recommended that a total of £8 million be invested in Fund M on behalf of four Pension Schemes. This was the exact sum requested by Mr Conway for investment purposes. The advice contained within Mr Powell's four reports of 6 April 2010 to invest in Fund M was not independently provided.
25. Over £8 million was subsequently invested in Fund M in accordance with Mr Conway's requirements.
26. The four Pension Schemes were the only investors in Fund M which would have made exit from the fund problematic. Moreover, the Independent Expert Report highlighted the *"significant concentration risk arising from the fact that [Fund M] invests in the small number of property developments of a single property developer."*
27. Mr Powell failed to determine the suitability of Fund M (designated by Mr Conway) for the Pension Schemes by failing to ascertain whether there were more appropriate investments on the market. This, he said, was because Mr Conway *"asked me purely to look at this in isolation"* and that *"if it was my money I would rather have looked at everything that was in the market..."*

Investment advice on 6 April 2010 – not complying with SOIPs

28. The SOIPs governed decisions about the Pension Schemes' investments. The SOIPs for the Pension Schemes were identical. The "Investment Objectives" set out within the SOIPs stated that the trustees should invest Pension Scheme assets *"in the best interest of the members and beneficiaries"*. Other key principles set out in the SOIPs were as follows:
 - *Investments should be broadly diversified to ensure there is not a concentration of investment with any one user;*

- *Investments in illiquid investments, such as property or pooled property funds, may be held as long as the total amount of the plan’s assets invested in such asset classes is not excessive;*
 - *Investments in derivatives is permitted within pooled funds as long as they contribute to a reduction in risk or facilitate efficient portfolio management; and*
 - *Assets of the Pension Scheme are predominately invested on regulated markets.*
29. Mr Powell was aware of and should have ensured that his financial advice was in line with the SOIP for each of the four Pension Schemes that he advised on 6 April 2010. His correspondence with the CBWPF prior to that date confirmed his awareness of SOIPs. For example, his letter to CBWPF of 16 March 2010 regarding one of the Pension Schemes stated:
- “Having reviewed the Statement of investment principles I can confirm that the current diversification within the portfolio complies fully with these principles. Furthermore, G and G ... have given effect to the investment principles in this statement so far as reasonably practicable when advising on all investments of this scheme.”* Mr Powell provided similar declarations in relation to the other Pension Schemes.
30. Section 36 of the Pensions Act 1995 states *“the trustee...must exercise their powers of investment with a view to giving effect to the principles contained in the statement under section 35 [the investment principles], so far as reasonably practicable”*.
31. In relation to Mr Powell’s advice of 6 April 2010, which overall advised that £8 million be invested in Fund M on behalf of four Pension Schemes, TPR’s Final Notice stated that *“there is no evidence to suggest that the investments were in accordance...”* with the relevant SOIPs of at least two of the investing Pension Schemes. The Final Notice went on to state *“there was a clear contravention of Section 36...”* in respect of two of the four Pension Schemes and *“a possible contravention”* in respect of a third.

32. In allowing himself to be inappropriately influenced Mr Powell failed to give proper and adequate consideration to the SOIPs when providing the investment advice contained in the reports of 6 April 2010.

FAILINGS

33. The regulatory provisions relevant to this Final Notice are referred to in the Annex to this Notice.
34. Mr Powell showed a lack of integrity in carrying out his controlled function of CF30 (Customer) at G&G during the relevant period and is therefore not fit and proper to perform any function in relation to any regulated activities carried out by any authorised or exempt persons, or exempt professional firm.
35. During this time, Mr Powell, as independent advisor to the corporate trustee of the Pension Schemes, CBWPF, was required to give independent advice which took account of the requirements of SOIPs. However, he improperly allowed himself to be directed by CBWPF to give particular advice in relation to four of the Pension Schemes. The members of these Pension Schemes totalled some 1,500 individuals. As a result, his advice of 6 April 2010 was not independent and recommended that the assets of four Pension Schemes be invested in a fund that was potentially unsuitable, in that it was high risk and illiquid. This may have affected the current value of the Pension Schemes and may impact the amounts pension scheme members are able to draw down from the Pension Schemes when they reach retirement age.

SANCTION

Prohibition Order

36. The Authority has had regard to the guidance in Chapter 9 of EG and has decided that it is appropriate and proportionate in all the circumstances to prohibit Mr Powell from performing any function in relation to any regulated activity carried out by an authorised person, exempt person or exempt professional firm because he is not a fit and proper person in terms of honesty and integrity. The relevant provisions of EG are set out in the Annex of this Notice.

37. Given the nature and seriousness of the failures outlined above, the Authority has decided that Mr Powell's conduct demonstrates a lack of honesty and integrity such that he is not fit and proper to perform any function in relation to regulated activities carried on at any authorised person, exempt person or exempt professional firm.
38. In the interests of consumer protection, the Authority has decided that it is appropriate and proportionate in all the circumstances to impose a Prohibition Order on Mr Powell in the terms set out above.

PROCEDURAL MATTERS

Decision maker

39. The decision which gave rise to the obligation to give this Notice was made by the Settlement Decision Makers.
40. This Final Notice is given to Mr Powell under, and in accordance with, section 390 of the Act.

Publicity

41. Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this notice relates. Under those provisions, the Authority must publish such information about the matter to which this notice relates as the Authority considers appropriate. The information may be published in such manner as the Authority considers appropriate. However, the Authority may not publish information if such publication would, in the opinion of the Authority, be unfair to you or prejudicial to the interests of consumers or detrimental to the stability of the UK financial system.
42. The Authority intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

Authority contacts

43. For more information concerning this matter generally, contact Paul Howick (direct line: 020 7066 7954 / email: paul.howick@fca.org.uk) of the Enforcement and Financial Crime Division of the Authority.

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Bill Sillett

Head of Department

Financial Conduct Authority, Enforcement and Financial Crime Division

Annex

STATUTORY PROVISIONS, REGULATORY GUIDANCE AND POLICY

Statutory Provisions under the Act

1. The Authority's regulatory objectives are set out in section 2(2) of the Act and include maintaining confidence in the financial system and the protection of consumers.
2. Section 56 of the Act provides that the Authority may make a prohibition order if it appears to the Authority that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person. Such an order may relate to a specific regulated activity, an activity falling within a specified description or all regulated activities.

Fit and Proper Test for Approved Persons ("FIT")

3. The section of the Authority handbook entitled "FIT" sets out the Fit and Proper test for Approved Persons. The purpose of FIT is to outline the main criteria for assessing the fitness and propriety of a candidate for a controlled function and FIT is also relevant in assessing the continuing fitness and propriety of an approved person.
4. FIT 1.3.1G provides that the Authority will have regard to a number of factors when assessing a person's fitness and propriety. The most important considerations include the person's honesty, integrity and reputation.
5. In determining a person's fitness and propriety FIT 2.2.1 provides that the Authority will have regard to matters including, but not limited to:
 - (1) whether the person has been the subject of any adverse finding or any settlement in civil proceedings, particularly in connection with investment or other financial business, misconduct, fraud or the formation or management of a body corporate;

- (2) whether the person has been the subject of, or interviewed in the course of, any existing or previous investigation or disciplinary proceedings, by the Authority, by other regulatory authorities (including a previous regulator), clearing houses and exchanges, professional bodies, or government bodies or agencies;
- (3) whether the person is or has been the subject of any proceedings of a disciplinary or criminal nature, or has been notified of any potential proceedings or of any investigation which might lead to those proceedings;
- (4) whether the person has contravened any of the requirements and standards of the regulatory system or the equivalent standards or requirements of other regulatory authorities (including a previous regulator), clearing houses and exchanges, professional bodies, or government bodies or agencies;
- (5) whether the person, or any business with which the person has been involved, has been investigated, disciplined, censured or suspended or criticised by a regulatory or professional body, a court or Tribunal, whether publicly or privately;
- (6) whether, in the past, the person has been candid and truthful in all his dealings with any regulatory body and whether the person demonstrates a readiness and willingness to comply with the requirements and standards of the regulatory system and with other legal, regulatory and professional requirements and standards.

EG

6. The Authority's approach to exercising its powers to make a Prohibition Order under section 56 of the Act is set out in Chapter 9 of EG.
7. EG 9.1 states that the Authority's power under section 56 of the Act to prohibit individuals who are not fit and proper from carrying out controlled functions in relation to regulated activities helps the Authority to work towards achieving its regulatory objectives. The Authority may exercise this power to make a prohibition order where it considers that, to achieve any of those objectives, it is appropriate

either to prevent an individual from performing any functions in relation to regulated activities, or to restrict the functions which he may perform.

8. EG 9.4 sets out the general scope of the Authority's powers in this respect, which include the power to make a range of prohibition orders depending on the circumstances of each case and the range of regulated activities to which the individual's lack of fitness and propriety is relevant.
9. EG 9.5 provides that the scope of a prohibition order will vary according to the range of functions which the individual concerned performs in relation to regulated activities, the reasons why he is not fit and proper and the severity of risk which he poses to consumers or the market generally.
10. In circumstances where the Authority has concerns about the fitness and propriety of an approved person, EG 9.8 to 9.14 provides guidance. In particular, EG 9.8 states that the Authority may consider whether it should prohibit that person from performing functions in relation to regulated activities, and that the Authority will consider whether its regulatory objectives can be achieved adequately by imposing disciplinary sanctions.
11. EG 9.9 provides that when deciding whether to make a prohibition order against an approved person, the Authority will consider all the relevant circumstances of the case, which may include (but are not limited to):
 - (1) whether the individual is fit and proper to perform functions in relation to regulated activities. The criteria for assessing the fitness and propriety are set out in FIT 2.1 (Honesty, integrity and reputation), FIT 2.2 (Competence and capability) and FIT 2.3 (Financial soundness);
 - (2) the relevance and materiality of any matters indicating unfitness;
 - (3) the length of time since the occurrence of any matters indicating unfitness;
 - (4) the particular controlled function the approved person is (or was) performing, the nature and activities of the firm concerned and the markets in which he operates; and

- (5) the severity of the risk which the individual poses to consumers and to confidence in the financial system.
12. EG 9.12 gives examples of types of behaviour which have previously resulted in the Authority deciding to issue a prohibition order, including severe acts of dishonesty and serious breaches of the Statements of Principle and Code of Conduct for Approved Persons.

Requirements under the Pensions Act 1995

13. Section 36(1) of the Pensions Act 1995 and Regulation 4(2) of the Occupational Pensions Schemes (Investment) Regulations 2005 ("the Regulations") impose requirements on trustees of pension schemes to act in the best interest of scheme members.
14. Section 36(1) requires that the trustees of a trust scheme must exercise their powers of investment in accordance with subsections (3) and (4) of the Regulations.
15. Subsections (3) and (4) of the Regulations are detailed provisions, but in summary they provide that trustees of a scheme must, inter alia:
- (1) invest assets in the best interests of members and beneficiaries;
 - (2) in the case of a potential conflict of interest invest the assets in the sole interest of members and beneficiaries;
 - (3) exercise the powers of investment in a manner calculated to ensure the security, quality, liquidity and profitability of the portfolio as a whole; and
 - (4) ensure that the assets of the scheme are properly diversified in such a way to avoid excessive reliance on any particular asset, issuer or group of undertakings and so as to avoid accumulations of risk in the portfolio as a whole.

- (5) exercise their powers of investment with a view to giving effect to the statement of investment principles.
16. Section 36(3) of the Pensions Act 1995 states that "before investing [pension scheme assets] in any manner...the trustees must obtain and consider proper advice on the question whether the investment is satisfactory having regard to the ... [SOIPS]."