
FINAL NOTICE

To: Jonathan Paul Elms
Of: "Springfield"
32 Cherry Orchard Road
West Molesey
Surrey
KT8 1QZ

Date: 29 July 2005

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") gives you a final notice about an order prohibiting you from carrying out any controlled function involving the exercise of significant influence over any Authorised Person in relation to any regulated activity carried on by it

1. THE ORDER

- 1.1. The FSA gave you a decision Notice on 19 June 2005 which notified you that, for the reasons set out in that Notice, pursuant to Section 56 of the Financial Services and Markets Act 2000 ("the Act") the FSA had decided to make an order prohibiting you, Mr Jonathan Paul Elms ("Mr Elms") from performing any controlled function involving the exercise of significant influence over any Authorised person in relation to any regulated activity carried on by it.
- 1.2. You have not referred the matter to the Financial Services and Markets Tribunal within 28 days of the date on which the Decision notice was given to you.
- 1.3. Accordingly for the reasons set out below, the FSA hereby makes an order pursuant to Section 56 of the Act

2. REASONS FOR THE ACTION

- 2.1. The FSA has exercised its statutory power to make a prohibition order against Mr Elms because it considers his conduct, as detailed below, demonstrated not only a failure to conduct the Pension Review in accordance with Regulatory requirements but that he displayed a lack of due care and skill well below the standard required of an Approved Person. Mr Elms also failed to be open and cooperative with the Regulator,
- 2.2. The FSA's action relates to the conduct of Mr Elms between March 1999 and July 2004 as a partner of Teare Rose ("the Firm"). In particular he:
 - (1) Failed to exercise due care and skill when completing returns to the FSA which contained inaccurate information and statements that the Pensions Review of the Firm had been completed when in fact it had not, and
 - (2) Failed to conduct the Pensions review of the firm in accordance with the prescribed Regulatory requirements.
- 2.3. Because of his conduct, the FSA is not satisfied that Mr Elms is a fit and proper person to perform any controlled function involving the exercise of significant influence over any Authorised Person in relation to any regulated activity carried on by it.
- 2.4. The prohibition order does not affect controlled functions which do not fall within the definition of "significant influence function". These include, for example, the controlled function of acting as an investment adviser.

3. RELEVANT STATUTORY PROVISIONS AND GUIDANCE

Statutory Provisions

- 3.1. The FSA's regulatory objectives established in section 2(2) of Financial Services and Markets Act ("FSMA") include the protection of consumers.
- 3.2. Section 56 of FSMA provides that the FSA may prohibit an individual from performing functions in relation to a regulated activity carried on by an authorised person.
- 3.3. The effect of making a prohibition order is to prohibit an individual from performing functions within authorised firms and to prohibit authorised firms from employing the individual to perform specific functions. Such an order may be made:
 - (a) in relation to a specified function, a class of function or any function; and
 - (b) in relation to authorised persons generally or a class of authorised persons.
- 3.4. Section 56(1) provides that the FSA may make a prohibition order if it appears to the FSA that the individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person.

- 3.5. A prohibition may therefore be partial or total and may be imposed if it appears to the FSA that the individual concerned is not a fit and proper person to perform such functions.
- 3.6. Section 64 of FSMA authorises the FSA to issue statements of principle with respect to the conduct expected of approved persons. If it does so it must also issue a code of practice for the purpose of helping to determine whether or not a person's conduct complies with the statement of principle. Such a code may specify:–
- (1) descriptions of conduct which, in the opinion of the Authority, comply with a statement of principle;
 - (2) descriptions of conduct which, in the opinion of the Authority, do not comply with a statement of principle;
 - (3) factors which, in the opinion of the Authority, are to be taken into account determining whether or not a person's conduct complies with a statement of principle.

Relevant Guidance

The FSA Handbook

- 3.7. In exercising its power to issue a prohibition order the FSA must have regard to guidance published in the FSA Handbook. The relevant considerations in relation to the action specified above are set out below.
- 3.8. The Fit and Proper Test for Approved Persons (“FIT”) identifies three criteria as being the most important considerations, namely:
- (1) honesty, integrity and reputation (FIT 2.1): This includes an individual's openness and honesty in dealing with consumers, market participants and regulators and ability and willingness to comply with requirements placed on him by or under the Act as well as with other legal and professional obligations and ethical standards;
 - (2) competence and capability (FIT 2.2): This includes an assessment of the individual's skills in carrying out the controlled function that he is performing, and
 - (3) financial soundness (FIT 2.3).
- 3.9. The Statements of Principle and Code of Conduct for Approved Persons (“APER”) sets out the Statements of Principle in respect of approved persons and descriptions of conduct which, in the opinion of the FSA, do not comply with a Statement of Principle. It further describes factors which, in the opinion of the FSA, are to be taken into account in determining whether or not an approved person's conduct complies with a Statement of Principle.
- 3.10. The guidance provided in APER 3.1.3 stipulates that, when establishing compliance with or a breach of a Statement of Principle, account will be taken of the context in

which a course of conduct was undertaken, the circumstances of the individual case, the characteristics of the particular controlled function and the behaviour to be expected in that function. APER 3.1.4 provides guidance that an approved person will only be in breach of a Statement of Principle if he is personally culpable, that is in a situation where his/her conduct was deliberate or where his/her standard of conduct was below that which would be reasonable in all the circumstances.

- 3.11. Statement of Principle 2 states that:

An approved person must act with due skill, care and diligence in carrying out his controlled function.

- 3.12. Statement of Principle 4 provides that:

An approved person must deal with the FSA and with other regulators in an open and cooperative way and must disclose appropriately any information of which the FSA would reasonably expect notice.

- 3.13. APER 4.4.4 states failing to promptly report, in accordance with the firm's internal procedures, information which would reasonably be of material significance to the FSA as conduct which does not comply with Statement of Principle 4. The guidance at APER 4.4.5 provides that there is no duty on an approved person to such information directly to the FSA unless he is one of the approved persons responsible within the firm for reporting matters to the FSA.

- 3.14. APER 4.4.9(1) includes failing without good reason to inform a regulator of information of which the approved person was aware in response to questions from that regulator is conduct which is in breach of Statement of Principle 4.

Enforcement Policy

- 3.15. ENF 8.4 summarises the powers to make prohibition orders set out in FSMA and the circumstances under which Enforcement will consider recommending such action. In particular ENF 8.4.2(3) states that the scope of a prohibition order will depend on the range of functions which the individual concerned carries out in relation to regulated activities, the reasons why he is not fit and proper and the severity of the risk which he poses to consumers or the market generally.

- 3.16. ENF 8.6 gives specific guidance in relation to prohibition orders against individuals employed or formerly employed by firms who are not approved persons. ENF 8.6.1 states that the FSA, when considering making a prohibition order against such individuals may make an order only on the grounds that the individual is not fit and proper to carry out functions in relation to regulated activities.

- 3.17. ENF 8.6.2 provides that the following specific criteria, as set out in ENF 8.5.2, should be considered when determining the fitness and propriety of an individual employed or formerly employed by a firm who is not an approved person:

- (1) whether the individual is fit and proper to perform the functions in relation to regulated activities in accordance with the criteria contained in FIT, and

- (2) whether and to what extent the individual has failed to comply with the Statements of Principle or been knowingly concerned in a contravention by the relevant firm of a requirement imposed on the firm by or under FSMA;
 - (3) the relevance, materiality and length of time since the occurrence of any matters indicating unfitness;
 - (4) the severity of the risk which the individual poses to consumers and to confidence in the financial system, and, if relevant
 - (5) whether the conduct in question occurred while the individual was an approved person, the previous disciplinary record and general compliance history of the individual.
- 3.18. In summary, the relevant considerations are whether, in terms of honesty, integrity, competence and capability, the relevant individual is fit and proper to perform functions in relation to regulated activities and, if not, the severity of the risk posed by them. Having established these matters, it can be determined whether prohibition will be necessary to achieve the FSA's regulatory objectives and what degree of prohibition would best serve the achievement of those objectives in each case.

4. FACTS AND MATTERS RELIED ON

Teare Rose

- 4.1. The Firm was an independent financial adviser partnership with 2 partners; Mr Elms was the senior partner. The Firm was formerly regulated by FIMBRA, IBRC and the PIA. Until 13 May 2004 the Firm's permitted regulated activities were advising on Pension Transfers, Pension Opt Outs and investments, arranging deals in investment and making arrangements, and agreeing to carry on regulated activity. The FSA cancelled the Firm's Part IV permission on 24 September 2004.
- 4.2. From March 1999, Mr Elms had sole responsibility for the conduct of the Firm's Pension Review including the review of customer files and completion of Pension Review returns.

Mr Elms conduct of the Teare Rose Pensions Review

- 4.3. From 1995 firms regulated by the PIA could be required to carry out a review of any aspect of their investment business with a view to determining whether redress should be offered to any investor who had suffered loss or damage as a result of a failure by a member to comply with its relevant duties.
- 4.4. The PIA subsequently published guidance ("the Priority Review Guidance") which provided the standards and specification enabling member firms to meet their respective responsibilities to review relevant past pension opt-out, pension non-joiner and pension transfer business. The Pensions Review was divided into two phases, Phase 1 and Phase 2. Firms carrying out the review were required to submit Quarterly Returns to the regulator detailing their progress.

- 4.5. Completion of the Pensions Review became a requirement for firms regulated by the FSA by virtue of transitional arrangements set out in the Financial Services and Markets Act 2000 (Transitional Provisions) (Review of Pensions Business) Order 2000, which treats a failure to carry out the Review as a failure to comply with FSA Rules. The deadline for completion of Phase 1 of the Review was 31 December 1998 and for Phase 2 it was 30 June 2002 (or 31 March 2003 where investors had received a windfall payment from the demutualization of the personal pension provider). Completion for this purpose meant that redress had been paid to relevant customers or that offers of redress had been made to them.
- 4.6. In March 1999 Mr Elms (on behalf of the Firm) sent letters to 34 investors who had been initially identified as falling within the reviewable population for the purposes of the Review. Included with each of the letters was a questionnaire issued in accordance with the Guidance. Some investors returned the questionnaire requesting a review. However the FSA has established that, for a period of nearly two years from March 1999, there is no evidence that Mr Elms made any progress with the Review.
- 4.7. Mr Elms carried out some work on the Pensions Review from 2001 but the Firm failed to meet the June 2002 deadline for its completion.
- 4.8. In the period between February 2001 and July 2003 Mr Elms submitted four Phase 2 Returns dealing with both phases of the Review. Each of these Returns showed anomalies and contained inaccurate information. In particular:
- (1) The Return for the quarter ended 30 September 2001 stated that the review population had been reduced from 34 to 28 cases,
 - (2) Subsequent Returns stated that the review population was 27 cases;
 - (3) The Return for the quarter ended 31 December 2002 stated that, of the 27 cases, 25 investors had been informed that they were not entitled to redress. At that date Mr Elms had in fact written to only seven investors closing their cases;
 - (4) The Return dated 17 July 2003 (which Mr Elms described as a "final" Return) stated that, of the 27 reviewable cases, all 27 investors had been informed that they were not entitled to redress. At that date Mr Elms had in fact written to only 11 investors closing their cases.
- 4.9. On 24 September 2003 the FSA's Pension Department conducted a visit to the firm. During this visit Mr Elms was unable to:
- (1) produce all relevant information requested, or
 - (2) demonstrate that the Firm had correctly closed cases in accordance with the Guidance
- 4.10. Following further correspondence, in December 2003, Mr Elms submitted a new Return dated 31 October 2003. This return contained significantly different information, including the statement that the reviewable population included only 14

cases. Despite repeated requests, Mr Elms failed to provide an adequate explanation of the changes in the figures.

- 4.11. Mr Elms remained an Approved Person until 13 May 2004.
- 4.12. The FSA appointed investigators on 18 May 2004 to examine the conduct of Mr Elms in relation to the Firm's Pensions Review and its submission of relevant returns. Mr Elms's response to a formal request for information and documents included the admission that there were errors on previous returns but no explanation of these errors. Instead he provided yet another Return containing further amendments without adequate explanation.
- 4.13. During the investigation the FSA established that Mr Elms had failed in every case to carry out the prescribed procedures to determine whether individual investors had suffered loss and whether redress was due to them or not.
- 4.14. Mr Elms has subsequently admitted that the majority of investor files were not materially compliant and that the Pensions Review procedures were not carried out properly or with the necessary due care and skill required. He has also conceded that he did not fully understand the Guidance issued by the regulator, did not follow it and never sought advice on how to carry out the Review in accordance with the Guidance.
- 4.15. As stated in his written representations to the Regulatory Decisions Committee dated 25 May 2005 Mr Elms has "*conceded that the manner in which I carried this [the Pensions Review] out was not up to the standard required*".
- 4.16. Although he was given numerous opportunities to explain the Firm's lack of progress with the Review and to ask for help with its completion Mr Elms did not do so. Furthermore, the FSA was only able to start to reconcile the Firm's records to the Returns that Mr Elms had submitted and to establish the true position of the Firm's Review after it had made a further formal information request and had formally interviewed Mr Elms.
- 4.17. The result of Mr Elms's actions has been that, potentially, at least 34 investors could have been denied redress that was due to them for at least two years. The FSA is now conducting the Firm's Pensions Review in its stead. The cases of four investors have been referred to the Financial Services Compensation Scheme for determination of the amount of redress due and payment of this amount to them.

5. CONCLUSIONS

- 5.1. The facts and matters described above lead the FSA, having regard to its regulatory objectives, to the following conclusions.
- 5.2. In his capacity as a partner of Teare Rose Mr Elms was responsible for the conduct of the Pensions Review, which included the completion of Pensions Review Quarterly Returns, their submission to the FSA and dealing with clients.
- 5.3. By submitting Pensions Review Quarterly Returns to the FSA which contained materially inaccurate information Mr Elms persistently misled the FSA into believing

that Teare Rose had made greater progress with the Pensions Review than was the case.

- 5.4. Mr Elms has breached Statement of Principle 2 by failing to carry out the prescribed Pensions Review procedures.
- 5.5. Mr Elms was the Approved Person within Teare Rose responsible for the conduct for the Pensions Review, including the completion and submission of the Returns. Thus, by failing to report the true extent of Teare Rose's Review to the FSA and by consistently failing to provide required information and explanations in connection with the Pensions Review, he has breached Statement of Principle 4.
- 5.6. By breaching the Statements of Principle and by failing to ensure that the Firm continued to fulfil its obligation to complete the Pensions Review from 1999 onwards Mr Elms has failed to act with the competence required of Approved Persons and has breached Fit and Proper Criteria

6. IMPORTANT NOTICES

- 6.1 This Final Notice is given to you in accordance with Section 390 of the Act.

Publicity

- 6.2 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 FSA must publish such information about the matter to which this notice relates as it considers appropriate. However, the FSA may not publish information if such publication would, in the opinion of the FSA, be unfair to you or prejudicial to the interests of consumers.
- 6.3 The FSA intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

Third party rights

- 6.4 This final Notice will be given to your former partner in Teare Rose, as a third party identified in the Decision Notice to whom in the opinion of the FSA the matter is prejudicial.

FSA Contacts

- 6.5 For more information concerning this matter generally, you should contact Sylvia Levi in the Enforcement Division (direct line: 020 7066 1422/fax: 020 7066 1423).

John Winfield
FSA Enforcement Division