
FINAL NOTICE

To: **Shane Lee Garvey**

D.O.B: **23 October 1965**

Date: 19 September 2007

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("the FSA") gives you final notice about a decision to make a prohibition order against you.

1. ACTION

- 1.1. The FSA gave you, Mr Shane Lee Garvey ("Mr Garvey"), a Decision Notice on 19 September 2007 which notified you that pursuant to section 56 of the Financial Services and Markets Act 2000 ("the Act"), the FSA had decided to make a prohibition order against you in the terms set out below
- 1.2. The terms of the prohibition order are that you, Mr Garvey, be prohibited from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm (the "Prohibition Order").
- 1.3. You agreed to settle at an early stage of the FSA's investigation on the basis of the Prohibition Order. In particular, you agreed that you will not be referring the matter to the Financial Services and Markets Tribunal.

1.4. Accordingly, for the reasons set out below and having agreed with you the facts and matters relied on, the FSA hereby makes the Prohibition Order against you. The Prohibition Order has effect from 21 September 2007.

2. REASONS FOR THE ACTION

2.1. The action taken by the FSA relates to your conduct from (at least) March 2004 until October 2005 while acting as a Director and Chief Executive of Fabien Risk Services Limited ("FRS"). This conduct, when considered by reference to the FSA's prescribed regulatory standards for individuals, is such that it appears to the FSA that you are not a fit and proper person and that the FSA should take this action.

2.2. In particular, you have breached the FSA's Rules and the Statements of Principle and Code of Conduct for Approved Persons by:

- (1) your failure to act with integrity by deliberately misappropriating client money which you used to run FRS's business and by knowingly concealing, or colluding in the concealment of the improper use of client money;
- (2) your failure to act with due skill, care and diligence in carrying out your controlled functions, and in managing the business of FRS for which you were responsible, by not ensuring adequate control of client monies;
- (3) your failure to deal with the FSA in an open and cooperative way and to disclose appropriately any information of which the FSA would reasonably expect notice, namely FRS's failure to meet the FSA's financial resources requirements and the improper use of client money; and
- (4) your failure to implement and maintain clear and appropriate apportionment of responsibilities among FRS's directors and senior managers to ensure that FRS's business for which you were responsible was organised so that it could be controlled effectively.

2.3. The FSA has concluded by virtue of the matters referred to above that:

- (1) you are not a fit and proper person; and
- (2) having regard to its regulatory objectives, including the severity of the risk that you pose to consumers and to confidence in the market generally, it is necessary and desirable for the FSA to exercise its power to make the Prohibition Order against you.

3. RELEVANT STATUTORY PROVISIONS, RULES AND GUIDANCE

Relevant statutory provisions

3.1. The FSA's statutory objectives, set out in Section 2(2) of the Act are: market confidence, public awareness, the protection of consumers and the reduction of

financial crime.

- 3.2. The FSA's power to make a prohibition order is set out at section 56 of the Act, which provides, *inter alia*:

"(1) Sub-section (2) applies if it appears to the [Financial Services] 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.

(2) The Authority may make an order ('a prohibition order') prohibiting the individual from performing a specified function, any function falling within a specified description or any function.

(3) A prohibition order may relate to:

- (a) a specified regulated activity, any regulated activity falling within a specified description or all regulated activities;*
- (b) authorised persons generally or any person within a specified class of authorised person."*

Relevant regulatory rules

- 3.3. In exercising its powers in relation to the making of a prohibition order the FSA must have regard to the guidance published in the FSA Handbook. The relevant considerations in relation to the action specified above are set out below.

The Enforcement manual

- 3.4. The FSA's policy in relation to prohibition orders is set out in Chapter 8 of the Enforcement Manual ("ENF"). ENF 8.4 summarises the FSA's policy on making prohibition orders and the circumstances under which Enforcement will consider recommending such action. In particular ENF 8.4.2 provides that:

"(1) the FSA will have 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.

(2) depending on the circumstances of each case, the FSA may seek to prohibit individuals from carrying out any class of relevant function in relation to any class of regulated activity, or it may limit the prohibition order to specific functions in relation to specific regulated activities. The FSA may also make an order prohibiting an individual from being employed by a particular firm, type of firm or any firm. (ENF 8.4.2G(2));

(3) 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 risk which he poses to consumers or the market generally (ENF 8.4.2G(3))."

3.5. ENF 8.5.1A provides that:

"The FSA will consider exercising its power to make a prohibition order against approved persons only in the more serious cases of lack of fitness and propriety where it considers that the other powers available to it are not sufficient to achieve the FSA's regulatory objectives."

3.6. ENF 8.5.2 states when it decides whether to exercise its power to make a prohibition order against an approved person the FSA will consider a number of factors including the criteria for assessing the fitness and propriety of approved persons contained in the Fit and Proper test for Approved Persons.

3.7. 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 him. 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.

The Fit and Proper Test

3.8. FIT 1.1.2 states:

"The purpose of FIT is to set out and describe the criteria that the FSA will consider when assessing the fitness and propriety of a candidate for a controlled function The criteria are also relevant in assessing the continuing fitness and propriety of approved persons."

3.9. FIT 1.2.4 explains:

"The Act does not prescribe the matters which the FSA should take into account when determining fitness and propriety. However, section 61(2) states that the FSA may have regard (among other things) to whether the candidate or approved person is competent to carry out a controlled function".

3.10. FIT 1.3.1 states:

"The FSA will have regard to a number of factors when assessing the fitness and propriety 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".

3.11. FIT 1.3.3 states:

"The criteria listed in FIT 2.1 to FIT 2.3 are guidance and will be applied in general terms when the FSA is determining a person's fitness and propriety. It would be impossible to produce a definitive list of all the matters which would be relevant to

a particular determination."

3.12. FIT 2.1.1 provides:

"In determining a person's honesty, integrity and reputation, the FSA will have regard to matters including, but not limited to, those set out in FIT 2.1.3 G which may have arisen either in the United Kingdom or elsewhere. The FSA should be informed of these matters (see SUP 10.13.16 R), but will consider the circumstances only where relevant to the requirements and standards of the regulatory system."

3.13. FIT 2.1.3 states:

"The matters referred to in FIT 2.1.1 G to which the FSA will have regard include, but are not limited to:

- (5) 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;*
- (13) 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."*

3.14. FIT 2.2.1 states that:

"In determining a person's competence and capability, the FSA will have regard to matters including but not limited to:

- (2) whether the person has demonstrated by experience and training that the person is able, or will be able if approved, to perform the controlled function."*

The Statements of Principle and Code of Conduct for Approved Persons

3.15. The Statements of Principle and Code of Conduct for Approved Persons ("APER") sets out the Statements of Principle in respect of approved persons and provides examples 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.

3.16. The guidance provided in APER 3.1.3 provides that:

"The significance of conduct identified in the Code of Practice for Approved Persons as tending to establish compliance with or a breach of a Statement of Principle will be assessed only after all the circumstances of a particular case have been considered. Account will be taken of the context in which a course of conduct was undertaken, including the precise circumstances of the individual case, the characteristics of the

particular controlled function and the behaviour to be expected in that function."

3.17. APER 3.1.4 provides that:

"An approved person will only be in breach of a Statement of Principle where he is personally culpable. Personal culpability arises where an approved person's conduct was deliberate or where the approved person's standard of conduct was below that which would be reasonable in all the circumstances (see ENF 11.5.3 G (Action against approved persons))."

Statement of Principle 1 provides that:

3.18. *"An approved person must act with integrity in carrying out his controlled function."*

3.19. APER 4.1 lists types of conduct which do not comply with Statement of Principle 1. In particular, APER 4.1.10 states that deliberately misusing the assets of a client is conduct which breaches Statement of Principle 1. APER 4.1.11 provides that this behaviour could include:

"(3) Misappropriating a client's assets, including wrongly transferring to personal accounts cash or securities belonging to clients;

(4) Wrongly using one client's funds to settle margin calls or to cover trading losses on another client's account or on the firm's accounts;

(5) Using a client's funds for purposes other than those for which they were provided."

3.20. APER 4.1.8E further states that *"deliberately preparing inaccurate records...in connection with a controlled function"* is conduct which breaches Statement of Principle 1.

Statement of Principle 2 states that:

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

3.22. APER 4.2 lists types of conduct which do not comply with Statement of Principle 2. In particular, APER 4.2.3 states that failing to inform his firm of material information in circumstances where he was aware, or ought to have been aware, of such information, and of the fact that he should provide it, is conduct which breaches Statement of Principle 2.

3.23. APER 4.2.11 further states failing to provide adequate control over a client's assets is conduct which breaches Statement of Principle 2.

Statement of Principle 4 states that:

3.24. *"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."

- 3.25. APER 4.4 lists types of conduct which do not comply with Statement of Principle 4. In particular, APER 4.4.7 states that failing promptly to inform the FSA of information of which he is aware and which it would be reasonable to assume would be of material significance to the FSA, whether in response to questions or otherwise is conduct which breaches Statement of Principle 4. APER 4.4.8 provides that the FSA can take account of:

"(1) The likely significance of the information to the FSA; and

(2) Whether any decision not to inform the FSA was taken after reasonable enquiry and analysis of the situation."

Statement of Principle 5 states that:

- 3.26. *"An approved person performing a significant influence function must take reasonable steps to ensure that the business of the firm for which he is responsible in his controlled function is organised so that it can be controlled effectively."*

- 3.27. APER 4.5 lists types of conduct which do not comply with Statement of Principle 5. APER 4.5.3 states that failing to take steps to apportion responsibilities for all areas of the business under the approved person's control is such conduct. In particular, APER 4.5.6 provides that in the case of an approved person responsible for dealing with the apportionment of responsibilities under SYSC 2.1.1R, failing to take reasonable care to maintain a clear and appropriate apportionment of significant responsibilities among the firm's directors and senior managers is conduct which breaches Statement of Principle 5. APER 4.5.7 provides that this behaviour could include:

"(1) Failing to review regularly the significant responsibilities which the firm is required to apportion...; and

(2) Failing to act where that review shows that those significant responsibilities have not been clearly apportioned."

Client assets manual (CASS)

- 3.28. **CASS 5.4** permits a firm which has adequate resources, systems and controls, to hold money in a non-statutory client money trust.
- 3.29. **CASS 5.4.1(2)** sets out that a firm is not permitted to make advances to itself out of the client money the client money trust. Accordingly, CASS 5.4 does not permit a firm to withdraw commission from the client money trust before it has received the premium from the client in relation to the non-investment insurance contract which generated the commission.
- 3.30. **CASS 5.5** sets out the rules and guidance applicable to the segregation and the operation of client money accounts and provides that unless otherwise permitted,

client money is kept separate from the firm's own money (CASS 5.5.2G).

- 3.31. **CASS Rule 5.5.3** requires a firm to hold client money separate from the firm's money and CASS Rule 5.5.5(1) requires that a firm must segregate client money by paying it as soon as practicable into a client bank account. Guidance on a firm's obligations to periodically calculate and reconcile the money in its client bank account is given at CASS 5.5.62.

4. FACTS AND MATTERS RELIED ON

Background

- 4.1. You have been a Director and shareholder of FRS since it commenced trading in September 2001. FRS was a small insurance intermediary specialising in Professional Indemnity and Directors and Officers Liability insurance.
- 4.2. The FSA became responsible for the regulation of general insurance firms on 14 January 2005 on which date FRS became an FSA authorised firm, permitted to hold and control client money but only in respect of non-investment insurance contracts, and to carry on certain insurance mediation activities.
- 4.3. FRS was authorised to hold and control client money in a non-statutory client money trust in accordance with the FSA Rules on Client Assets (CASS). Premiums received and payable to insurers were held in this separate client account (the "IBA").
- 4.4. From 14 January 2005, you became an approved person responsible for insurance mediation at FRS and to perform the following significant influence controlled functions:
- CF1 (Director);
 - CF3 (Chief Executive); and
 - CF8 (Apportionment and Oversight).
- 4.5. On 19 October 2005, FRS went into creditors voluntary liquidation. According to the Statement of Affairs prepared by the Liquidators, there was an estimated deficiency of **£701,128** in respect of unsecured creditors. Of this figure, the sum owed to various insurers/brokers/underwriters was **£469,741**. Of this group, the largest creditor was owed **£212,797**. The Liquidators have indicated that unsecured creditors cannot expect to receive any dividend.
- 4.6. According to a report from the Liquidators' dated 10 April 2006, creditors' claims in the sum of **£230,000** have been agreed representing client funds wrongfully misappropriated by the company, and further trust money claims in the region of **£204,742** are expected to be made.
- 4.7. As at 26 April 2006, FSCS have confirmed that compensation claims of £27,000 have been received (but not yet paid), and further claims are anticipated based on the

potential claims identified by the Liquidators.

4.8. The FSA appointed investigators on 18 November 2005. The Memorandum of Appointment of Investigators notified you that the investigation was directed to considering your fitness and propriety in the context of events that led to a deficit in FRS's IBA.

4.9. The FSA investigation has established that:

- (1) in interview you admitted you had responsibility for overseeing what was going on at FRS including FRS' finances but that the directors and senior managers' functions were not defined and there was no reporting structure in place from (at least) March 2004 to September 2005;
- (2) in interview you admitted you knowingly authorised the wrongful withdrawal of client money from the IBA and the use of that money to keep FRS trading, including payment of Directors' and staff salaries and other expenses relating to FRS' business;
- (3) you were fully aware that your conduct was wrong, unlawful, and in breach of the FSA's requirements relating to holding client assets and client money ("CASS");
- (4) in interview you admitted you knowingly authorised and colluded in the deliberate misrepresentation of FRS's true financial position through the preparation of false and misleading accounting records;
- (5) in a meeting with the FSA on 7 October 2005 you admitted you falsely certified in FRS's application for the firm's Part IV authorisation in July 2004 that FRS would be compliant from the date of its authorisation with the FSA's financial resources requirements knowing this would not be the case;
- (6) Moreover, you failed to inform the FSA of FRS' financial difficulties and specifically when you knew, or ought to have known that, FRS was in breach of its financial resources requirements.

5. RELEVANT GUIDANCE ON SANCTION

5.1. Paragraphs 3.4-3.7 above explain the FSA's policy in relation to prohibition orders as set out in Chapter 8 of the Enforcement Manual. ENF 8.5.2 provides that FSA will consider a number of factors and criteria for assessing the fitness and propriety of approved persons. The FSA considers that the conduct described at 4.9 above was in breach of the following Statements of Principle:

- (1) Principle 1: *"An approved person must act with integrity in carrying out his controlled function;*
- (2) Principle 2: *"An approved person must act with due skill, care and diligence in carrying out his controlled function."*

5.2. The FSA considers that by misappropriating a significant amount of client money

over an extended period of time (at least 19 months) you have demonstrated a serious lack of honesty and integrity. This is compounded by the fact that not only did you know that it was wrong to improperly use client monies but that you authorised and colluded in concealing its improper use by failing to fully implement accounting systems available to FRS that, if used appropriately, would have highlighted the deficit on the IBA.

- 5.3. Principle 4: *"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."*
- 5.4. The FSA also considers that by failing to deal with the FSA in an open and cooperative way and by failing to inform the FSA of FRS's financial difficulties, and only doing so after FRS became insolvent and had ceased trading, you have demonstrated that you do not have the requisite honesty, integrity, competence and capability to perform the functions for which you were approved.
- 5.5. Principle 5: *"An approved person performing a significant influence function must take reasonable steps to ensure that the business of the firm for which he is responsible in his controlled function is organised so that it can be controlled effectively."*
- 5.6. The FSA considers that you failed to maintain clear and appropriate apportionment of significant responsibilities at FRS so that it was unclear what responsibilities staff had. This meant that FRS's business and affairs were inadequately organised to enable it to be controlled effectively.

6. CONDUCT FOLLOWING THE CONTRAVENTION

- 6.1. When initially approached by the FSA you admitted misappropriating client money from the IBA and made open admissions in relation to your misconduct set out in this Final Notice. You have received full credit for your cooperation with the FSA investigation, your admissions, the action taken by you to voluntarily vary FRS's Part IV permission and for agreeing to the Prohibition Order by consent at the earliest possible stage.

7. CONCLUSION

- 7.1. In the light of the facts and matters described above, the FSA considers that you failed to act with the honesty integrity and competence required of an Approved Person and you have breached the fit and proper criteria.
- 7.2. Having regard to its regulatory objectives including the need to maintain confidence in the financial system, and the severity of risks posed to consumers, the FSA considers it necessary to impose the Prohibition Order prohibiting you from performing any function in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm.

8. DECISION MAKER

- 8.1. The decision which gave rise to the obligation to give this Final Notice was made by

the executive settlement decision makers on behalf of the FSA.

9. IMPORTANT

9.1. This Final Notice is given to you in accordance with section 390 of the Act.

Publicity

9.2. Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this Final Notice relates. Under those provisions, the FSA must publish such information about the matter to which this Final Notice relates as the FSA considers appropriate. The information may be published in such manner as the FSA 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.

9.3. The FSA intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

FSA contacts

9.4. For more information concerning this matter generally, you should contact Paul McGowan of the FSA's Enforcement Division on 020 7066 2824.

Jonathan Phelan
Head of Department
FSA Enforcement Division