
FINAL NOTICE

To: Mr Graham Darby

D.O.B: 8 July 1964

Date: 6 July 2009

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS (“the FSA”) gives you final notice about an order prohibiting you, Graham Darby, from performing any function involving the exercise of significant influence in relation to any regulated activity carried on by any authorised person.

1. THE ORDER

- 1.1. The FSA gave you a Decision Notice dated 6 July 2009 (the “Decision Notice”) which notified you that the FSA had decided to withdraw the approval given to you under Section 59 of the Financial Services and Markets Act 2000 (“FSMA”) and to make a prohibition order against you to prevent you from carrying out any function involving the exercise of significant influence in relation to any regulated activity carried out by any authorised person (“the Prohibition Order”), pursuant to sections 63 and 56 of FSMA respectively.
- 1.2. You agreed that you would not be referring the matter to the Financial Services and Markets Tribunal.

- 1.3. Accordingly, for the reasons set out below, the FSA hereby withdraws your approval and makes an order pursuant to section 56 of FSMA prohibiting you from performing any function involving the exercise of significant influence in relation to any regulated activity carried out by any authorised person. The Prohibition Order takes effect from 6 July 2009.

2. REASONS FOR THE ORDER

- 2.1. On the basis of the facts and matters summarised below, and set out in more detail at section 4 of this Notice, the FSA has concluded that you are not fit and proper to perform any controlled function involving the exercise of significant influence in relation to any regulated activity carried on by any authorised person.
- 2.2. The FSA considers that your conduct as the sole director and shareholder of Ambrose Darby Limited (“Ambrose Darby”) and as an approved person who performed, pursuant to an approval given by the FSA under section 59 of the FSMA, the controlled functions of CF8 (apportionment and oversight) and CF1 (director) and was responsible for Insurance Mediation at Ambrose Darby between 1 November 2007 and 18 September 2008 ("the Relevant Period"), failed to comply with the standards required by the FSA's Statements of Principle and Code of Practice for Approved Persons (“APER”).
- 2.3. In particular, you have contravened APER by virtue of:
- (1) your failure to take reasonable steps to ensure that the business of the firm for which you were responsible in your controlled function was organised so that it would be controlled effectively in contravention of Statement of Principle 5;
 - (2) your failure to act with due skill, care and diligence in managing the business of the firm, in contravention of Statement of Principle 6; and
 - (3) your failure to take reasonable steps to ensure that the business of the firm complied with the relevant requirements and standards of the regulatory system, in contravention of Statement of Principle 7.

3. RELEVANT STATUTORY PROVISIONS AND REGULATORY GUIDANCE

- 3.1. The relevant statutory provisions and regulatory requirements are attached at Annex A.

4. FACTS AND MATTERS RELIED ON

Background

- 4.1. Ambrose Darby was an insurance broker whose client base was mostly commercial clients. These included transport and fleet companies through to small and medium sized businesses.
- 4.2. Ambrose Darby was incorporated on 15 May 2002 but had been running as a family business since 1978. On 14 January 2005, Ambrose Darby became authorised to provide insurance advice. Its registered office and trading address was at 1st Floor, Finance House, 17 Kenyon Road, Lomeshaye Estate, Nelson, Lancashire BB9 5SP.
- 4.3. You were Ambrose Darby's only director and held more than a 50% controlling interest in Ambrose Darby. Throughout the Relevant Period you exercised significant influence functions at Ambrose Darby. Your responsibilities included controlled functions CF1 (director) and CF8 (apportionment and oversight). You were therefore responsible for ensuring that Ambrose Darby complied with its regulatory requirements and treated its customers fairly.

Visit by the FSA's Small Firms and Contact Division ("the SFCD")

- 4.4. The FSA was notified on 16 June 2008 by a third party (Firm "A") that it had concerns regarding Ambrose Darby. Firm A is also authorised by the FSA and dealt with Ambrose Darby in its capacity as an authorised insurer. Specifically, Firm A had concerns that Ambrose Darby was experiencing management problems as they had been unable to discuss a problem relating to the late payment of premiums due to Firm A from Ambrose Darby.
- 4.5. The FSA initially attempted to contact you by telephone on 16 and 23 July 2008 with a view to discussing the financial position of Ambrose Darby as it appeared from the Retail Mediation Activities Return ("RMAR") form submitted by Ambrose Darby that it had not properly calculated its capital resources and had included intangible assets when calculating its financial resources. These initial attempts at contact were unsuccessful.

- 4.6. However, on 23 July 2008, you contacted the FSA by telephone to advise that you had been diagnosed with a severe medical condition and that you had not been to work following your diagnosis and because of other personal matters which had arisen. You further explained that because you had not been attending the business the accounts of Ambrose Darby were not up to date, that these were being worked on and they should be available by 31 July 2008. These accounts were not, however, provided to the FSA as you had indicated.
- 4.7. The FSA attempted to contact you by telephone on 4, 5 and 6 August 2008. On 6 August 2008 you contacted the FSA to explain that you had had some further health problems and that all the accounts were not yet ready. The FSA sent you a letter on 8 August 2008 seeking financial information relating to Ambrose Darby and enquiring as to what arrangements had been put in place should you be absent from Ambrose Darby again. Subsequently, the FSA again attempted to contact you by telephone on 18, 19 and 21 of August 2008. A further letter was sent on 22 August 2008 repeating the request for information contained in the letter of 8 August 2008 and indicating that the SFCD was considering referring the matter to the Enforcement Division of the FSA.
- 4.8. The SFCD visited Ambrose Darby on 5 September 2007. The outcome of that visit was that a number of regulatory failures were identified within Ambrose Darby. Following that visit you agreed to make an application to the FSA to vary the Part IV permissions of Ambrose Darby so as to remove all regulated activities from Ambrose Darby's regulatory permissions.
- 4.9. The regulatory failures identified in Ambrose Darby were communicated to you in a letter dated 10 September 2008. That letter also identified specific facts and matters in relation to client money handling, financial resources and management and control concerns. These facts and matters included the following:
- (1) that you had not conducted client money reconciliations since November 2007 (despite a requirement to carry out such reconciliations every 25 business days);
 - (2) from the financial records provided by Ambrose Darby it appeared (at that time) that it owed insurance providers £83,814.71 and was owed £61,961 from customers (some of which had been outstanding for more than 90 days);

- (3) there were no systems and controls in operation in Ambrose Darby to manage the receipt of monies from customers or to effect the payment of premiums to providers;
- (4) the RMAR for the period ending 31 May 2008 included a sum of £105,000 for intangible assets in the form of goodwill notwithstanding that from 14 January 2008 authorised firms had been required to remove goodwill from their assets when calculating capital resources (for the purposes of complying with the relevant FSA rules relating to the maintenance of regulatory capital that are applicable to authorised firms such as Ambrose Darby under MIPRU). The SFCD were able to calculate the capital position of Ambrose Darby using the figures from the RMAR for 31 May 2008. Ambrose Darby's deficit amounted to £120,868;
- (5) the paperwork relating to the bank account holding client money did not specify the status of the account as statutory or non-statutory and it was unclear from the name on the account that it held only client money. Additionally, you did not have a full understanding of Ambrose Darby's responsibilities regarding the handling of client money; and
- (6) your disabling medical condition and the lack of structured systems and controls in the business highlighted the fact that Ambrose Darby lacked adequate resources from both a financial and personnel point of view. Furthermore, it was unclear both to customers and providers who was responsible for the day to day operation of Ambrose Darby whilst you were absent from the business.

4.10. In addition to the failings and facts and matters identified in the SFCD's letter of 10 September 2008 to Ambrose Darby, a series of action points were identified to enable Ambrose Darby and you to address the identified failings. The letter required that full details of the steps that Ambrose Darby proposed to take was required by 8 October 2008.

4.11. On 18 September 2008, the SFCD attempted to telephone you to discuss progress. You were unavailable and the SFCD spoke with an employee of Ambrose Darby. The employee indicated that Ambrose Darby was continuing to carry on regulated activities as an insurance intermediary despite the variation of its Part IV FSMA

permissions as you had not told the staff about the variation. The SFCD advised the employee that all such activities should cease immediately. The SFCD advised the employee that it was imperative that Mr Darby called them the same day. No such call was received.

- 4.12. As communication with Ambrose Darby over the course of time proved difficult, and more information was uncovered from the insurers regarding non payment of premiums, the SFCD became increasingly concerned about the operation of the business and the potential for consumer detriment. The matter was therefore referred to the FSA's Enforcement Division ("Enforcement") on 21 October 2008.
- 4.13. On 29 October 2008 the SFCD were made aware that Ambrose Darby had informally transferred its book of business to another company ('Firm "B"'). There was no formal agreement in place and no money has been paid by Firm B. A further attempt to contact you was made by the SFCD supervisor by letter dated 5 November 2008 with no success.
- 4.14. On 10 November 2008, Firm B, following the SFCD's request, agreed to write to Ambrose Darby's former customers informing them that there was a risk that they may not be insured and that they should contact the relevant insurer to check this. On 9 December 2008, Firm B confirmed to the SFCD supervisor that it had written to 100 out of 200 former Ambrose Darby customers and that it had been contacted by 25 of these customers. Firm B informed the SFCD that it was helping these customers as well as it was able to. The remaining 100 customers were contacted by the insurers directly at the insurers own initiative.

Enforcement Investigation

- 4.15. On 20 November 2008, members of both Enforcement and the SFCD made an unannounced visit to the offices of Ambrose Darby. During the course of this visit, amongst various matters, you confirmed the following material facts:
- a) Since the diagnosis of your illness you had been unable effectively to deal with your business affairs.
 - b) Since the diagnosis of your illness, you had not sought assistance to deal with your business affairs, although you now appreciated the need to do so.

- c) You would remain in contact and would cooperate with the FSA.
- d) You had not written to insurers to tell them that there had been a change in the insurance intermediary, although Firm B had done this.
- e) You had no current income.
- f) Ambrose Darby was owed approximately £18,000 and the monies still outstanding from clients amounted to approximately £49,000.
- h) The bank had put a stop to Ambrose Darby's accounts. "[You] needed to get up to date statements so that [you] could see how much money was there" because the business had not been in operation over the last few weeks all of your systems had been disabled. You could not get access to anything online and you were going to ask a friend to help you address this matter.
- i) Ambrose Darby's accounts had not been finalised for 2007 and 2008.
- j) Ambrose Darby's client account contains mixed funds (i.e. office and client money) and you did not know how much money it contained.

Winding up proceedings

- 4.16. The FSA exercised its insolvency powers under the FSMA to petition for the winding up of Ambrose Darby on just and equitable grounds under section 367(1)(a), and pursuant to section 367(3)(b) of the FSMA. This was on the basis that you were, as a result of your illness, not able to resolve the client money issues at Ambrose Darby and wind up the company yourself in an orderly fashion. There was no other officer of Ambrose Darby who would have been able to do this.
- 4.17. The winding up order was granted on 10 March 2009. The principal reason for having obtained the winding up order is that you, as the sole director and/or shareholder of Ambrose Darby appeared unwilling and/or unable to properly administer the affairs of Ambrose Darby. Without your active involvement, Ambrose Darby appeared unable to transact any business or carry out any steps that it was required to take in respect of its affairs. There appeared to be no other individual who was willing and able to take over the affairs of Ambrose Darby. It therefore failed to comply with the requirements and standards of the regulatory regime that it was subject to as an authorised firm under the FSMA.

5. ANALYSIS OF BREACHES

- 5.1. The FSA concludes that the conduct summarised above demonstrates a failure to meet minimum regulatory standards of competence and capability and it therefore considers that you are not fit and proper to carry out any functions involving the exercise of significant influence in relation to any regulated activity carried on by any authorised person exempt person or exempt professional firm.
- 5.2. As Ambrose Darby's only director and approved person, you were, during the Relevant Period responsible for the day-to-day running of Ambrose Darby, including compliance matters, monitoring the administration of the business and ensuring that Ambrose Darby complied with its regulatory requirements. Your failure to adequately monitor Ambrose Darby's compliance with the regulatory system placed customers at risk of being treated unfairly.
- 5.3. The FSA considers that you pose a risk to consumers and to confidence in the financial system and that it is therefore necessary to withdraw the approval given to you and to prohibit you from performing any functions involving the exercise of significant influence in relation to any regulated activity carried on by any authorised person exempt person or exempt professional firm.

6. CONCLUSION AND SANCTION

- 6.1. Having regard to the facts and matters described above, the FSA has considered whether you are a fit and proper person to continue to perform some or any functions in relation to regulated activities. In doing so, the FSA has considered its statutory objectives, the regulatory requirements and relevant guidance referred to in section 3 above.
- 6.2. The FSA has concluded that your breaches of Principles 5, 6 and 7 of APER, the reasons for those breaches, the nature of these matters, the lengthy period of time during which they occurred and the gravity of them directly impugn your competence and capability. They demonstrate that you have failed to meet minimum regulatory standards and that you are not a fit and proper person to perform any function involving the exercise of significant influence in relation to any regulated activity carried on by any authorised person, exempt person, or exempt professional firm.

- 6.3. The FSA considers that, to achieve its regulatory objectives which include the protection of consumers, it should exercise its power to withdraw the approval given to you and to make an order prohibiting you from performing any function involving the exercise of significant influence in relation to any regulated activity carried on by any authorised person because you are not a fit and proper person.

7. DECISION MAKERS

- 7.1. The decision which gave rise to the obligation to give this notice was made by Settlement Decision Makers on behalf of the FSA.

8. PUBLICITY

- 8.1. Sections 391(4), 391(6) and 391(7) of FSMA 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 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.

FSA contacts

- 8.2. For more information concerning this matter generally, you should contact Paul Howick of the Enforcement Division of the FSA (direct line: 020 7066 7954).

Signed:

.....

Jonathan Phelan
Head of Department
FSA Enforcement Division

ANNEX A

Statutory Provisions

The FSA's statutory objectives, set out in section 2(2) of the FSMA are: market confidence; public awareness; the protection of consumers and the reduction of financial crime.

Pursuant to section 63 of the FSMA, the FSA has the power to withdraw the approval given to you under section 59 of the FSMA to perform controlled functions if it considers that you are not a fit and proper person to perform them.

Further, the FSA has the power, by virtue of section 56 of the FSMA, to make an order prohibiting you from performing a specified function, any function falling within a specified description or any function, if it appears to the FSA that you are 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 specified regulated activity, any regulated activity falling within a specified description or all regulated activities.

Statements of Principle and Code of Practice for Approved Persons

The part of the FSA Handbook entitled Statements of Principle and Code of Practice for Approved Persons ("APER") is issued by the FSA under section 64 of the FSMA with respect to the conduct expected of approved persons.

The Statements of Principle which are most relevant to your conduct are Statements of Principle 5, 6 and 7.

In determining whether your conduct amounts to a breach of Statement of Principle 5, the FSA has had regard to the guidance and examples in APER 4.5. In the opinion of the FSA, conduct of the type described below does not comply with Statement of Principle 5.

APER 4.5.3E: Failing to take reasonable steps to apportion responsibilities for all areas of the business under the approved person's control falls within APER 4.5.2 E (see APER 4.5.11 G).

APER 4.5.8E: Failing to take reasonable steps to ensure that suitable individuals are responsible for those aspects of the business under the control of the individual performing a significant influence function falls within APER 4.5.2 E (see APER 4.5.14 G).

APER 4.5.9E: Behaviour of the type referred to in APER 4.5.8 E includes, but is not limited to; (3) allowing managerial vacancies which put at risk compliance with the requirements and standards of the regulatory system to remain, without arranging suitable cover for the responsibilities (see APER 4.5.15 G).

In determining whether your conduct amounts to a breach of Statement of Principle 6, the FSA has had regard to the guidance and examples in APER 4.6. In the opinion of the FSA, conduct of the type described below does not comply with Statement of Principle 6.

APER 4.6.3E: Failing to take reasonable steps to adequately inform himself about the affairs of the business for which he is responsible. Behaviour of the type referred to in APER 4.6.3E includes, but is not limited to failing to (3) inadequately monitoring highly profitable transactions or business practices or unusual transactions or business practices;

APER 4.6.11G: An approved person performing a significant influence function will not always manage the business on a day-to-day basis himself. The extent to which he does so will depend on a number of factors, including the nature, scale and complexity of the business and his position within it. The larger and more complex the business, the greater the need for clear and effective delegation and reporting lines. The FSA will look to the approved person performing a significant influence function to take reasonable steps to ensure that systems are in place which result in issues being addressed at the appropriate level. When issues come to his attention, he should deal with them in an appropriate way.

In determining whether your conduct amounts to a breach of Statement of Principle 7, the FSA has had regard to the guidance and examples in APER 4.7. In the opinion of the FSA, conduct of the type described below does not comply with Statement of Principle 7.

APER 4.7.3: Failing to take reasonable steps to implement (either personally or through a compliance department or other departments) adequate and appropriate systems of control to comply with the relevant requirements and standards of the regulatory system in respect of its regulated activities. In the case of an approved person who is responsible, under SYSC 2.1.3 R (2), with overseeing the firm's obligation under SYSC 3.1.1 R, failing to take reasonable care to oversee the establishment and maintenance of appropriate systems and controls.

APER 4.7.4: Failing to take reasonable steps to monitor (either personally or through a compliance department or other departments) compliance with the relevant requirements and standards of the regulatory system in respect of its regulated activities.

APER 4.7.7: Failing to take reasonable steps to ensure that procedures and systems of control are reviewed and, if appropriate, improved, following the identification of significant breaches (whether suspected or actual) of the relevant requirements and standards of the regulatory system relating to its regulated activities.

APER 4.7.12G: An approved person performing a significant influence function need not himself put in place the systems of control in his business (APER 4.7.4 E). Whether he does this depends on his role and responsibilities. He should, however, take reasonable steps to ensure that the business for which he is responsible has operating procedures and systems which include well-defined steps for complying with the detail of relevant requirements and standards of the regulatory system and for ensuring that the business is run prudently. The nature and extent of the systems of control that are required will depend upon the relevant requirements and standards of the regulatory system, and the nature, scale and complexity of the business (see APER 3.3.2).

Fit and Proper Test for Approved Persons

The part of the FSA 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.

FIT 1.3 provides that the FSA will have regard to a number of factors when assessing a person’s fitness and propriety. Among the most important considerations will be the person’s honesty, integrity and reputation, competence and capability and financial soundness.

In determining a person's competence and capability FIT 2.2.1G provides that the FSA will have regard to matters including but not limited to whether the person satisfies the relevant FSA training and competence requirements in relation to the controlled function the person performs or is intended to perform, and 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 FSA's policy for exercising its power to make a prohibition order and withdraw a person’s approval

The FSA’s approach to exercising its powers to make prohibition orders and withdraw its approval is set out at Chapter 9 of the Enforcement Guide (“EG”).

EG 9.1 states that the FSA's power to make prohibition orders under section 56 of the FSMA helps it work towards achieving its regulatory objectives. The FSA may exercise this power 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.

EG 9.2 states that, where it considers it appropriate, the FSA may prohibit an approved person, in addition to withdrawing their approval.

EG 9.4 sets out the general scope of the FSA'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. EG 9.5 provides that the scope of a prohibition order will vary according to the range of functions that the individual performs in relation to regulated activities, the reasons why he is not fit and proper and the severity of the risk posed by him to consumers or the market generally.

In circumstances where the FSA has concerns about the fitness and propriety of an approved person, EG 9.8 to 9.14 provide guidance. In particular, EG 9.8 states that in deciding whether to withdraw approval and/or make a prohibition order, the FSA will consider whether its regulatory objectives can be achieved adequately by imposing disciplinary sanctions.

EG 9.9 provides that when deciding whether to make a prohibition order against an approved person, and/or withdraw its approval, the FSA 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) whether, and to what extent, the approved person has:
 - (a) failed to comply with the Statements of Principle issued by the FSA with respect to the conduct of approved persons; or

- (b) been knowingly concerned in a contravention by the relevant firm of a requirement imposed on the firm by or under FSMA (including the Principles and other rules);
- (3) the relevance and materiality of any matters indicating unfitness;
- (4) the length of time since the occurrence of any matters indicating unfitness;
- (5) 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
- (6) the severity of the risk which the individual poses to consumers and to confidence in the financial system.

EG 9.10 provides that the FSA may have regard to the cumulative effect of a number of factors and may take into account the particular controlled function which an approved person is performing for a firm, the nature and activities of the firm concerned and the markets within which it operates.

EG 9.12 provides a number of examples of types of behaviour which have previously resulted in the FSA deciding to issue a prohibition order or withdraw the approval of an approved person. The examples include:

- (1) providing false or misleading information to the FSA;
- (2) serious lack of competence;
- (3) serious breaches of APER, acting without regard to instructions, giving clients poor or inaccurate advice and providing misleading information to clients, consumers or third parties.