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2nd September 2016

General, Banking, Insurance, Investment, Fiduciary, Consumers, Public Statements

IN THE MATTER OF:

THE FINANCIAL SERVICES COMMISSION (BAILIWICK OF GUERNSEY) LAW, 1987

THE PROTECTION OF INVESTORS (BAILIWICK OF GUERNSEY) LAW, 1987

THE BANKING SUPERVISION (BAILIWICK OF GUERNSEY) LAW, 1994

THE REGULATION OF FIDUCIARIES, ADMINISTRATION BUSINESSES AND COMPANY DIRECTORS, ETC (BAILIWICK OF GUERNSEY) LAW, 2000

THE INSURANCE BUSINESS (BAILIWICK OF GUERNSEY) LAW, 2002

THE INSURANCE MANAGERS AND INSURANCE INTERMEDIARIES (BAILIWICK OF GUERNSEY) LAW, 2002

AND IN THE MATTER OF ENFORCEMENT PROCEEDINGS AGAINST:

(1) GUERNSEY INSURANCE BROKERS LIMITED

(2) MR RICHARD JULIAN WICKINS

(3) MR DAVID JOHN MERRIEN

AMENDED PUBLIC STATEMENT

On 3 December 2014, the Commission decided:

1. To impose a financial penalty of £8,000 on Guernsey Insurance Brokers Limited ("GIBL") under section 11D of the Financial Services Commission Law.
2. To impose a financial penalty of £8,000 on Mr Richard Julian Wickins ("Mr Wickins") under section 11D of the Financial Services Commission Law.
3. ...
4. To impose the following conditions on the licence held by GIBL under section 7 of the Insurance Managers and Insurance Intermediaries Law:
 - a. That within three months of the date of the imposition of these conditions, GIBL is to make such appointment or appointments as may be required so that it has at least two directors apart from Mr Wickins, both directors to be acceptable to the Commission, and GIBL is not thereafter to permit the number of its directors to fall below three;
 - b. That within 18 months of the date of the imposition of these conditions, Mr Wickins is to achieve the Certificate in Company Direction or Accelerated Certificate in Company Direction offered by the Institute of Directors in the UK, or an equivalent qualification in corporate governance acceptable to and agreed in advance in writing by the Commission, and is to deliver to the Commission evidence that he has achieved the said qualification;
 - c. That unless Mr Wickins achieves the qualification to which the previous paragraph refers by 31 July 2016, Mr Wickins is not to act as a director of GIBL unless and until he does achieve such qualification and has delivered to the Commission written evidence that he has achieved it.

5. To make orders under the Regulatory Laws prohibiting Mr Merrien from performing any function in relation to business carried on by an entity licensed under the Regulatory Laws.
6. To disapply the exemption set out in section 3(1)(g) of the Fiduciary Law in respect of Mr Merrien.
7. To make orders under the Protection of Investors Law, the Insurance Managers and Insurance Intermediaries Law and the Insurance Business Law prohibiting Mr Wickins from performing any function in relation to controlled investment business, any function in relation to an insurance intermediary conducting long-term insurance business and from performing the functions of controller, partner, director or manager in relation to a person licensed under the Insurance Business Law to conduct long-term insurance business.
8. To make a Public Statement under section 11C of the Financial Services Commission Law.

The Commission considered it reasonable, necessary and proportionate to make this decision and impose these sanctions and penalties having concluded that Mr Merrien is not a fit and proper person to perform any function in relation to regulated business in the Bailiwick of Guernsey. The Commission's independent Senior Decision Maker found that Mr Merrien had failed to appreciate or properly to advise clients of GIBL of risks in connection with an investment into which they were persuaded to switch part of their pension funds, that he had recklessly promoted a high-risk investment which was unsuitable for retail investors, and that he had dishonestly diverted payments into his personal bank account. The contraventions by Mr Merrien as an Authorised Insurance Representative were very serious, and were exacerbated by his failures to deal openly and cooperatively with the Commission in the course of its investigation or to accept responsibility for what he has done.

The Commission also concluded that GIBL and Mr Wickins had failed in material respects to fulfil the minimum criteria for licensing set out in Schedule 4 of the Protection of Investors Law and the Insurance Managers and Insurance Intermediaries Law, and that Mr Wickins should not perform any function in relation to controlled investment or long-term insurance business. There was no criticism of Mr Wickins in connection with general insurance business.

Financial Penalties

The financial penalties imposed on Mr Wickins and GIBL reflect a 20% discount because they accepted the sanctions proposed to be imposed on them within 7 days of the notice issued by the Commission's Senior Decision Maker indicating the sanctions he was minded to impose.

The Commission considers that the contraventions by Mr Merrien, exacerbated by his failure to take responsibility for exposing clients of GIBL to undue risk in connection with a significant part of their pension portfolios, and by his failure to deal with the Commission in an open and cooperative manner in the course of the Enforcement Proceedings, were very serious and would, taken in isolation and without having regard to the matters the Commission is required to take into account under section 11D(2)(e) of the Financial Services Commission Law, attract a significant financial penalty within the statutory maximum of £200,000.

Following an appeal by Mr Merrien to the Royal Court in which judgment handed down in private on 25 September 2015 and published on 9 June 2016 (David John Merrien v Cees Schrauwens (Chairman of the Financial Services Commission), Judgment 23/2016), and the Commission's subsequent appeal to the Guernsey Court of Appeal against parts of the Royal Court's judgment in which judgment was handed down by the Court of Appeal in private on 17 March 2016 and published on 9 June 2016 (Cees Schrauwens (Chairman of the Financial Services Commission) v David John Merrien, Judgment 24/2016), the question of what, if any, financial penalty should be imposed on Mr Merrien was remitted to the Commission for reconsideration.

By the time that the Commission came to reconsider the question of financial penalty, Mr Merrien had pleaded guilty to unrelated charges in the Royal Court, and had been sentenced to five concurrent terms of 4 years' imprisonment.

Mr Merrien is serving a custodial sentence. He has no material income and no substantial assets from which he would be able to satisfy a financial penalty, and there is no prospect that he would be in a position to do so within the foreseeable future.

On 30 August 2016 the Commission decided that, in the particular circumstances of this case, it is not appropriate to impose any financial penalty on Mr Merrien (and that in consequence a Public Statement should be published in this amended form).

Background

GIBL was incorporated as a limited company in Guernsey on 8 July 2010 and was licensed on 21 July 2010 under the Insurance Managers and Insurance Intermediaries Law to operate as an insurance intermediary for personal lines and commercial insurance.

On 21 July 2011, the licence for GIBL was extended to long term life insurance products under the Insurance Managers and Insurance Intermediaries Law.

On 10 August 2011, GIBL became licensed under the Protection of Investors Law to carry out the restricted activities of Advising and

Promotion in connection with Category 1 controlled investment business.

At material times Mr Wickins and Mr Merrien were Directors and the full time employees of GIBL. Mr Wickins was the Managing Director, Money Laundering Reporting Officer and had day-to-day responsibility for the general insurance business of GIBL. Mr Merrien was the Compliance Officer and had day-to-day responsibility for the long-term insurance and controlled investment business of GIBL.

Mr Merrien was also the Authorised Insurance Representative ("AIR") in respect of long-term insurance business and provided advice to clients on long term insurance and controlled investment products, including personal pensions and recommending investment products in respect of pension contributions.

GIBL employed a part time consultant to peer review the activities of Mr Merrien.

GIBL was visited in October 2013 by the Commission's Conduct Unit as part of a thematic review of advice given by insurance and investment intermediaries. That visit identified serious concerns with regard to regulatory compliance. A significant number of clients had received unsuitable investment advice from Mr Merrien, and it appeared that the advice provided was not truly independent. The Unit's report found that record keeping in respect of client files was weak, written 'advice' held on file was not advice but merely a summary of what was discussed with the client, and there was no evidential documentation pertaining to recommended switches between personal pensions and GIBL's own branded Retirement Annuity Trust Schemes. The concerns arising from that visit were referred to the Enforcement Division.

Findings

As a result of the Commission's enquiries, the Commission found that:

Mr Merrien

- Mr Merrien failed to take proper account of the financial interests of GIBL's clients and the information held by GIBL as to their financial needs and appetite for risk.
- Mr Merrien recommended that clients switch a significant portion of their investment portfolio into a specific Investment Fund ("the Fund"), for which Mr Merrien received significant amounts of commission into his personal bank account without the knowledge of GIBL.
- Mr Merrien did not provide clients with an appropriate amount of information regarding the recommendation to invest in the Fund.
- The advice given to GIBL clients by Mr Merrien was not suitable to the relevant clients' needs in that the Fund recommended was higher risk than those clients' stated cautious investment outlook.
- Mr Merrien failed properly to inform himself about the risks of the Fund and either chose to ignore the risk associated with an investment into the Fund or had failed to avail himself with an appropriate amount of information prior to making any recommendation.
- Mr Merrien stated that he had not reviewed the scheme documentation which showed that it is a high risk and speculative investment vehicle and also stated that investors should be prepared to lose all of their capital.
- The investment advice given by Mr Merrien to invest in the Fund was neither i) impartial nor ii) independent.
- Mr Merrien caused GIBL to breach a condition of its licence regarding the removal of records from GIBL's premises.

Mr Merrien's behaviour is considered to be very serious. It was found that he is not a fit and proper person to perform any function within the regulated sectors of the Bailiwick of Guernsey and he has accordingly been prohibited from carrying on any such function.

Guernsey Insurance Brokers Limited

- GIBL and its Board failed to ensure it had adequate systems of control in place in relation to its controlled investment and long-term insurance business, which was being conducted solely by Mr Merrien. This included failing to:
 - a) discuss investment and long-term insurance business at board meetings;
 - b) review the Fund adequately or be conversant with the risks associated with an investment into the Fund before allowing it to be recommended to GIBL's clients;
 - c) have systems of control in place so that it was aware that Mr Merrien was recommending the Fund to all of GIBL's investment and long-term insurance clients;
 - d) have adequate systems of control in place so that all advice provided by Mr Merrien was subject to independent review;

e) manage the conflict of interest between Mr Merrien acting as compliance officer for GIBL and his being the sole person providing investment advice to clients in respect of long term business.

Mr Wickins

- Mr Wickins failed to appreciate the responsibility of a licensee to make appropriate enquiries before appointing an AIR (Mr Merrien).
- Mr Wickins permitted Mr Merrien to carry on his activities effectively unsupervised.
- Mr Wickins was a member of a board of directors which met only infrequently, and was the managing director of a licensed firm which did not have appropriate systems and controls in place.
- Mr Wickins had placed complete reliance on Mr Merrien as GIBL's AIR. Both directors of GIBL had, in effect, acted in silos in respect of the general insurance, long-term insurance and controlled investment business activities undertaken by GIBL.
- Mr Wickins became aware from a meeting with one of the clients that Mr Merrien had encouraged them to switch to an unsuitable investment into the Fund, and even if up to that time he had not appreciated that Mr Merrien was offering the Fund to all GIBL's clients, he ought then to have looked into Mr Merrien's activities.

Conclusions

The Commission concluded that the Directors of GIBL had not discharged their duties in accordance with Schedule 4 of the Protection of Investors Law. Mr Wickins did not undertake his duties as a director with adequate competence and soundness of judgement. The Commission also concluded that Mr Wickins and Mr Merrien had not acted with skill, prudence and integrity in accordance with the regulatory requirements as set out in section 2(2) of Schedule 4 of the Protection of Investors Law.

Mr Merrien is not a Fit and Proper person having regard to the factors set out in section 1 of Schedule 4 of the Protection of Investors Law, in particular:

- His probity, competence, soundness of judgement for fulfilling his responsibilities;
- The diligence with which he is fulfilling those responsibilities; and
- The interests of clients or investors being jeopardised.

GIBL, principally due to the actions of Mr Merrien for which it was vicariously responsible, breached the following regulatory requirements referred to in paragraph 2.(2) of Schedule 4 of the POI Law in respect of the suitability of advice provided to GIBL's long-term and controlled investment business clients:

Principles of Conduct of Finance Business

Principle 1 A licensee should observe high standards of integrity and fair dealing in the conduct of its business.

Principle 2 A licensee should act with due skill, care and diligence towards its customers and counterparties.

Principle 3 A licensee should either avoid any conflict of interest arising or, where a conflict arises, should ensure fair treatment to all its customers by disclosure, internal rules of confidentiality, declining to act, or otherwise. A licensee should not unfairly place its interests above those of its customers and, where a properly informed customer would reasonably expect that the firm would place his interests above its own, the firm should live up to that expectation.

Principle 4 A licensee should seek from customers it advises or for whom it exercises discretion any information about their circumstances and investment objectives which might reasonably be expected to be relevant in enabling it to fulfil its responsibilities to them.

Principle 5 A licensee should take reasonable steps to give a customer it advises, in a comprehensible and timely way, any information needed to enable him to make a balanced and informed decision. A licensee should similarly be ready to provide a customer with a full and fair account of the fulfilment of its responsibilities to him.

Principle 7 A licensee should observe high standards of market conduct, and should also comply with any code of standard as in force from time to time and issued or approved by the Commission.

Licensees (Conduct of Business) Rules, 2009

Rule 5.1.1 A licensee must observe the Principles in carrying on its controlled investment business.

Rule 5.2.2(a) A licensee, at the outset of its provision of advisory or discretionary investment services to a client, should ensure that it has obtained sufficient knowledge of the client to ensure that any advice or discretionary decision is suitable to the requirements of the client.

Rule 5.2.2(b) A licensee should establish and maintain systems to ensure that its employees do not procure, endeavour to procure or advise anyone to enter into a transaction if that employee is not competent to advise on that transaction or to assess its suitability for investors.

Rule 5.2.2(c) A licensee must take reasonable steps to ensure that it does not in the course of its controlled investment business –

(i) recommend an investment to a client; or

(ii) effect or arrange a discretionary transaction with or for any client,

(iii) unless the recommendation or transaction is suitable for him having regard to the facts disclosed by that client, the terms of any agreement with that client, and other relevant facts about the client of which the licensee is, or reasonably should be, aware.

Rule 5.2.3(d) A licensee must not recommend a transaction or investment strategy to a client or act as a discretionary manager for him unless it has taken reasonable steps to make him aware of the risks involved, including conflicts of interest.

Rule 5.3.8(b) A licensee must not:

(i) make a recommendation to a client to switch within or between a controlled investment; or

(ii) effect such a switch in the exercise its of discretion for a client,

unless it believes on reasonable grounds that the switch is justified from the client's viewpoint.

Rule 5.4.1 The licensee shall, if responsible for promotion and advertising, must:-

(a) ensure that any materials issued are clear, fair and not misleading; and

(b) take all reasonable steps with a view to ensuring that any form of promotion or advertising in a country or territory outside of the Bailiwick of Guernsey is in accordance with the laws and regulations in force in that country or territory.

Code of Conduct for Authorised Insurance Representatives

Principle 1 An insurance representative shall comply with the principles of the Code and at all times conduct business with utmost good faith and high standards of integrity, exercising due skill, care and diligence when dealing with clients.

Principle 2 An insurance representative shall in the conduct of his business, provide advice objectively and not act in any way which is contrary to this Code or any other relevant legislation or Code of Conduct or Practice.

Principle 27 Insurance representatives advising on long term insurance business shall, in addition to complying with section (A), adhere to the following:

(a) In order to be able to advise a client correctly, the insurance representative should ensure that he has sufficient knowledge of the legislation (including taxation legislation) affecting the products the client already owns or is considering purchasing. If he is unable to advise a client then he should inform the client and, if possible, refer the client to a person who can give him appropriate advice;

(b) the insurance representative shall not advise a client to convert, allow to lapse, cancel or surrender any long term insurance contract unless he can demonstrate the action to be in the best interests of the policyholder. If such action is advised then the advice should be fully documented in a written advice, a copy of which should be sent to the client.

Principle 28 Prior to the inception (or any other material change to the policy including cancellation) of the policy, the insurance representative shall:

(a) Take all reasonable steps to obtain and record information from the client concerning the personal and financial circumstances of that client necessary to give suitable advice.

(b) Provide the client with a copy of the written advice.

(e) Ensure that the client is warned of the possible penalties of early surrender. Where a terminal bonus maybe payable, emphasis that the policy will normally have to run its full term before the bonus becomes payable.

(f) In the case of long term insurance policies where the investment return is not guaranteed, explain that it is not guaranteed. Where a product purports to be guaranteed, explain any conditions or limitations applying to the guarantee. The insurance representative shall use his best endeavours to enable the client to understand the nature of any risks involved.

(i) Explain to the client the amount or percentage of commission that the licensee will receive as a result of the sale or variation of single

premium insurance contracts, Traded Endowment Plans and any contract involving "gearing/leveraging" or, in respect of any other policy, when requested. Also, explain any charges (including bid-offer spread charges and cancellation charges) that will or maybe incurred.

(l) If using illustrations, projections and forecasts supplied by an insurer, ensure that the client is provided with all relevant documentation that has been supplied.

There is no criticism of Mr Wickins in connection with general insurance business carried on by GIBL. The criticisms are of his conduct as a director of a regulated firm, and the Commission has found that he does not yet have the competence to perform the functions of director, controller, partner or manager (or AIR) of a firm conducting long-term insurance or controlled investment business.

Mitigating Factors

GIBL suspended Mr Merrien from his position as a director of GIBL when it became aware of the issues relating to the advice provided by Mr Merrien.

GIBL has surrendered its licences for conducting controlled investment business and long-term insurance business and arranged for the transfer of the clients to another insurance and investment intermediary.

Mr Wickins and GIBL have, at all material times, co-operated and assisted fully with the Commission's enquiries.