
FINAL NOTICE

To: Michael Thomas Davies

Of: c/o Forbes Solicitors
Ribchester House,
Lancaster Road
Preston
PR1 2QL

Date 28 July 2004

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS ("FSA") gives you final notice about a requirement to pay a financial penalty.

THE PENALTY

The FSA gave you, Michael Thomas Davies ("Mr Davies") a Decision Notice dated 28 July 2004 which notified you that, pursuant to section 123 (Power to impose penalties in cases of market abuse) of the Financial Services and Markets Act 2000 ("the Act"), the FSA had decided to impose a financial penalty on you in the amount of £1,000.

On your behalf your solicitor confirmed on 27 July 2004 that you have waived your right to refer the matter to the Financial Services and Markets Tribunal within 28 days of the date on which the Decision Notice was given to you. Accordingly, for the reasons set out below and having taken into account that settlement is reached, the FSA imposes a financial penalty on you in the amount of £1,000 ("the Penalty").

REASONS FOR THE ACTION

Introduction

1. The FSA has decided to impose this penalty as a result of the behaviour of Mr Davies in January 2004 in relation to his dealing in the shares of Berkeley Morgan Group plc ("BMG") ahead of the announcement of its Chairman's statement for the consolidated

unaudited results for BMG for the six months ended 31 October 2003 ("the announcement") which was released on 6 January 2004. The ordinary share capital of BMG was admitted to trading on OFEX in January 2000.¹

2. On the basis of the facts and matters described below, the FSA has decided that:
 - (a) Mr Davies has engaged in market abuse; and
 - (b) in all the circumstances, it is appropriate to impose a penalty on Mr Davies in the amount proposed.

Relevant statutory provisions

3. Under section 123(1)(a) of the Act the FSA may impose a financial penalty of such amount as it considers appropriate if the FSA is satisfied that a person has engaged in market abuse.
4. Section 118(1) of the Act defines "market abuse" as "*behaviour which...*
 - (a) *occurs in relation to qualifying investments traded on a market to which this section applies;*
 - (b) *satisfies any one or more of the conditions set out in subsection (2); and*
 - (c) *is likely to be regarded by a regular user of that market who is aware of the behaviour as a failure on the part of the person or persons concerned to observe the standard of behaviour reasonably expected of a person in his or their position in relation to the market.*"
5. Of the three conditions set out in section 118(2) the one relevant to this case is that:

"the behaviour is based on information which is not generally available to those using the market but which, if available to a regular user of the market, would or would be likely to be regarded by him as relevant when deciding the terms on which transactions in investments of the kind in question should be effected."
6. Shares in BMG traded on OFEX are qualifying investments and are traded on a market to which section 118 of the Act applies; and dealing in such shares is behaviour occurring in relation to such investments for the purposes of section 118 of the Act.

¹ OFEX is a share – trading market which enables OFEX member firms to deal in the securities of companies which are not traded on the London Stock Exchange. OFEX is a prescribed market for the purposes of section 118 of the Act.

7. The term "*regular user*", in relation to a particular market, means "*a reasonable person who regularly deals on that market in investments of the kind in question*" (section 118(10) of the Act).
8. Under section 119 of the Act, the FSA has issued a code, the Code of Market Conduct ("the Code"), which contains guidance as to whether or not behaviour amounts to market abuse. Under section 122 of the Act, the Code may be relied on so far as it indicates whether or not particular behaviour should be taken to amount to market abuse.

Findings of Fact

Background

9. BMG, formed in 1991, operates as a holding company which provides a range of management services to its six wholly owned subsidiaries. These subsidiaries provide independent financial planning advice and the supply and packaging of medical and general insurance services.
10. In January 2000 BMG joined OFEX. Its ordinary shares were thereafter traded on OFEX.
11. Mr Davies joined the Finance Department of BMG in June 1998 as an assistant accountant to the Finance Director. At all material times relevant to this Final Notice, Mr Davies was employed as Group Financial Controller and reported directly to the Finance Director. As Group Financial Controller, Mr Davies' responsibilities include:
 - a) preparing the management accounts for two subsidiary companies on a monthly basis;
 - b) preparing the analysis and reconciliation for the other BMG subsidiaries to assist the Finance Director's production of the management accounts for these companies;
 - c) performing complex analysis for the Managing Director in relation to medical insurance policy calculations; and
 - d) assisting the Finance Director in preparing the interim and year end financial statements for BMG.

Events leading to BMG's interim results announcement on 6 January 2004

12. Under OFEX Rule 9.17, BMG is required to prepare interim and final results which are to be made public within three months of the period to which the results relate. Accordingly, on 25 November 2003, BMG informed the market that it would announce its consolidated interim results for the six months ended 31 October 2003 ("the interim results") on 6 January 2004.
13. During November and December 2003, Mr Davies assisted in the preparation of the interim results.
14. In or around the beginning of December 2003, Mr Davies was sent a copy of the draft Chairman's statement. The draft Chairman's statement formed an important part of

the announcement and included BMG's interim results. Mr Davies was provided with the draft Chairman's statement so that he could verify the figures contained therein.

Information available to Mr Davies by 5 January 2004

15. By 5 January 2004, Mr Davies was in possession of the following information:
- a) That the exceptional items contained in BMG's accounts in the previous financial year (2002/2003) which had had an adverse effect on BMG's profits would not be recurring;
 - b) That BMG's interim results were favourable and that these results demonstrated that the company had returned to generating profits; and
 - c) The contents of the announcement.

Mr Davies' share dealing

16. On the morning of 5 January 2004, Mr Davies checked the BMG share price as he was intending to purchase shares the following day, after the company had announced its interim results. However, having noted that BMG's share price was rising, Mr Davies telephoned his broker and placed an order to purchase 4,000 BMG ordinary shares which were trading at 52.5p per share. It was Mr Davies' intention to benefit from the price rise in BMG shares which he considered was likely to occur as a result of the announcement of the company's favourable interim results the next day.

The Announcement of 6 January 2004

17. At 8.00am on 6 January 2004, the announcement was made via the Newstrack news and information service published on the OFEX website. The announcement included the following statement by the Chairman of BMG:

"I am delighted to report that during the last six months we have made significant steps towards our road to recovery. This is particularly pleasing after the tough conditions we witnessed last year.

Revenues for the first six months increased by over 7% to GBP 8,161,630 (GBP 7,613,495); Gross margins remained above 30%; Administrative expenses fell by 16% to GBP 1,794,715 (GBP 2,147,936) and the Group made pre-tax profits of GBP 672,176 (Loss of GBP 1,051,549). The net assets have improved from the year end by GBP 499,426 to GBP 1,968,374. Net current assets have increased by GBP 443,158".

18. Following the announcement, BMG's share price rose approximately 29% from 52.5p (opening price) to 67.5p per share at the close of the market on 6 January 2004.
19. On 7 January 2004, Mr Davies telephoned his broker and placed an order to sell the 4,000 BMG shares. The shares were sold at 63p per share. As a result, Mr Davies realised a net profit of £420.

20. Mr Davies has cooperated fully with the FSA investigation and has admitted misconduct by investing in BMG shares on 5 January 2004, on the basis of information which he knew was relevant and not generally available.

Market Abuse

21. The FSA considers that in this case market abuse occurred within the meaning of that expression in section 118 of the Act.
22. Market abuse consists of behaviour that fulfils three required elements identified in section 118(1) of the Act and which is described at paragraph 4 above.
23. From at least December 2003, Mr Davies was in possession of information concerning the details of the interim results. Such information, if disclosed to the market, would have been likely to impact positively on BMG's share price.
24. The behaviour of Mr Davies considered by the FSA to amount to market abuse is that he dealt in BMG shares on 5 January 2004 based on that information.
25. By reference to the three required elements under section 118(1) of the Act, Mr Davies' behaviour amounted to market abuse in that the behaviour:
 - (a) occurred in relation to BMG shares, being qualifying investments traded on OFEX, which is a prescribed market, for the purposes of section 118(1)(a) of the Act;
 - (b) was based on information which was not generally available to those using the market but which, if available to a regular user of the market, would or would have been likely to be regarded by him as relevant when deciding the terms on which transactions in investments in the kind in question should be effected, for the purposes of sections 118(1)(b) and 118(2)(a) of the Act; and
 - (c) is likely to be regarded by a regular user of OFEX as a failure on the part of Mr Davies to observe the standards of behaviour reasonably expected of a person in his position in relation to the market, for the purposes of section 118(1)(c) of the Act.

Behaviour in relation to qualifying investments

25. As stated at paragraph 6 above, BMG shares are qualifying investments. Mr Davies' behaviour occurred in relation to BMG shares traded on OFEX (which is a prescribed market) to which section 118 of the Act applies. His behaviour involved dealing directly in qualifying investments.

Misuse of Information

26. As noted at paragraph 5 above, under section 118(2)(a) of the Act, behaviour may amount to market abuse where it is based on information which is not generally available to those using the market but which, if available to a regular user of the market, would or would be likely to be regarded by him as relevant when deciding the terms on which transactions in investments of the kind in question should be effected.

27. As indicated in the Code (at MAR 1.4.4.E), behaviour will amount to market abuse under section 118(2)(a) where all four of the following circumstances are present:
- a) the deal must be based on information. The information must have a material influence on the person's decision to deal (but need not be the only reason for his dealing);
 - b) the information is not generally available;
 - c) a regular user of the market is likely to regard the information as relevant when deciding the terms on which transactions of the kind in question should be effected; and
 - d) the information must relate to matters which the regular user would reasonably expect to be disclosed to users of the prescribed market.
28. By 5 January 2004 the information which Mr Davies possessed, as described in paragraph 15 above, was such as to satisfy the tests set out in paragraph 27 above for the reasons set out in paragraphs 29 to 32.

Behaviour based on information

29. Mr Davies dealt in the shares of BMG at a time when he was in possession of information concerning BMG's interim results. The FSA considers that the information set out at paragraph 15 above had a material influence on Mr Davies' decision to deal in BMG shares. The timeliness of the dealing coincides with Mr Davies' knowledge of the contents of the announcement and demonstrates that his dealing was based on such information. Mr Davies has admitted that he knew that this information would be released into the market and that this would, or would be likely to have the effect of moving the price of BMG shares.

Information not generally available

30. The information set out at paragraph 15 above was generally not available. At the time of preparing the interim results, Mr Davies admitted that he knew he had access to inside information which, if made public, would have a material effect on BMG's share price. The information could not have been obtained by research or analysis conducted by or on behalf of users of the market. Neither had the information been made generally available under the criteria set out under the Code (at MAR 1.4.5.E). It was information that was only available to Mr Davies because of his position within BMG's Finance Department.

Relevance of information

31. The information concerned the business affairs and prospects of BMG. In addition to being material and current, the information was both specific and precise. Mr Davies has admitted that at the time of dealing he was in possession of relevant information before BMG released its interim results and that this information was his reason for dealing. The information was obtained by Mr Davies during the course of his employment at BMG and was obtained directly in connection with the fulfilment of his duties within BMG's Finance Department. A regular user of the market would regard such information as relevant when deciding the terms on which to deal in BMG shares.

Discloseable information

32. For the purposes of the Code (at MAR 1.4.4.E) the information related to matters a regular user would reasonably expect to be disclosed to other users of the market. The information set out at paragraph 15 above was information relating to the financial condition of BMG and the performance of its business which was required to be disclosed under OFEX Rule 9.17. Mr Davies has admitted that he knew that the six months accounts were always made public each year. Mr Davies knew that the interim results for the period to 31 October 2003 would be the subject of an announcement on 6 January 2004.

Failure to observe standards of behaviour

33. The FSA considers that a reasonable person familiar with the OFEX market would regard Mr Davies' behaviour as a failure to observe the standard of behaviour reasonably to be expected of an accountant employed as a Group Financial Controller of a company whose shares are traded on OFEX. Being in such a position, Mr Davies ought to be aware of the sensitivity of the information available to him and the impropriety of exploiting that information to his own advantage before it had been made available to investors in accordance with BMG's obligations under the OFEX Rules.
34. The Code clearly indicates (at MAR 1.4.3.E) that, where market users rely on the timely dissemination of relevant information, (as in this case on OFEX) those who possess relevant information ahead of its general dissemination should refrain from acting on that information. Confidence in such markets depends, in part, on market users' confidence that they can deal with each other on the basis that they have equal, simultaneous access to information that is required to be disclosed.

Financial Penalties

35. In enforcing the market abuse regime the FSA's priority is to protect prescribed markets from any damage to their efficiency caused by the misuse of information in relation to the market. The effective and appropriate use of the power to impose penalties for market abuse will help to maintain confidence in the UK financial system by demonstrating that high standards of market conduct are appropriately enforced in the UK financial markets. The public enforcement of these standards also furthers the FSA's regulatory objectives of public awareness, protection of consumers and the reduction of financial crime (ENF 14.1.3).
36. In accordance with the FSA's published policy (ENF 14.4) in determining whether to take action in respect of market abuse, and in determining the level of the proposed penalty, the FSA has regard to all the circumstances, including the nature and seriousness of the abuse, the person's conduct following the abuse (including their co-operation with the FSA's investigation), the nature of the market that has been abused, the likelihood of abuse of the same type being repeated and the need to deter such abuse, and the previous history of the person concerned.
37. The FSA has taken all the relevant circumstances into account in deciding that the imposition of a financial penalty in this case is appropriate and that the level of the

penalty proposed is proportionate. The FSA has particular regard to the guidance set out in ENF 14.4, 14.6 and 14.7 and to the following considerations:

- a. Mr Davies realised a profit of £420 as a result of his behaviour. The FSA would normally seek to impose a penalty that at a minimum deprived Mr Davies of the benefits that he gained from his abusive behaviour.
 - b. Investors in BMG, as with any investors in shares traded on OFEX, need to have confidence in the integrity of the processes by which shares are traded on the market. The misuse of information by an employee of BMG (or anyone who obtains relevant information in the course of his employment) must seriously undermine investor confidence. It can result in significant financial gain (or, the avoidance of a significant loss) and yet the detection of such abuse is very difficult. The FSA therefore considers it essential that the penalty imposed should not only deprive Mr Davies of his ill-gotten gains but also impose an additional amount to act as a deterrent to others to refrain from such abuse.
 - c. The seriousness of this case is aggravated by the fact that Mr Davies was at the time BMG's Group Financial Controller, a position of trust. As such he was entrusted with highly sensitive information, a trust that he abused through the misuse of that information by his dealing.
 - d. Mr Davies' behaviour was deliberate. He foresaw the consequences of his actions.
38. In deciding the level of penalty the FSA has also taken into consideration the following mitigating factors:
- a. Mr Davies has given full co-operation to the FSA. He attended a voluntary interview at the first available opportunity. He answered all questions in interview with openness and, in the FSA's opinion, truthfully.
 - b. Mr Davies made full admissions of market misconduct at the first available opportunity. He then expressed a desire to have the matter dealt with as soon as practicable.
 - c. Mr Davies has no previous history of market misconduct and nor is he an approved person. The imposition of a penalty for market abuse is a very serious measure and the FSA recognises that, as an individual, the impact on Mr Davies is likely to be significant. Nevertheless, the seriousness of the abuse in this case is such that the imposition of a penalty is appropriate.
 - d. The personal circumstances and limited financial resources of Mr Davies which may result in severe financial hardship.

CONCLUSION

38. In all the circumstances, the FSA considers that the imposition of a penalty on Mr Davies in the amount of £4,000 is appropriate. However, given Mr Davies' full and frank admission of his abusive behaviour, his co-operation with the FSA investigation, his financial resources and personal circumstances, it is considered that the level of penalty be reduced to £1,000.

IMPORTANT NOTICES

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

Manner of Payment

The financial penalty of £1,000 must be paid to the FSA in full.

Time for Payment

The Penalty must be paid to the FSA no later than 16 August 2004, being not less than 14 days beginning with the date on which this notice is given to you.

If the penalty is not paid

If all or any of the Penalty is outstanding on 17 August 2004, the FSA may recover the outstanding amount as a debt owed by you and due to the FSA.

Publicity

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 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 information would, in the opinion of the FSA, be unfair to Mr Davies or prejudicial to the interests of consumers.

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

FSA contact

For more information concerning this matter generally, you should contact Herricia Willis at the FSA (direct line: 020 7066 1146/fax 020 7066 1147

Carlos Conceicao
Head of Market Integrity
Enforcement Division