

**CAPTION AND SUMMARY**

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**FINANCIAL MARKETS AUTHORITY**

**v**

**DAVID ROBERT GILMOUR ROSS**

105 Woburn Road  
Woburn  
Lower Hutt

DOB: 19/04/1950

OCC: Company director

(Informant)

(Defendant)

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**CRI-xxxx-xxx-xxxx**

**David Robert Gilmour Ross**

**CHARGES**

Being in the business of providing a broking service when not authorised

**Section/Act:**

Section 11 Financial Service Providers (Registration and Dispute Resolution) Act 2008

**Penalty:**

12 months imprisonment or a \$100,000 fine

**CRN:**

XXXXXXXXXXXXXX

**CHARGES:**

Making a false declaration or representation for the purposes of obtaining authorisation as an authorised financial adviser

**Section/Act:**

Section 136 Financial Advisers Act 2008

**Penalty:**

\$100,000 fine

**CRN:**

XXXXXXXXXXXXXX

**CHARGES:**

Supplying information and documents in purported compliance with a notice issued under section 25 of the Financial Markets Authority Act 2011 knowing it to be false or misleading

**Section/Act:**

Section 61(1) Financial Markets Authority Act 2011

**Penalty:**

\$300,000 fine

**CRN:**

XXXXXXXXXXXXXX

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## SUMMARY OF FACTS

### INTRODUCTION

1. Mr Ross faces 1 charge under each of section 11(1) of the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (**FSP Act**), section 136(1)(a) of the Financial Advisers Act 2008 (**FA Act**) and section 61(1)(b) of the Financial Markets Authority Act 2011 (**FMA Act**).

### BACKGROUND

2. The Financial Markets Authority (**FMA**) is the financial markets conduct regulator established under the FMA Act. FMA is a Crown Entity established under the FMA Act. As provided in section 8 of the FMA Act, FMA's main objective is to promote and facilitate the development of fair, efficient, and transparent financial markets. FMA's functions include:
  - 2.1 To monitor compliance with, and investigate conduct that constitutes or may constitute a contravention of financial markets legislation, including the FA Act and the FSP Act;
  - 2.2 To monitor and conduct inquiries and investigations into any matter relating to financial markets or the activities of financial markets participants.
3. Mr Ross was a financial adviser who offered financial management and advice services to clients through Ross Asset Management Limited (**RAM**), a company which was incorporated in 1989. Mr Ross also used various other entities in the course of his financial management and advice services, including Dagger Nominees Limited (**Dagger**) a company which was incorporated in 1989 and which held investments as a nominee for RAM and for RAM investors. Mr Ross was the sole director of RAM at all material times. Mr Ross and his wife each own 50% of the shares in RAM. Mr Ross was the sole director and sole shareholder of Dagger.
4. Pursuant to the FSP Act:
  - 4.1 On 29 November 2010 Dagger became a registered financial services provider
  - 4.2 On 2 December 2010 RAM became a registered financial services provider. RAM and Dagger were each registered to provide the following financial services: keeping,

investing, administering or managing money, securities, or investment portfolios on behalf of other persons.

- 4.3 On 5 April 2011 Mr Ross became a registered financial services provider, registered to provide financial adviser services.
5. RAM, Dagger and Mr Ross are all financial markets participants as defined in the FMA Act.
  6. On 12 July 2011 Mr Ross was authorised as an authorised financial adviser (**AFA**). Mr Ross was authorised to provide financial advice and discretionary investment management services.
  7. None of RAM, Dagger or Mr Ross were registered to provide broking services.
  8. Prior to his authorisation as an AFA, and from about 1989, Mr Ross provided finance management and advice services to clients. Mr Ross was assisted by two administrative staff, but he was the sole financial adviser and had sole decision-making authority for all aspects of the operation of RAM and related entities.
  9. RAM's clients were, typically, individuals, husband and wife investors and family trusts.
  10. When new clients were introduced to RAM they received an introductory pack containing an engagement letter, disclosure statements and a RAM Management Deed which was between the client, RAM and Dagger.

### **RAM Management Deeds**

11. The RAM Management Deeds contained the following clauses:

#### **3 APPOINTMENT**

*The Client hereby appoints the Manager to be the agent of the Client for the purposes of managing and administering the Portfolio in accordance with the terms, conditions and covenants of this Deed*

...

*the Manager is hereby authorised to act as agent of the Client in the management and administration of the Portfolio.*

#### **4 ACCEPTANCE**

*The Manager hereby accepts the above appointment and agrees to manage and administer the Portfolio in a proper manner. The Manager shall also:*

...

*4.2 Procure that a detailed statement and records for the operation of the Portfolio is prepared quarterly;*

*4.3 Comply with instructions given by the Client in accordance with this Deed (subject to clause 10)*

#### **5 TERMINATION**

*Each of the parties shall have the right at any time upon giving to the other party at least 30 working days prior notice in writing... to terminate this Deed*

#### **6 OBLIGATIONS ON TERMINATION**

*Upon the termination of this Deed the Manager shall forthwith deliver to the Client all records and information kept by the Manager in connection with the Portfolio and any other information in any way relating to the Portfolio which the client may require...*

*The Manager shall also deliver to the Client (or any person nominated by the Client) as soon as reasonably practicable after receiving a request to that effect from the Client, any of the Business of the Portfolio held in the name of the Nominee Company... and any cash held by the Manager as at the date of termination.*

#### **7 MANAGEMENT AND ADMINISTRATION PROCEDURE**

*The management and administration of the Portfolio shall be carried out in accordance with the following procedure:*

...

*7.8 All Money in the Portfolio shall be handled by the Manager on behalf of the Client and when not invested shall be paid by the Manager at its discretion into an account to be opened by the Manager at a Bank in the name of the Client,*

*and the Client agrees that the Manager shall have the sole signing authority over that account.*

#### **Investment reports provided to clients**

12. RAM provided quarterly investment reports to RAM investors (**Investment Reports**), which included:
  - 12.1 A list of transactions for the quarter (contributions, withdrawals, purchase or sale of securities, interest or dividends received, management fees deducted).
  - 12.2 The book value and market value of the investment portfolio at the end of that quarter.

#### **Complaints received**

13. On 25 October 2012 FMA received complaints from two investors who held investment portfolios with RAM. FMA commenced inquiries into these complaints. On 29 October 2012, FMA received a third complaint from a RAM investor. The complainants advised FMA that RAM had failed to meet their requests for withdrawals from and/or redemptions of their RAM investment portfolios pursuant to the instructions given.
14. FMA commenced an investigation into whether Mr Ross and his associated entities has breached financial markets legislation in particular the FA Act, FMA Act and the FSPR Act. On 29 October 2012 FMA issued a notice to Mr Ross under section 25 of the FMA Act requesting certain information in respect of the conduct of RAM's business. On 29 October 2012 Mr Ross arranged for the delivery to FMA's offices of 3 bags containing the Investment Reports, in purported compliance with the section 25 notice.
15. On 31 October 2012, FMA obtained and executed a search warrant, under section 29 of the FMA Act, at the RAM office premises at Level 14, 105 The Terrace, Wellington.
16. On 2 November 2012 FMA applied for and obtained asset preservation orders under the FA Act over Mr Ross, RAM and associated entities. On 6 November 2012 receivers were appointed over the property of Mr Ross, RAM, Dagger and the following other associated entities, trading accounts and business accounts under the FA Act:
  - 16.1 Bevis Marks Corporation Limited
  - 16.2 Mercury Asset Management Limited

- 16.3 Ross Investment Management Limited
  - 16.4 Ross Unit Trusts Management Limited
  - 16.5 United Asset Management Limited
  - 16.6 McIntosh Asset Management Limited
  - 16.7 Chapman Ross Trust
  - 16.8 Woburn Ross Trust
  - 16.9 Ace Investment Trust
  - 16.10 Ace Investment Trust Ltd
  - 16.11 Ace Investments Limited
  - 16.12 Ross Unit Trust
  - 16.13 Ross Unit Trust Limited
  - 16.14 Vivian Investments
  - 16.15 Vivian Investments Ltd
17. In their first report to the High Court on 13 November 2012 the receivers identified individual accounts holding purported investments of NZ\$449.6 million, the majority of which (\$436.7 million) were held under the name Bevis Marks. However, only investments totalling \$10.214 existed, and were held by various parties such as brokers, registries and banks.
18. The receivers advised that there was a significant gap between the identified market value of the Ross entities' investments and the amounts reported in investors' portfolios. The receivers stated that their analysis to date indicates it is likely the historical returns advised to investors are exaggerated and were possibly fictitious.
19. On 17 December 2012 the companies identified at paragraphs [16.1] to [16.6] above were placed into liquidation.

## Operation of RAM

20. Mr Ross had sole responsibility and sole decision making authority for all aspects of the operation of RAM. For several years Mr Ross instructed RAM's administrative assistants (verbally, by handwritten note or email) to enter false securities transactions into RAM's computer system. RAM's administrative assistants did not know such entries were false. The false securities transactions were all recorded as being conducted through a broker named Bevis Marks. A large number of the securities transactions involving Bevis Marks were fictitious. Profits and losses purportedly arising from the fictitious trades were also entered into RAM's computer system by RAM's administrative assistants on Mr Ross' instructions.
21. Mr Ross admitted instructing RAM's administrative assistants to enter the fictitious Bevis Marks transactions in RAM's computer system.
22. Mr Ross provided Investment Reports to clients on a quarterly basis which reported on the book value and market value of the investor's portfolio at the end of that quarter and recorded the transactions that had occurred during the quarter, including client contributions, withdrawals, purchases and sales of securities, interest or dividends earned and management fees deducted.
23. The Investment Reports were generated from the RAM computer system and therefore included the fictitious Bevis Marks securities transactions and recorded closing positions (market value and book value for the period) which reflected those transactions.
24. The Investment Reports recorded the application of clients' cash contributions to securities purchases, including in respect of the fictitious Bevis Marks transactions.
25. When a client requested withdrawal from and/or redemption of their investment portfolio, Mr Ross would sell securities using information generated from the RAM computer system to identify which securities were held in the investor's portfolio. Where the portfolio included the fictitious Bevis Marks transactions, no cash could be generated from the 'sales' of these securities.
26. Where there were insufficient funds to meet a repayment request, Mr Ross used funds from the RAM client bank account (which was the account into which investor contributions were paid) to meet the repayment or in some cases did not respond to the repayment request.

## OVERVIEW OF OFFENDING

### Legislation

27. Section 11(1) FSP Act provides that it is an offence for someone to whom the FSP Act applies knowingly to be in the business of providing a financial service for which they are not registered.
28. If a person makes a declaration or representation for the purpose of obtaining authorisation, knowing it to be false or misleading in a material particular, they commit an offence under section 136(1)(a) of the FA Act.
29. Under section 61(1)(b) of the FMA Act it is an offence to supply information or produce a document in purported compliance with a notice under section 25, knowing it to be false or misleading.

### Registration as a Financial Services Provider

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30. On 5 April 2011 Mr Ross became a registered financial services provider. He was registered to provide financial adviser services. Financial adviser services includes the following:
  - 30.1 Giving financial advice (making a recommendation or giving an opinion in relation to acquiring or disposing of (or refraining from) a financial product);
  - 30.2 Providing an investment planning service (designs, or offering to design, a plan for an individual based on (or purporting to be based on) an analysis of the individual's current and future overall financial situation and identification of their investment goals, including recommendations or opinions on how to realise those goals); and
  - 30.3 Providing a discretionary investment management service (deciding which financial products to acquire or dispose of on a client's behalf, acting under an authority granted by the client).
31. Applicants wishing to apply for registration as a financial service provider had to complete an online application form through the financial service providers' website, operated by the Companies Office (**FSPR Website**). As part of the registration process applicants had to select all of the activities which they wished to be registered for. The FSPR Website contained



guidance on the registration process, which included a link to section 5 of the FSP Act, which contained the definition of “financial service”.

32. Section 5 of the FSP Act states:

In this Act, **financial service** means any of the following financial services:

(a) a financial adviser service:

(ab) a broking service:

...

33. FMA’s website provides the following guidance on the registration regime:

“During the registration process you will need to select all the activities for which you wish to be registered. The FSPR website contains guidance on the definitions of various financial services.”

34. Mr Ross applied for registration to provide financial adviser services. Mr Ross did not apply to be registered for broking services. Each of RAM and Dagger also registered as financial service providers. Neither RAM nor Dagger applied to be registered for broking services.

35. A broking service is defined in section 77B of the FA Act as the receipt, holding, payment, or transfer of client money or client property by a person acting as an intermediary for a client. Further, neither of RAM or Dagger were registered to provide broking services.

36. In accordance with the terms of the Management Deed, clients invested funds with RAM by payment of a cheque or direct credit to the RAM client bank account. RAM’s administrative assistants entered the receipt of investor funds into RAM’s computer system as client contributions. Investors’ funds were held in the RAM client bank account and were also paid to share brokers to purchase securities.

37. Mr Ross purchased securities as an intermediary for his clients, completing the purchase using nominee parties such as RAM and Dagger. Mr Ross transferred payments of the share purchase price and any applicable brokerage to the relevant share broker (except in the case of the fictitious broker Bevis Marks, when no payment was made) receiving a “Buy Confirmation / Tax Invoice” documents which confirmed the purchase.

38. When a client requested a withdrawal from or redemption of their investment portfolio, on certain occasions Mr Ross would sell securities (where such securities were held) and use the proceeds received from the sale to repay the client.
39. Mr Ross admitted that he provided broking services to clients.

### Authorisation as an AFA

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40. following its establishment on 1 May 2011 pursuant to the FMA Act, FMA assumed the obligations, previously held by the Securities Commission, to authorise financial advisers under the FA Act.
41. On 24 June 2011 Mr Ross applied for authorisation as an AFA. On 12 July 2011 FMA approved Mr Ross' authorisation as an AFA.
42. The application process required Mr Ross to answer the following question to satisfy the good character requirements:

“Are you aware of any matters that may have an adverse impact on the Securities Commission's view of your character? Please read the AFA Authorisation Guide before answering this question.”

43. In his application Mr Ross responded “No” to the question.
44. The AFA Authorisation Guide contained the following guidance under the heading “Proof of good character”:

*The Securities Commission must be satisfied that an applicant is of good character before it will grant authorisation. The Commission's assessment of an adviser's character is an important tool in preserving public confidence in the professionalism and integrity of financial advisers. To enable the Commission to make an assessment about your character, you are required to declare any matters that may have an adverse impact on the Commission's view of your character...*

*During the online application process you will be asked:*

*“Are you aware of any matters that may have an adverse impact on the Securities Commission's view of your character?”*

...

*The Commission expects the following types of information to be disclosed by applicants and/or referees:*

- *Information suggesting a lack of willingness to comply with legal obligations, regulatory requirements or professional standards*
- *Obstructive, misleading or untruthful dealings with others*
- *A breach of fiduciary obligation or other obligation involving trust*
- *A failure to deal appropriately with conflicts of interest*
- *Involvement in negligent, deceitful or otherwise discreditable business or professional practices*
- *Failure to manage business or personal debts or financial affairs satisfactorily.*

45. Mr Ross confirmed he had read the AFA Authorisation Guide before he answered the question.
46. The Investment Reports that Mr Ross provided to clients on a quarterly basis reported on the book value and market value of the client's portfolio at the end of that quarter and recorded the transactions that had occurred during the quarter. The transactions included the fictitious Bevis Marks transactions and the closing balances (book values and market values) took into account the purported profits (or losses) arising from the fictitious Bevis Marks transactions.
47. The Investment Reports had the effect of misrepresenting the true value of the client's investment in RAM.
48. This conduct was not disclosed in the declaration made by Mr Ross which FMA considered in making the decision to authorise Mr Ross as an Authorised Financial Adviser.
49. Mr Ross admits that he answered 'No' to the question as he wanted to become an AFA. He admitted that he should not have signed the application form containing this declaration.

**Response to Section 25 Notice****CRN\*\*\*\***

50. On 29 October 2012 FMA issued a notice to Mr Ross under section 25 of the FMA Act requesting, inter alia:
1. *A complete list of the names and contact details of all current clients of David Robert Gilmour Ross (Mr Ross) and Ross Asset Management Limited (RAM) (the Clients)*
  2. *The portfolio valuation report for each of the Clients as at 29 October 2012.*
  3. *A print out of all securities and cash held by RAM or any nominee or custodian of RAM (whether directly or indirectly) on behalf of the customers of RAM and/or Mr Ross...*
51. On 29 October 2012, in purported compliance with the section 25 notice, 3 bags were delivered to FMA on behalf of Mr Ross, containing Investment Reports for RAM's clients as at 30 September 2012. The Investment Reports were generated from RAM's computer system and, as set out above, reported on transactions including the fictitious Bevis Marks transactions and recorded closing positions which included profits (or losses) purportedly arising from the fictitious Bevis Marks transactions.
52. No information was given to FMA to suggest that the information contained in the Investment Reports was false.
53. On 22 November 2012 Mr Ross agreed to meet with the receivers and FMA. In response to a question from one of the receivers, Mr John Fisk: *In our report we mentioned that there is a large value in the portfolios that seem to be attributed to Bevis Marks. Of the \$449.6 million I think it is something like \$435 million is linked to Bevis Marks in the Access database [RAM's computer system]. Can you just help me with understanding how that system worked?* Mr Ross replied *Well those assets don't exist. And to put them into the clients' accounts, we had to have a broker so that was the broker.*
54. Mr Ross knew that at the time that he provided the Investment Reports to FMA that they contained false and misleading information.

**PREVIOUS APPEARANCES**

55. Mr Ross has not previously appeared before the Court.