
FINAL NOTICE

To: **Noel Smith**
IRN: **NXS00016**
Address: **230 Portland Road**
London
SE25 4SL
Date: **1 April 2010**

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS (“the FSA”) gives you, Noel Smith, final notice about the imposition of a financial penalty and the withdrawal of your individual approval to perform the controlled function of CF1 (Director):

1. ACTION

1.1. The FSA gave you, Noel Smith of Andrew Copeland Mortgages Limited (“the Firm”), a Decision Notice on 1 April 2010 (“the Decision Notice”) which stated that, for the reasons given below, it had decided to:

- (1) impose a financial penalty of £17,500 on you, pursuant to section 66 of the Financial Services and Markets Act 2000 (“the Act”) in respect of a failure to comply with Statement of Principle 7 of the FSA’s Statements of Principle and Code of Practice for Approved Persons (“Statements of Principle”) between 15 August 2007 and the date of this notice (“the relevant period”); and

- (2) withdraw the approval given to you to perform the significant influence function of CF1 (Director) pursuant to section 63 of the Act.
- 1.2. You agreed to settle at an early stage of the FSA's investigation and you therefore qualified for a 30% (stage 1) discount under the FSA's executive settlement procedures. Were it not for this discount, the FSA would have imposed a financial penalty of £25,000 on you.
- 1.3. You also agreed not to apply, for a period of two years from the date of this Notice, to perform any significant influence functions, that is, any of the controlled functions 1 to 12B and 28 and 29 in the table of Controlled Functions in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm.
- 1.4. Accordingly, the FSA has today imposed on you a financial penalty of £17,500 and withdrawn your approval to perform the controlled function of CF1 (Director).

2. REASONS FOR THE ACTION

- 2.1. The FSA concluded on the basis of the facts and matters summarised below and set out in more detail in section 4 of this Notice that, while acting in your capacity as CF1 (Director) of the Firm, your conduct fell short of the standards expected of approved persons performing significant influence functions at authorised firms, and that you lacked the competence and capability to perform such functions.
- 2.2. In summary, during the relevant period:
 - (1) you failed to ensure that the Firm completed all of the required remedial action identified during a visit by the FSA to the Firm in August 2007, which meant that customers were subject to an ongoing risk of receiving unsuitable mortgage advice and being recommended mortgage contracts that they could not demonstrably afford;
 - (2) in instances where customers had rejected the advisers' advice, their mortgage applications were then submitted on an advised basis despite the customers having been notified that the transactions were progressed on a non-advised basis;
 - (3) the Initial Disclosure Document ("IDD") for buy-to-let mortgages included the FSA logo and details of both the Financial Services Compensation Scheme ("FSCS") and the Financial Ombudsman Service ("FOS") which could have misled the customers into believing that they would benefit from the protection available under the regulatory system;
 - (4) in nine of the Firm's mortgage client files that the FSA reviewed there was either no documented evidence of affordability or insufficient information in the documented assessment to satisfy the FSA that affordability had been demonstrated;
 - (5) there was no evidence of product research on nine of the client files reviewed;

- (6) the suitability letters issued by the Firm contained standard generic phrases and the letters did not contain specific reasons why the respective mortgage contracts had been selected or why the Firm considered the contracts to meet the customers' needs and circumstances;
 - (7) you were responsible for reviewing all of the mortgage advice given by advisers at the Firm but no records were kept of these reviews and they were not used to identify any potential training or developmental requirements;
 - (8) your reviews of mortgage client files were not effective because they did not identify any issues of concern about suitability of advice, affordability of recommended mortgage contracts, record keeping failures, or possible indicators of mortgage fraud;
 - (9) while the Firm was able to show that it had put in place systems and controls to help prevent it from being used to facilitate financial crime, of the 21 files that the FSA reviewed, six were found to contain false employment and income information; and
 - (10) in two cases, the incomes of two people were rolled into one income and declared as the applicant's income on mortgage applications, purportedly on the advice of the business development manager ("BDM") at the lender (which was denied by the BDM).
- 2.3. These matters represented a failure by you, in contravention of Statement of Principle 7, to take reasonable steps to ensure that the business of the Firm for which you were responsible in your controlled functions complied with the relevant requirements and standards of the regulatory system.
- 2.4. The FSA viewed the nature and extent of your misconduct as serious because your actions exposed 224 customers of the Firm to the risk of being recommended mortgage contracts that might not have been suitable.
- 2.5. The FSA also concluded that your conduct during the relevant period demonstrated that you lacked the competence and capability to perform significant influence functions and that you would pose a risk to consumers if you continued to perform such functions. The FSA therefore concluded that you were not a fit and proper person to perform significant influence functions and that it was therefore necessary and proportionate to withdraw your individual approval to perform the controlled function of CF1 Director.
- 2.6. The FSA took into account the following steps taken by you which were regarded as mitigating factors:
- (1) you were open and cooperative with the FSA's investigation; and
 - (2) there was no particular evidence that you sought to profit or avoid a loss as a result of the identified failings.

3. RELEVANT STATUTORY AND REGULATORY PROVISIONS

- 3.1. The relevant statutory provisions and regulatory requirements are set out at Annex A to this Final Notice.

4. FACTS AND MATTERS RELIED UPON

Background

- 4.1. The Firm was a mortgage and general insurance intermediary based in South London.
- 4.2. You and your wife were the sole directors of the Firm as well as the shareholders. In practice, your wife had no day to day involvement in the Firm and you had sole responsibility for the running of the Firm and for ensuring that it complied with the relevant regulatory requirements and standards.
- 4.3. During the relevant period, there were four advisers at the Firm, of which you were one, who provided mortgage advice to customers.

Conduct in issue

Communications with customers

- 4.4. As a result of a visit by the FSA to the Firm in August 2007 (“the 2007 visit”), you were asked to undertake remedial action in respect of two customers, namely to draw their attention to potentially unsuitable advice given to them. However, you did not contact these customers until after the FSA visited the Firm again in April 2009 (“the 2009 visit”). You stated in correspondence that your reason for taking no remedial action in the interim period was that you believed that no action was required as the customers’ mortgage contracts were still in place and they were not in arrears.
- 4.5. Five customers who had rejected the advice provided by you and the other advisers were dealt with subsequently on a non-advised basis. However, when the Firm submitted the mortgage applications to lenders, it processed these applications as advised sales.
- 4.6. The Firm issued three different Initial Disclosure Documents (“IDDs”) depending on the level of service and type of contract. The IDD for buy-to-let mortgage advice included the FSA logo and details of the FSCS and FOS, despite the fact that such mortgages are not covered by FSA regulation. These IDD’s could have misled customers into believing that the advice that they were receiving was regulated and that they would benefit from the protection available under the regulated financial system (i.e. Financial Ombudsman Service and Financial Services Compensation Scheme).

Suitability

- 4.7. After the FSA’s visit in 2007, you stated that you had put in place an affordability assessment that demonstrated affordability at the initial/discounted interest rate and at the standard variable rate (“lifestyle questionnaire”).

- 4.8. In nine of the client files reviewed, there was either no affordability assessment or insufficient information in the lifestyle questionnaire or equivalent record to show that an adequate assessment of affordability of the recommended mortgage contract had been made. In addition, the mortgage term of one client extended beyond their expected retirement age but there was no evidence on the file of any assessment of affordability of the mortgage contract into retirement.
- 4.9. You told the FSA that you did not insist on the advisers completing affordability assessments if it was self-evident that the mortgage was affordable. You said that the Lifestyle questionnaire was also only used in the more “borderline” affordability cases.
- 4.10. In one case, the FSA found a note on the client file stating that the recommended mortgage contract was unaffordable and that the case was still going to proceed but on a non-advised basis.
- 4.11. There was no product research on nine client files reviewed by the FSA.
- 4.12. The suitability letters issued by the Firm contained standard generic phrases. The letters failed to explain why the mortgage contracts had been selected or why the recommendations met the customers’ needs and circumstances. For example, in two cases where clients were consolidating existing debts as part of their re-mortgages, the suitability letters did not mention the additional long-term costs associated with this consolidation.

Management oversight

- 4.13. You were responsible for reviewing all of the mortgage advice given by the advisers at the Firm. However, you did not keep a record of these reviews and, if any issues were identified, they were only raised informally with the advisers and were not used to highlight potential training or developmental requirements.
- 4.14. The file reviews that you undertook were not effective because they did not identify any of the affordability and suitability issues or mortgage fraud indicators, subsequently identified by the FSA. In addition, there was no arrangement in place to review the mortgage advice that you provided to customers.
- 4.15. The advisers were given copies of the money laundering prevention procedures when they joined the Firm but there was no refresher training and you told the FSA that you relied on the advisers’ knowledge of their money laundering obligations.
- 4.16. When asked about the controls in relation to financial crime, you told the FSA that you:

“read the files...it’s just looking for the flaws in that really I mean anything sort of implausible.”
- 4.17. These retrospective sense checks missed various fraud indicators. For example on Client A’s application the perforated edges on the payslips have never been sealed and the sealing instructions were still intact, which suggests that the payslips were false.

- 4.18. Further, in Client B's application, the payslips showed a salary of £16,800 but the salary declared on the mortgage application was £21,000. When asked about this discrepancy, you said that you had not noticed it.
- 4.19. The FSA submitted income details from seven mortgage applications to Her Majesty's Revenue and Customs ("HMRC") for verification. Six of these applications were found to contain false employment and income information.
- 4.20. In the cases of Client C and Client D, the incomes of third parties were rolled into their own incomes and declared as the applicants' own incomes (on a self-certification basis) thereby misleading the lenders about the applicant's actual incomes and personal circumstances. You were the adviser for Client C and you were responsible for reviewing the sales file of Client D. You told the FSA that you were advised to roll up the two incomes sources on the mortgage applications in this way by the BDM at the relevant lender. The BDM denied advising you in this way.

5. ANALYSIS OF MISCONDUCT AND SANCTIONS

Breaches

- 5.1. During the relevant period, you were the approved person responsible for ensuring that the Firm complied with all regulatory requirements. By reason of the facts and matters set out in paragraphs 4.4 to 4.20 above, it appeared to the FSA that you failed to take reasonable steps to ensure that the business of the Firm for which you were responsible in your controlled function of CF1 (Director) complied with the relevant requirements of the regulatory system in breach of Statement of Principle 7.
- 5.2. By reason of the facts and matters set out in paragraphs 4.4 to 4.20 above, the FSA considered that you were not fit and proper in that you failed to act with competence and capability.

Financial penalty

- 5.3. The FSA's policy on the imposition of financial penalties as at the date of this notice is set out in Chapter 6 of the Decision Procedures and Penalties Manual ("DEPP"), which forms part of the FSA Handbook. In addition, the FSA had regard to the corresponding provisions of Chapter 13 of the Enforcement Manual ("ENF") in force during the relevant period until 27 August 2007 and Chapter 7 of the Enforcement Guide ("EG"), in force thereafter.
- 5.4. The principal purpose of a financial penalty is to promote high standards of regulatory conduct by deterring approved persons who have committed breaches from committing further breaches, helping to deter other persons from committing similar breaches, and demonstrating generally the benefits of compliant behaviour.
- 5.5. In determining the level of the financial penalty, the FSA had regard to the need to ensure those who are approved persons and are exercising management functions act with the appropriate levels of competence and capability, and manage their business in accordance with regulatory requirements and standards. The FSA considered that a penalty should be imposed to demonstrate to you and others the seriousness with which the FSA regards such behaviour.

- 5.6. DEPP 6.5.2 sets out a non-exhaustive list of factors that may be of relevance in determining the level of a financial penalty. The FSA considered that the following factors were particularly relevant in this case.

Deterrence (DEPP 6.5.2(1))

- 5.7. A financial penalty will deter you from further breaches of regulatory rules and Principles. In addition, others will be deterred from allowing similar failings to occur and it will therefore promote the message to the industry that the FSA expects approved persons to maintain high standards of regulatory conduct.

The nature, seriousness and impact of the breach in question (DEPP6.5.2(2))

- 5.8. In determining the appropriate sanction, the FSA had regard to the seriousness of the breaches, including the nature of the requirements breached, the duration and frequency of the breaches and the number of customers who were affected and/or placed at risk of loss.
- 5.9. The FSA concluded that you exercised inadequate management and control over the running of the Firm, which resulted in the business failing to comply with regulatory requirements and standards for a prolonged period of time (approximately five years). You failed to ensure that the mortgage advice provided to customers was suitable during the relevant period and created a serious risk that the Firm's customers might have received unsuitable mortgage advice.

The extent to which the breach was deliberate or reckless (DEPP 6.5.2(3))

- 5.10. The FSA considered that you did not act in a deliberate manner but that your conduct was in some respects reckless (i.e. you did not take remedial action aimed at treating customers fairly).

Whether the person on whom the penalty is to be imposed is an individual (DEPP 6.5.2(4))

- 5.11. When determining the appropriate level of financial penalty, the FSA will take into account that individuals will not always have the same resources as a body corporate, that enforcement action may have a greater impact on an individual, and further, that it may be possible to achieve effective deterrence by imposing a smaller penalty on an individual than a body corporate. The FSA will also consider whether the status, position and/or responsibilities of the individuals are such to make a breach committed by the individual more serious and whether the penalty should therefore be set at a higher level.
- 5.12. The FSA recognised that the financial penalty imposed on you was likely to have a significant impact on you as an individual but it was considered to be proportionate in relation to the seriousness of the misconduct and given your previous position as an approved person performing significant influence functions at the Firm.

The size, financial resources and other circumstances of the person on whom the penalty is to be imposed (DEPP 6.5.2(5))

- 5.13. The FSA considered that a financial penalty of the level imposed was appropriate, having taken into account all relevant factors, including your income from the Firm during the relevant period.

Conduct following the breach (DEPP 6.5.2(8))

- 5.14. You co-operated with the FSA's investigation.

Previous disciplinary history (DEPP 6.5.2(9))

- 5.15. The FSA took into account the fact that you had not been the subject of previous disciplinary action by the FSA.

Previous action taken by the FSA (DEPP 6.5.2(10))

- 5.16. In determining the appropriate sanction, the FSA took into account sanctions imposed by the FSA on other approved persons for similar behaviour. This was considered alongside the deterrent purpose for which the FSA imposes sanctions.

Withdrawal of approval

- 5.17. The FSA also concluded that your conduct demonstrated a lack of competence and capability and you were not fit and proper to carry out the significant influence function for which you had approval. The FSA therefore withdrew the approval given to you to perform the controlled function of CF1 (Director).
- 5.18. You agreed not to apply, for a period of two years from the date of this Notice, to perform any significant influence functions, that is, any of the controlled functions 1 to 12B and 28 and 29 in the table of Controlled Functions in relation to any regulated activity carried on by any authorised person, exempt person or exempt professional firm.

6. DECISION MAKER

- 6.1. The decision which gave rise to the obligation to give this notice was made on behalf of the FSA by Settlement Decision Makers for the purposes of the FSA's Decision Procedure and Penalties manual ("DEPP").

7. IMPORTANT

- 7.1. This Final Notice is given to you in accordance with section 390(1) of the Act.

Manner of and time of payment

- 7.2. The financial penalty must be paid in full by you to the FSA by no later than 15 April 2010, 14 days after the date of this Final Notice.

If the financial is not paid

- 7.3. If all or any of the financial penalty is outstanding on 15 April 2010 the FSA may recover the outstanding amount as a debt owed by you and due to the FSA.

Publicity

- 7.4. Sections 391(4), 392(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 publication would, in the opinion of the FSA, be unfair to you or prejudicial to the interests of consumers.
- 7.5. The FSA intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

FSA contacts

- 7.6. For more information concerning this matter generally, you should contact Chris Walmsley of the Enforcement and Financial Crime Division at the FSA (direct line: 020 7066 5894).

Tom Spender
Head of Department
FSA Enforcement and Financial Crime Division

ANNEX

1. Statutory provisions

- 1.1. The FSA's statutory objectives, set out in section 2(2) of the Act, are: market confidence; public awareness; the protection of consumers and the reduction of financial crime.
- 1.2. The FSA has the power, by virtue of section 66 of the Act, to impose a financial penalty on you of such amount as it considers appropriate where it appears to the FSA that you are guilty of misconduct and it is satisfied that it is appropriate in all the circumstances to take action against you.
- 1.3. You are guilty of misconduct if, while an approved person, you fail to comply with a statement of principle issued under section 64 or have been knowingly concerned in a contravention by the relevant authorised person of a requirement imposed on that authorised person by or under the Act.
- 1.4. Pursuant to section 63 of the Act, the FSA has the power to withdraw the approval given to you under section 59 of the Act if it considers that you are not a fit and proper person to perform them.

2. Statements of Principle for Approved Persons

- 2.1. The Statements of Principle for Approved Persons ("APER") sets out conduct which, in the opinion of the FSA, constitutes a failure to comply with a particular Statement of Principle and describes factors which the FSA will take into account in determining whether an approved person's conduct complies with it.
- 2.2. APER 3.1.3 G states that, when establishing compliance with, or breach of, a Statement of Principle, account will be taken of the context in which a course of conduct was undertaken, the precise circumstances of the individual case, the characteristics of the particular controlled function and the behaviour expected in that function.
- 2.3. APER 3.1.4 G states that an approved person will only be in breach of a Statement of Principle when he is personally culpable. Personal culpability arises where an approved person's conduct was deliberate or where the approved person's standard of conduct was below that which would be reasonable in all the circumstances.
- 2.4. In this case, the FSA considers the most relevant Statement of Principle to be Statement of Principle 7, which provides that an approved person performing a significant influence function must take reasonable steps to ensure that the business of the firm for which he is responsible in his controlled function complies with the relevant requirements and standards of the regulatory system.
- 2.5. APER 3.3 sets out factors relevant to an assessment of compliance with Statements of Principle 5 to 7.
- 2.6. APER 3.3.1 E provides that in determining whether or not the conduct of an approved person performing a significant influence function complies with Statements of Principle 5 to 7, the following are factors which, in the opinion of the

FSA, are to be taken into account: (1) whether he exercised reasonable care when considering the information available to him; (2) whether he reached a reasonable conclusion which he acted on; (3) the nature, scale and complexity of the firm's business; (4) his role and responsibility as an approved person performing a significant influence function; (5) the knowledge he had, or should have had, of regulatory concerns, if any, arising in the business under his control.

2.7. APER 4.7.2 E to 4.7.10 E provides examples of the types of behaviour that, in the opinion of the FSA, do not comply with Statement of Principle 7. We consider the following provisions to be particularly relevant to the misconduct by you and your breaches of Statement of Principle 7:

- (1) APER 4.7.3 E - 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 standards of the regulatory system in respect of its regulated activities;
- (2) APER 4.7.4 E - 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;
- (3) APER 4.7.5 E - failing to take reasonable steps adequately to inform himself about the reason why significant breaches (whether suspected or actual) of the relevant requirements and standards of the regulatory system in respect of its regulated activities may have arisen;

2.8. APER 4.7.11 G provides that the FSA expects an approved person performing a significant influence function to take reasonable steps both to ensure his firm's compliance with the relevant requirements and standards of the regulatory system and to ensure that all staff are aware of the need for compliance.

3. FSA's policy on financial penalties

3.1. The FSA's policy on the imposition and amount of penalties is set out in Chapter 6 of DEPP. This states that the FSA will consider the full circumstances of each case when determining whether or not to take action for a financial penalty, and sets out a non-exhaustive list of factors that may be relevant for this purpose.

3.2. The principal purpose of imposing a financial penalty is to promote high standards of regulatory conduct by deterring persons who have committed breaches from committing further breaches, helping to deter other persons from committing similar breaches and demonstrating generally the benefits of compliant behaviour.

3.3. The FSA will consider the full circumstances of each case when determining whether or not to take action for a financial penalty. DEPP 6.2.1G sets out guidance on a non-exhaustive list of factors that may be of relevance in determining whether to take action for a financial penalty, which include the following.

- (1) DEPP 6.2.1G(1): The nature, seriousness and impact of the suspected breach.

- (2) DEPP 6.2.1G(2): The conduct of the person after the breach.
 - (3) DEPP 6.2.1G(3): The previous disciplinary record and compliance history of the person.
 - (4) DEPP 6.2.1G(4): FSA guidance and other published materials.
 - (5) DEPP 6.2.1G(5): Action taken by the FSA in previous similar cases.
- 3.4. The FSA will consider all the relevant circumstances of a case when it determines the level of financial penalty. DEPP 6.5.2G sets out guidance on a non exhaustive list of factors that may be of relevance when determining the amount of a financial penalty.
- 3.5. Factors that may be relevant to determining the appropriate level of financial penalty include:
- (1) the nature, seriousness and impact of the breach in question, including the duration and frequency of the breach, whether the breach revealed serious or systemic weaknesses in the person's procedures or of the management systems or internal controls relating to all or part of a person's business, and the loss or risk of loss caused to consumers (DEPP 6.5.2G(2));
 - (2) the extent to which the breach was deliberate or reckless (DEPP 6.5.2(3));
 - (3) the size, financial resources and other circumstances of the person on whom the penalty is to be imposed (DEPP 6.5.2(5)); and
 - (4) the general compliance history of the person, including whether the FSA has previously brought to the person's attention, issues similar or related to the conduct that constitutes the breach in respect of which the penalty is imposed (DEPP 6.5.2(9)(d)).

4. Fit and Proper Test for Approved Persons

- 4.1. 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. FIT is also relevant in assessing the continuing fitness and propriety of an approved person.
- 4.2. FIT 1.3.1G provides that the FSA will have regard to a number of factors when assessing a person's fitness and propriety. One of the most important considerations will be the person's competence and capability.
- 4.3. FIT 2.2 provides that, in determining a person's competence and capability, the FSA will have regard to matters including but not limited to:
- (1) 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

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

5. FSA's policy for exercising its power to withdraw a person's approval

- 5.1. The FSA's approach to exercising its powers to withdraw individual approvals is set out in Chapter 9 of the Enforcement Guide ("EG").
- 5.2. EG 9.2 provides that the FSA's effective use of the power under section 63 of the Act to withdraw approval from an approved person will also help ensure high standards of regulatory conduct by preventing an approved person from continuing to perform the controlled function to which the approval relates if he is not a fit and proper person to perform that function. Where it considers this is appropriate, the FSA may prohibit an approved person, in addition to withdrawing their approval.
- 5.3. EG 9.8 to 9.14 set out additional guidance on the FSA's approach to withdrawing such approved persons' approvals. In deciding whether to withdraw an approval, the FSA will consider whether its regulatory objectives can be achieved adequately by imposing disciplinary sanctions.
- 5.4. EG 9.9 states that the FSA will consider all the relevant circumstances when deciding whether to withdraw that person's approval. Such circumstances may include, but are not limited to, the following factors:
 - (1) whether the individual is fit and proper to perform functions in relation to regulated activities;
 - (2) whether, and to what extent, the approved person has failed to comply with the Statements of Principle;
 - (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;
 - (6) the severity of the risk which the individual poses to consumers and to confidence in the financial system; and
 - (7) the previous disciplinary record and general compliance history of the individual.
- 5.5. 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 serious lack of competence and serious breaches of the Statements of Principle, such as giving clients poor or inaccurate advice.