
FINAL NOTICE

To: **Derick Anthony Whewall**

Individual reference no: **DAW01169**

Dated: **3 July 2008**

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS (“the FSA”) gives you final notice about an order prohibiting you, Derick Anthony Whewall, from carrying out any controlled function involving the exercise of any significant influence at any authorised person, exempt person, or exempt professional firm

1. THE ORDER

1.1. The FSA gave you a Decision Notice dated 3 July 2008 (“the Decision Notice”) which notified you that it had decided:

- (1) pursuant to section 63 of the Financial Services and Markets Act 2000 (the “Act”), to withdraw the approval given to you to perform controlled functions in relation to Derick Anthony Whewall trading as The Mortgage Exchange (“The Mortgage Exchange”); and

- (2) pursuant to section 56, to make an order prohibiting you from carrying out any controlled function involving the exercise of any significant influence at any authorised person, exempt person, or exempt professional firm (“the Prohibition Order”).
- 1.2. You agreed that you would not be referring the matter to the Financial Services and Markets Tribunal.
- 1.3. Accordingly, for the reasons set out below, the FSA hereby withdraws the approval given to you to perform controlled functions, and makes an order pursuant to section 56 of the Act prohibiting you from carrying out any controlled function involving the exercise of any significant influence at any authorised person, exempt person, or exempt professional firm. The Prohibition Order takes effect from 3 July 2008.

2. REASONS FOR THE ORDER

- 2.1. You are a partner with approval to carry out the controlled functions of CF4 (Partner) and CF8 (Apportionment and Oversight).
- 2.2. On the basis of the facts and matters described below, the FSA has withdrawn your approval and made the Prohibition Order against you for a failure to comply with Statement of Principle 7 of the FSA’s Statements of Principle for Approved Persons, and for failing to meet the standards expected of approved persons in terms of competence and capability, while performing the controlled functions of CF4 and CF8.
- 2.3. Between January 2005 and August 2007, you failed to treat your customers fairly (thereby putting approximately 250 customers at risk of receiving unsuitable advice), and you failed to take appropriate steps to prevent the Partnership from being used for the purpose of committing financial crime.
- 2.4. More specifically, you failed to take reasonable steps to ensure that the Partnership complied with regulatory requirements and standards, by failing to ensure that the Partnership:
- (1) adequately assessed and recorded customers' needs and preferences;

- (2) adequately assessed affordability and suitability of recommended mortgage contracts, and therefore exposed customers to the risk of receiving unsuitable advice;
- (3) made and retained adequate records to demonstrate how particular mortgage contracts were considered to be suitable;
- (4) provided the FSA with accurate information about its financial resources in its Retail Mediation Activities Returns (“RMAR”);
- (5) had put in place any complaint handling procedures;
- (6) established whether its advisers held the appropriate professional qualifications to give mortgage advice;
- (7) supervised and monitored its mortgage advisers;
- (8) was organised so that it could identify and act upon obvious anomalies in false mortgage applications and help prevent it from being used to commit financial crime by third parties; and
- (9) monitored business submitted, including business submitted by a packager in the name of the Partnership.

2.5. By virtue of such conduct, the FSA concluded that if you continued to perform any controlled function involving the exercise of significant influence over any authorised person, exempt person, or exempt professional firm, you would pose a risk to consumers and also to the fulfilment of the FSA’s market confidence and financial crime objectives.

Statutory and regulatory provisions

The Act

- 2.6. 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.

Withdrawal of approval

- 2.7. Under section 63 of the Act, the FSA may withdraw the approval given under section 59 of the Act if it considers that the person in respect of whom it was given is not a fit and proper person to perform the function to which the approval relates.

Prohibition

- 2.8. Under section 56 of the Act, if it appears to the FSA that an individual is not a fit and proper person to perform functions in relation to a regulated activity carried on by an authorised person, exempt person or exempt professional firm, the FSA may make a prohibition order.
- 2.9. The effect of making a prohibition order is to prohibit an individual from performing functions within authorised firms and to prohibit authorised firms from employing the individual to perform specific functions. Such an order may relate to:
- (1) a specified function, any function falling within a specified description, or any function (section 56(2)); and
 - (2) a specified regulated activity, any regulated activity falling within a specified description, or all regulated activities (section 56(3)(a)).

Principles, Rules and Guidance

Statements of Principle and Code of Practice for Approved Persons

- 2.10. The part of the FSA Handbook entitled Statements of Principle and Code of Practice for Approved Persons (“APER”) is issued by the FSA under section 64 of the Act with respect to the conduct expected of approved persons.
- 2.11. Statement of Principle 7 is most relevant to your conduct, under which 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.

- 2.12. Other relevant rules and guidance are set out in an annex to this Notice.

Facts and matters relied on

Background

- 2.13. You were approved by the FSA on 31 October 2004 to perform the controlled functions of CF4 (Partner) and CF8 (Apportionment and Oversight) at the Partnership. You provided mortgage advice at the Partnership and were jointly responsible for the day-to-day running of the Partnership. The other partner is Mr Alan Hewitt. Two other advisers worked for the Partnership, referred to in this Notice as Adviser A and Adviser B.

- 2.14. From 31 October 2004, the Partnership was granted permission by the FSA to carry on the following regulated activities in relation to regulated home finance:

- (1) advising on regulated mortgage contracts;
- (2) agreeing to carry on a regulated activity;
- (3) arranging regulated mortgage contracts; and
- (4) making arrangements.

- 2.15. On 14 January 2005, the Partnership was granted permission to carry on the following additional regulated activities in relation to non-investment insurance contracts:

- (1) assisting in administration of insurance;
- (2) dealing in investments as agent; and
- (3) making arrangements.

Suitability of advice

- 2.16. You failed to take reasonable steps to ensure that the Partnership gave suitable advice

to customers.

2.17. The Partnership failed to obtain and record sufficient Know Your Customer (“KYC”) information to establish customers’ needs and objectives at the time the recommendation was being made to customers.

- (1) The Partnership's assessment and recording of affordability of recommended mortgage contracts was inadequate. For example, in 7 of the 26 cases reviewed the Partnership failed to record customers' monthly expenditure and therefore it was unable to determine whether the mortgage was affordable.
- (2) In 5 of the 26 cases it did not assess the affordability of the mortgage into retirement. For example, in one case the applicant stated that he would retire at 70, however, his mortgage would continue until he was 74.
- (3) The Partnership also failed to record and therefore to demonstrate reasons for the particular recommendations it made to its customers. For example, “Reasons Why” file notes contained insufficient information to explain why a particular product, lender or term had been recommended in respect of customers’ needs, preferences and personal and financial information. None of the files contained any evidence of product research.

2.18. The Partnership’s failures with regards to KYC and affordability assessments exposed customers to the risk of receiving unsuitable advice.

Management and control

2.19. The FSA concluded that you failed to take reasonable steps to ensure that the Partnership had adequate systems and controls in place to enable its mortgage advisory business to be controlled effectively.

- (1) The Partnership’s management information systems failed to adequately monitor the business submitted by the Partnership. According to the Partnership’s records, the Partnership submitted 195 regulated mortgage applications between 1 April 2005 and 31 March 2007. However, product sales data sent to the FSA by product providers, covering the same period,

showed that the Partnership had submitted 257 regulated mortgage applications (which completed) during this period.

- (2) The Partnership did not have a formal training and competency regime, and did not undertake regular competency assessments of its advisers. The Partnership took no steps to assess advisers as competent on an ongoing basis.
- (3) The Partnership operated without any formal compliance monitoring procedures. The Partnership failed to take reasonable steps to ensure that client files were reviewed and that the suitability of advice was monitored and assessed. Mr Hewitt purportedly reviewed 25% of all business written by Adviser A and Adviser B. However, no records of file reviews were kept and no issues of concern were ever identified or recorded.
- (4) According to the Partnership's records, 71% of the Partnership's customers were given mortgage advice by Adviser A or Adviser B between June 2006 and June 2007. Adviser A sent 54% of his business to Lender One, and Adviser B sent 61% of his business to Lender Two, yet the Partnership offered a whole of market service. The Partnership failed to take adequate steps to investigate why such large proportions of each adviser's business were submitted to one lender, and could not explain to the FSA's satisfaction this pattern of business.
- (5) The Partnership failed to implement adequate procedures to ensure that copies of key documents, including the mortgage application, Initial Disclosure Document and Key Facts Illustration, were retained on client files.

Unqualified adviser

- 2.20. The Partnership failed to take steps to establish whether its advisers were appropriately qualified to give mortgage advice. Adviser A provided mortgage advice at the Partnership between July 2006 and May 2007. As at 19 July 2007, the Partnership still did not know whether Adviser A was qualified to provide mortgage advice.

Complaint handling

- 2.21. The Partnership had no complaint handling procedures, and it was not therefore ready and organised to identify, classify and manage even the minor complaints it received from customers.

Analysis of breaches

- 2.22. The failures summarised above represent a failure by you to comply with Statement of Principle 7 for Approved Persons while you performed controlled functions of significant influence at the Partnership.
- 2.23. You failed to take reasonable steps to implement adequate management information systems and to inform yourself about the affairs of the business. As such, you had no particular knowledge of business written by the Partnership's other advisers and you did not know that the Partnership had been removed from two lenders' panels.
- 2.24. The Partnership had no formal training and competency regime, and failed to assess advisers as competent on an ongoing basis. File reviewing procedures were insufficient to adequately monitor advisers. You failed to adequately supervise and monitor the activities of individuals to whom you had delegated responsibility and over whom you exercised little or no control.
- 2.25. The consequences of the failures identified in this Notice were serious in that the Partnership failed to treat approximately 250 customers fairly. Additionally, the Partnership's failures meant it was used by third parties to obtain mortgage applications on a fraudulent basis.
- 2.26. You failed to ensure that the Partnership took reasonable steps to obtain from customers all information likely to be relevant for the purposes of recommending a specific mortgage contract.
- 2.27. You failed to ensure that the Partnership adequately recorded why a particular mortgage product had been recommended as suitable.
- 2.28. You failed to ensure that one of the Partnership's advisers was suitably qualified to

give mortgage advice.

- 2.29. You failed to ensure that the Partnership had put in place appropriate and effective complaint handling procedures.

Analysis of sanction

- 2.30. In concluding that you failed to comply with Statement of Principle 7, the FSA considers that you were personally and jointly responsible for the failures summarised in this Notice, and that your conduct falls well below the standards expected of approved persons performing significant influence functions.
- 2.31. Because of your failure to take reasonable steps to ensure that the Partnership retained appropriate records to demonstrate suitability, the FSA has not been able to assess whether customers received suitable advice.
- 2.32. Your failures exposed approximately 250 customers to the risk of receiving unsuitable advice and also exposed the Partnership to be used for the purpose of facilitating financial crime.
- 2.33. Accordingly, the FSA considered it necessary to withdraw your approval and to prohibit you from performing significant influence functions.

Mitigation

- 2.34. On 7 August 2007, the Partners agreed to vary the Partnership's permission such that it would cease conducting all regulated activities with immediate effect because of the potential ongoing risk it posed to customers and to lenders.
- 2.35. To address the risk of unsuitable recommendations having been made to customers, the FSA required the appointment of a skilled person, at the Partners' expense, to review mortgage recommendations during the relevant period. The review was aimed at identifying any unsuitable recommendations and assessing any loss to customers. You agreed, where appropriate, to seek to pay redress to customers where unsuitable advice had led to loss.
- 2.36. You co-operated fully with the FSA and agreed the facts quickly ensuring efficient

resolution of the matter.

3. CONCLUSIONS

- 3.1. On the basis of the facts and matters set out in section 2 above, the FSA has concluded that you were not fit and proper to be an approved person carrying out significant influence functions because you have failed to meet the required standards expected of approved persons in terms of competence and capability.

4. DECISION MAKERS

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

5. IMPORTANT

- 5.1. This Final Notice is given to you in accordance with section 390 of the Act.

Third party rights

- 5.2. A copy of this Final Notice is being given to Mr Alan Hewitt as a third party who has been referred to in this Notice and to whom, in the opinion of the FSA, the reference is prejudicial.

Publicity

- 5.3. Sections 391(4), 391(6) and 391(7) of the Act apply to the publication of information about the matter to which this notice relates. Under those provisions, the FSA must publish such information about the matter to which this notice relates as the FSA considers appropriate. The information may be published in such manner as the FSA considers appropriate. However, the FSA may not publish information if such publication would, in the opinion of the FSA, be unfair to you or prejudicial to the interests of consumers.
- 5.4. The FSA intends to publish such information about the matter to which this Final Notice relates as it considers appropriate.

FSA contacts

- 5.5. For more information concerning this matter generally, you should contact Chris Walmsley of the Enforcement Division of the FSA (direct line: 020 7066 5894/fax 020 7066 5895).

Jonathan Phelan

Head of Department

FSA Enforcement Division

Annex

Statements of Principle and Code of Practice for Approved Persons

APER sets out the Statements of Principle in respect of approved persons. APER also describes conduct which, in the opinion of the FSA, does not comply with the relevant Statements of Principle. It further describes factors to be taken into account in determining whether an approved person's conduct complies with a Statement of Principle.

APER 3.1.3G states that when establishing compliance with, or a 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.

APER 3.1.4G states that an approved person will only be in breach of a Statement of Principle if they are personally culpable, that is, in a situation where their conduct was deliberate or where their standard of conduct was below that which would be reasonable in all the circumstances.

In determining whether your conduct amounts to a breach of a Statement of Principle, the FSA has had regard to the guidance and examples in APER 4.6 and APER 4.7, in particular:

- (1) In the opinion of the FSA, conduct of the type described below does not comply with Statement of Principle 6.
 - (a) APER 4.6.3E Failing to take reasonable steps to adequately inform himself about the affairs of the business for which he is responsible; and
 - (c) APER 4.6.8E Failing to supervise and monitor adequately the individual or individuals to whom responsibility for dealing with an issue or authority for dealing with a part of the business has been delegated.
- (2) In the opinion of the FSA, conduct of the type described in below does not comply with Statement of Principle 7.

- (a) APER 4.7.3E Failing to take reasonable steps to implement adequate and appropriate systems of control to comply with the relevant requirements and standards of the regulatory system in respect of its regulated activities. In the case of an approved person who is responsible, under SYSC 2.1.3R(2), with overseeing the firm's obligation under SYSC 3.1.1R, failing to take reasonable care to oversee the establishment and maintenance of appropriate systems and controls.
- (b) APER 4.7.4E Failing to take reasonable steps to monitor compliance with the relevant requirements and standards of the regulatory system in respect of its regulated activities.
- (c) APER 4.7.10E In the case of an approved person performing a significant influence function responsible for compliance under SYSC 3.2.8R failing to take reasonable steps to ensure that appropriate compliance systems and procedures are in place.

The FSA's policy in relation to disciplinary powers

The FSA's policy on exercising its power to issue a prohibition order is set out in Chapter 9 of the Enforcement Guide ("EG").

EG 9.9 provides that when it decides to make a prohibition order against an approved person and/or withdraw its approval, the FSA will consider all the relevant circumstances of the case. These may include, but are not limited to those set out below:

- (1) the matters set out in section 61(2) of the Act;
- (2) whether the individual is fit and proper to perform functions in relation to regulated activities. The criteria for assessing the fitness and propriety of approved persons are set out in FIT 2.1 (Honesty, integrity and reputation); FIT 2.2 (Competence and capability) and FIT 2.3 (Financial soundness);
- (3) whether, and to what extent, the approved person has failed to comply with the Statements of Principle issued by the FSA with respect to the conduct of

approved persons;

- (4) the relevance and materiality of any matters indicating unfitness;
- (5) the length of time since the occurrence of any matters indicating unfitness;
- (6) the particular controlled function the approved person is (or was) performing;
and
- (7) the severity of the risk which the individual poses to consumers and to confidence in the financial system.

In summary, the relevant considerations are whether, in terms of honesty, integrity and reputation, competence and capability, and financial soundness, the relevant individual is fit and proper to perform functions in relation to regulated activities and, if not, the severity of the risk posed by him. Having established these matters, it can be determined whether prohibition will be necessary to achieve the FSA's regulatory objectives and what scope of prohibition would best serve the achievement of those objectives in each case.

The Fit and Proper Test for Approved Persons

The section of the FSA Handbook, entitled the Fit and Proper Test for Approved Persons ("FIT") sets out guidance on the fitness and propriety of individuals. The purpose of FIT is to outline the main criteria for assessing the fitness and propriety of a candidate for a controlled function and FIT is also relevant in assessing the continuing fitness and propriety of an approved person.

In this instance, the criteria set out in FIT are relevant in considering whether the FSA may exercise its powers to make a prohibition order against an approved person in accordance with EG 9.9.

FIT 1.3 provides that the FSA will have regard to a number of factors when assessing the fitness and propriety of a person and one of the most important considerations is the person's "competence and capability". FIT 1.3.3G states that the guidance will be applied in general terms when the FSA is determining a person's fitness and propriety and it would be impossible to produce a definitive list of all the matters relevant to a particular determination.

In determining a person's competence and capability, FIT 2.2.1G provides guidance that the FSA will have regard to matters including but not limited to whether the person has demonstrated by experience and training that the person is able...to perform the controlled functions (FIT 2.2.1G(2)).