
SECOND SUPERVISORY NOTICE

To: Mortgage and Property Services Limited

**Of: Shildon Business Centre
Dabble Duck Industrial Estate
Shildon
County Durham
DL4 2RF**

Dated: 13 March 2008

TAKE NOTICE: The Financial Services Authority of 25 The North Colonnade, Canary Wharf, London E14 5HS (the "FSA") has decided to take the following action

1 ACTION

- 1.1 For the reasons listed below and having had regard to the written representations made by letters dated 16 January 2008 and 13 February 2008, the FSA has decided not to rescind the variation of the permission granted to Mortgage and Property Services Limited ("MPSL"), pursuant to Part IV of the Act ("MPSL's permission") effected by the First Supervisory Notice dated 13 December 2007.
- 1.2 That variation was to remove all regulated activities with immediate effect. It also imposed the following requirements, namely that within 14 days MPSL must:
- (i) notify in writing all clients for its regulated activities that it is no longer permitted by the FSA to carry on regulated activities, and

- (ii) provide the FSA with a copy of the written notice sent in accordance with (i) above, together with a list of all clients to whom the notice has been sent.
- 1.3 The variation also imposed, pursuant to sections 43, 45 and 48 of the Act, a requirement that all assets held by MPSL, may not, so long as the requirement is in force, be dealt with or disposed of, with immediate effect.
- 1.4 This asset requirement does not apply to prevent the transfer of an asset which is transferred with the prior written consent of the FSA or with the prior written consent of such person as may be appointed by the FSA for this purpose.

2 REASONS FOR ACTION

Summary

- 2.1 The FSA has concluded, on the basis of the facts and matters described below, that MPSL is failing to satisfy the threshold conditions set out in Part 1 of Schedule 6 to the Act (the “threshold conditions”) in that, in the opinion of the FSA, its resources are not adequate in relation to the regulated activities it has permission to carry on.
- 2.2 The FSA has therefore concluded that it should not rescind the variation of MPSL’s permission effected by the First Supervisory Notice.

Relevant Statutory Provisions

- 2.3 The FSA’s regulatory objectives, established in section 2(2) of the Act, include the protection of consumers.
- 2.4 By section 45 of the Act, the FSA is authorised:
 - to vary an authorised person’s permission, where it appears to the FSA that such person is failing to satisfy the threshold conditions;
 - to vary an authorised person’s permission, where it is desirable to exercise that power in order to protect the interests of consumers, and
 - to include any provision in the permission as varied that could be included if a fresh permission were being given in response to an application under section 40 of the Act, including the imposition pursuant to section 43 of the Act of such requirements as the FSA considers appropriate.
- 2.5 By section 43(2) of the Act, the FSA may impose a requirement on an authorised person. Section 48(3)(a) states that an “assets requirement” under section 43 of the Act prohibits an authorised firm from the disposal of, or other dealing with, any of its assets or restricting such disposals or dealings.
- 2.6 Section 53(3) of the Act allows such variations to take effect immediately if the FSA reasonably considers that it is necessary for the variations to take effect immediately.

Relevant Regulatory Provisions

- 2.7 In exercising its power to vary a Part IV permission, the FSA must have regard to the relevant regulatory provisions and guidance, including the provisions and guidance contained in the FSA's Handbook of Rules and Guidance, and also, in particular, the Enforcement Guide ("EG"). The main considerations in relation to the action specified above are set out below.

EG 8 - The FSA's policy for exercising its own-initiative power to vary a Part IV permission

- 2.8 EG 8.1 provides that the FSA will have regard to its regulatory objectives and the range of regulatory tools that are available to it.
- 2.9 EG 8.2 provides that the FSA will take formal action affecting the conduct of a firm's commercial business only if that business is being conducted in such a way that the FSA judges it necessary to act in order to address the consequences of non-compliance with the Act, the Principles for Businesses and other rules.
- 2.10 EG 8.4 provides that where the FSA considers that it cannot rely on a firm taking effective action, or if the firm fails to comply with the FSA's reasonable request for it to take remedial steps, the FSA will consider exercising its formal powers under section 45 of the Act to vary a firm's permission. This may include instances where the FSA is concerned that the consequences of a firm not taking the desired steps may be serious and the firm appears unwilling or unable to take adequate and timely steps to address the FSA's concerns.
- 2.11 EG 8.5 provides that the circumstances in which the FSA will consider exercising its power include where the FSA has serious concerns that the authorised person has breached requirements imposed on it by or under the Act (including Principles and rules) and the breaches are material in number or individual seriousness. EG 8.5(1) (a) G specifies that the FSA will consider exercising its own-initiative power where a firm's financial resources appear to be inadequate.
- 2.12 EG 8.9 includes a non-exhaustive list of factors which will determine whether the urgent exercise of the FSA's own-initiative power is an appropriate response to serious concerns. These factors include the financial resources of a firm and the risk that MPSL's conduct, set out below, presents to the financial system and to confidence in the financial system.

Guidance Concerning Threshold Condition 4: Adequate resources (paragraph 4, Schedule 6 to the Act) (COND 2.4)

- 2.13 COND 2.4.1(1) D reproduces the relevant statutory provision that the resources of the person concerned must, in the opinion of the FSA, be adequate in relation to the regulated activities that he seeks to carry on, or carries on.
- 2.14 COND 2.4.1(2)(b)(i) D permits the FSA, when forming its opinion as to whether the resources of an authorised person are adequate in relation to the regulated activities that he carries on, to have regard to the provision he makes in respect of liabilities (including contingent and future liabilities).

- 2.15 COND 2.4.2(2) G states that, when assessing the adequacy of a firm's resources for the purposes of Threshold Condition 4, the FSA will interpret the term "adequate" as meaning sufficient in terms of quantity, quality and availability, and "resources" as all financial resources, non-financial resources and means of managing its resources.
- 2.16 COND 2.4.4(1) G states that when assessing whether a firm will satisfy and continue to satisfy Threshold Condition 4, the FSA will have regards to all relevant matters. COND 2.4.4(2) G states that the relevant matters may include whether there are any indications that the firm will not be able to meet its debts as they fall due.

Relevant Rules

- 2.17 MIPRU 4.2.1 R requires that a firm must at all times ensure that it is able to meet its liabilities as they fall due.

Facts and matters relied on in the First Supervisory Notice

- 2.18 MPSL is a limited company, authorised by the FSA to carry on regulated mortgage business since 31 October 2004. MPSL is subject to a requirement in MIPRU 4.2.1R that it must at all times ensure that it is able to meet its liabilities as they fall due.
- 2.19 On 20 September 2007, during a meeting with the FSA, MPSL was informed that a skilled person requirement notice would be sent to it. The skilled person would be required to review the suitability of regulated mortgage contracts advised on by MPSL between 31 October 2004 and 17 October 2006. Where unsuitable sales were identified, the skilled person would be required to recommend appropriate remedial action, which might include the payment of redress. The skilled person would also identify any shortcomings in MPSL's systems and controls, which may have led to customers receiving unsuitable advice and then to recommend improvements to eradicate these shortcomings on an ongoing basis.¹
- 2.20 On 23 October 2007 the FSA's Small Firm's Division issued MPSL with a skilled person requirement notice that required MPSL to provide the FSA with a report by a skilled person. It also invited MPSL to put forward three suitably qualified candidates to carry out this work.
- 2.21 On 16 November 2007, the FSA received from MPSL three nominations to undertake the skilled person work. MPSL did not indicate to the FSA that it would not comply with the skilled person requirement notice until 11 December 2007.

¹ Section 166 of the Act gives the FSA the power to require a report on any matter about which the FSA has required or could require the provision of information or production of documents under section 165 of the Act. Section 165 of the Act gives the FSA the power to require information and documents reasonably required in connection with the exercise by the FSA of functions conferred on it by or under the Act.

- 2.22 On 11 December 2007, solicitors acting for MPSL, wrote to the FSA stating that although MPSL was able to meet current debts as they fell due it had no further assets and the expense of a skilled person's review would render it insolvent.

Representations

- 2.23 MPSL made written representations by letters dated 16 January 2008 and 13 February 2008. For the purposes of those representations MPSL did not dispute the allegations of misselling, but did dispute that the reasons set out in the First Supervisory Notice were justified or justified the action taken.
- 2.24 MPSL's representations described the events leading up to the notification made on 11 December 2007 (referred to in paragraph 2.22). In particular MPSL referred to its initial indication, in the course of negotiations, that funds could be provided to MPSL for the skilled persons review. In the course of further discussions, the proposed source of funds subsequently withdrew the offer as a result of the estimate of the costs of review being very substantially higher than MPSL had envisaged, and additional investigations by the FSA.
- 2.25 MPSL denies that it is unable to or is likely to be unable to meet its liabilities as they fall due. MPSL asserts that this conclusion is not justified from the letter of 11 December, which stated that MPSL was able to meet current debts as they fell due. MPSL notes the similarity of wording between the MIPRU requirement and the wording used to define "insolvency" in section 123 of the Insolvency Act 1986. MPSL considers that its admission that it is not able to meet the cost of the skilled persons review does not mean that it is unable to meet its debts as they fall due as required by MIPRU 4.2.1R. MPSL denies that it is insolvent, and denies that MIPRU 4.2.1R requires provision for future contingent liabilities. MPSL argued that the "future liabilities" relied on by the FSA (the costs of the skilled persons review and redress to customers) have yet to crystallise.
- 2.26 MPSL has indicated that it will not carry on any further regulated activities with customers and is prepared to give a "binding undertaking" to that effect. MPSL suggests that this will ensure that there is no customer prejudice from its current parlous financial position. MPSL states that this will enable it to collect commissions due to it, following which it will voluntarily apply for cancellation of its permission. MPSL stated that its decision derives only from stagnation in the property market in North-East England, loss of key staff and the failure of its franchise plans. Until it received the First Supervisory Notice, MPSL believed that it could achieve a solvent winding-up.
- 2.27 MPSL also argued that the assets requirement was not justified and will have an unjustified impact on it. MPSL stated that it has already resulted in the withdrawal of its overdraft facility, upon which it relied to pay its creditors, pending receipt of commissions due to it. MPSL suggested that it had not, originally, been recommended by the Enforcement Division. MPSL argued that there was no basis for concluding that there was a risk of dissipation of MPSL's assets.

Conclusions

- 2.28 Threshold Condition 4 (Adequate resources) and MIPRU 4.2.1R require a firm to be able to demonstrate that it will be able to meet future liabilities. The FSA accepts that the liability to meet the fees of the skilled person is a prospective liability (in relation to which the precise timing and amount are yet to be ascertained) and that redress to customers is a contingent liability (as it has yet to be ascertained that sums are required to make redress). The skilled persons review has been an actual and not contingent obligation of MPSL since 23 October 2007.
- 2.29 MPSL has stated that it will not be able to meet the first of these. Accordingly, the FSA can only conclude that, going forward, MPSL will not be able, at all times, to meet its liabilities as they fall due (as required by MIPRU 4.2.1R). The FSA notes that section 123 of the Insolvency Act 1986 specifically includes contingent and prospective liabilities as well as current liabilities. As a result, the FSA considers that MPSL cannot demonstrate that it will continue to meet Threshold Condition 4. MPSL appears to argue for revocation of the First Supervisory Notice so that MPSL can remain authorised while it collects commissions due to it (with a view to an orderly cessation of business). The FSA notes that MPSL has not explained why it cannot do so while subject to the variation imposed by the First Supervisory Notice, and is not aware of any reason why it cannot. MPSL has not put forward any alternative proposals as to how it will meet liabilities arising from the skilled persons report.
- 2.30 The FSA notes the representations made on behalf of MPSL that there is no risk of its assets being dissipated. However, the FSA notes that MPSL has previously made distributions at times when it was not entitled to do so, albeit having sought advice from its accountants. MPSL's suggestion that the assets requirement was not recommended is incorrect. The FSA considers that MPSL's financial position should be maintained as it is (so far as possible) pending resolution of whether and how much redress is due to customers.
- 2.31 The facts and matters described above lead the FSA, having regard to its regulatory objectives, which include the protection of consumers, to the following conclusions:
- that MPSL is failing to meet the requirement set out in MIPRU 4.2.1 R, that it must, at all times, ensure that it is able to meet its liabilities as they fall due.
 - this failing is significant and material in relation to the regulated activities for which MPSL has permission and MPSL therefore fails to satisfy Threshold Condition 4 (Adequate resources);
 - the risk of adverse effect on consumers arising from this failing, which is a material breach of requirements imposed upon MPSL by the FSA's rules, causes the FSA to have very serious concerns about MPSL such that the exercise of the FSA's own-initiative power to vary MPSL's permission with immediate effect and to impose an asset requirement with immediate effect is an appropriate response to those concerns; and

- specifically, the variation of MPSL's permission and the imposition of the asset requirement should take immediate effect to address the FSA's serious concern that MPSL has failed to ensure that at all times it is able to meet its liabilities as they fall due.

2.32 Accordingly the FSA has concluded that it should not revoke the variation of MPSL's permission effected by the First Supervisory Notice.

3. DECISION MAKER

The decision which gave rise to the obligation to give this Supervisory Notice was made by the Regulatory Decisions Committee.

4. IMPORTANT

4.1 This Supervisory Notice is given to you, MPSL, in accordance with section 53(7) of the Act. The following statutory rights are important.

The Tribunal

4.2 You may refer this matter to the Financial Services and Markets Tribunal (the "Tribunal"). Under section 133 of the Act, you have 28 days from the date you were sent this Supervisory Notice to refer the matter to the Tribunal or such other period as specified in the Tribunal Rules or as the Tribunal may allow. A reference to the Tribunal is made by way of a written notice signed by you and filed with a copy of this Notice. The Tribunal's address is: 15-19 Bedford Avenue, London WC1B 3AS (telephone 020 7612 9700). The detailed procedures for making a reference to the Tribunal are contained in section 133 of the Act and the Tribunal Rules.

4.3 You should note that the Tribunal Rules provide that at the same time as filing a reference notice with the Tribunal, you must send a copy of the notice to the FSA. Any copy notice should be sent to Chris Walmsley at the FSA, 9th Floor, 25 The North Colonnade, Canary Wharf, London E14 5HS.

Confidentiality and publicity

4.4 You should note that this Supervisory Notice may contain confidential information and should not be disclosed to a third party (except for the purpose of obtaining advice on its contents). You should also note that section 391 of the Act requires the FSA when the Supervisory Notice takes effect, to publish such information about the matter as it considers appropriate.

FSA contacts

- 4.5 For more information concerning this matter generally, you should contact Chris Walmsley at the FSA (direct line: 020 7066 5895 / fax: 020 7066 5896).

Tim Herrington
Chairman, Regulatory Decisions Committee