



Reference number: FS/2013/002

FINANCIAL SERVICES-financial penalty for submitting fraudulent mortgage applications-whether conduct of applicant dishonest or reckless-found to be dishonest-whether imposition of financial penalty appropriate-yes-scale of appropriate penalty-whether appropriate in the circumstances to take account of applicant's means-yes-Authority directed to impose penalty of £80,000-reference dismissed

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

AMIR KHAN

Applicant

- and -

THE FINANCIAL CONDUCT AUTHORITY

The Authority

**TRIBUNAL: JUDGE TIMOTHY HERRINGTON
RUTHVEN GEMMELL
MICHAEL HANSON**

Sitting in public in Edinburgh on 27 and 28 January 2014

Miss Saima Hanif, counsel, for the Applicant

**Ms Sarah Clarke, counsel, instructed by the Financial Conduct Authority, for
the Authority**

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DECISION

Introduction and decision referred

1. This is a reference by Amir Khan (“Mr Khan”) of one of the decisions made by the Authority in a decision notice dated 4 March 2013 (the “Decision Notice”) addressed to Mr Khan and his employer, Sovereign Worldwide Limited (“Sovereign”).
2. The reference concerns the Authority’s decision to impose a financial penalty of £80,000 on Mr Khan under section 66 of the Financial Services and Markets Act 2000 (“the Act”). The Decision Notice contained two further decisions, namely to withdraw Mr Khan’s approval to perform controlled functions pursuant to section 63 of the Act and to prohibit Mr Khan from performing any function in relation to any regulatory activity pursuant to section 56 of the Act but Mr Khan has not referred those decisions.
3. The essence of the Authority’s case is that Mr Khan breached Statement of Principle 1 of the Statements of Principle and Code of Practice for Approved Persons (“APER”) (failing to act with integrity) by:
- (1) In October 2009, knowingly submitting a personal mortgage application (“the 2009 Application”) through Sovereign that contained false and misleading information about his income and which he supported with falsified payslips;
 - (2) In May 2010, knowingly confirming that the false information supporting the 2009 Application was correct when submitting a substitute mortgage application (“ the 2010 Application”); and
 - (3) For the purposes of customer mortgage applications, dishonestly certifying as true likenesses photographs of mortgage applicants whom he had not met.
4. The Authority contends that this misconduct is aggravated by the fact that:
- (1) This was not the first time that Mr Khan had supplied false details in support of a personal mortgage application. The Authority contends that he had done so in 2007; and
 - (2) In respect of the 2009 Application, he deliberately attempted to mislead the Authority during the course of its investigation by attempting to divert responsibility for his misconduct to a professional adviser (his accountant).
5. In the Decision Notice the Authority, acting through its Regulatory Decisions Committee (“RDC”), found that Mr Khan breached Principle 6 of APER (failing to act with due skill, care and diligence) exposing Sovereign to an increased risk of being used for the purposes of mortgage fraud through inadequate verification of customer applications referred to Sovereign.

6. In the Decision Notice, the Authority decided to impose a penalty of £80,000 on Mr Khan which related entirely to the Principle 1 breaches. The Decision Notice records that the RDC decided to reduce a penalty of £3,300 for the Principle 6 breaches to zero, on the grounds of financial hardship.

5 7. Mr Khan has accepted the RDC's findings on the Principle 6 issues and does not contest them in his reference. As he did not in his Reference Notice specify these issues as ones he wished the tribunal to consider in accordance with paragraph 2 (3) (d) of Schedule 3 to the Tribunal Procedure (Upper Tribunal) Rules 2008 they do not
10 sought to pursue the question as to whether a financial penalty is appropriate in respect of the Principle 6 issues.

8. However, the Authority asserts in its statement of case that £100,000 is the appropriate penalty in respect of the Principle 1 issues, which we were told was the penalty proposed in the Authority's Warning Notice dated 18 October 2012. The
15 Authority asks the Tribunal to direct it to impose this higher penalty. The Authority contends that where there has been knowing involvement in mortgage fraud involving deliberate dishonesty, which it contends is the case here, the appropriate penalty is a minimum of £100,000 and it would not generally be appropriate to reduce the penalty below this minimum, even where the penalty could cause the subject serious financial
20 hardship or lead to him becoming insolvent as to do so would reduce the deterrent effect of the penalty.

9. The Applicant accepts that in relation to the 2009 and 2010 mortgage applications he acted recklessly but not dishonestly. In relation to the issue concerning the certification of photographs he accepts that he acted negligently but
25 not dishonestly or recklessly.

10. Mr Khan contends that it is not appropriate to impose a financial penalty of any significant amount because of his financial and personal circumstances, which he has adequately verified.

Applicable legal and regulatory provisions

30 11. The Authority's regulatory objectives are set out in section 1B of the Act and include securing an appropriate degree of protection for consumers and protecting and enhancing the integrity of the UK financial system (and, specifically, ensuring that it is not being used for the purposes of financial crime).

35 12. Section 66 of the Act provides that the Authority may take action to impose a penalty on an individual of such amount as it considers appropriate where it appears to the Authority that the individual is guilty of misconduct and it is satisfied that it is appropriate in all the circumstances to take action.

13. Misconduct includes failure, while an approved person, to comply with a statement of principle issued under section 64 of the Act or to 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.

14. In exercising its power to impose a financial penalty, the Authority must have regard to relevant provisions in the Authority's Handbook of rules and guidance. The main provisions relevant to the action specified above are set out below.

15. APER sets out the Statements of Principle as they relate to approved persons and descriptions of conduct which, in the opinion of the Authority, do not comply with a Statement of Principle. APER further describes factors which, in the opinion of the Authority, are to be taken into account in determining whether or not an approved person's conduct complies with a Statement of Principle.

16. The Statements of Principle relevant to this reference are:

- (1) Statement of Principle 1, which provides that an approved person must act with integrity in carrying out his controlled function; and
- (2) Statement of Principle 6, which provides that an approved person performing a significant influence function must exercise due skill, care and diligence in managing the business of the firm for which he is responsible in his controlled function.

17. APER 4.1.4E (3) states that deliberately misleading (or attempting to mislead) a client, the firm or the Authority by act or omission is conduct that does not comply with the Statement of Principle 1. APER 4.1.4E (9) states that such conduct includes, but is not limited to, providing false or inaccurate documentation or information.

18. The Authority has determined the financial penalty that is the subject of this reference by having regard to the guidance on the imposition and amount of penalties set out in Chapter 6 of the version of the Authority's Decisions Procedures and Penalties Manual ("DEPP") as in place between 28 August 2007 and 5 March 2010, as the behaviour concerned occurred during that period. In this decision we refer to such guidance by the use of the phrase "Old DEPP" to distinguish it from the guidance which applies to behaviour occurring after 5 March 2010, which, where necessary, we refer to as "New DEPP".

19. Old DEPP 6.1.2G provides that the principal purpose of imposing a financial penalty is to promote high standards of regulatory and/or market 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. Financial penalties and public censures are therefore tools that the Authority may employ to help it to achieve its regulatory objectives.

20. Old DEPP 6.5.2G provides more detail on the relevant factors to be taken into account as follows:

- (1) When determining the appropriate level of financial penalty, the Authority has regard to the principal purpose for which it imposes

sanctions, namely to promote high standards of regulatory and/or market conduct by deterring persons who have committed breaches from committing further breaches and helping to deter other persons from committing similar breaches, as well as demonstrating generally the benefits of compliant business;

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(2) The Authority will consider the seriousness of the breach in relation to the nature of the rule, requirement or provision breached, which can include considerations such as 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, the nature and extent of any financial crime facilitated, occasioned or otherwise attributable to the breach and the loss or risk of loss caused to consumers, investors or other market users;

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(3) The Authority will regard as more serious a breach which is deliberately or recklessly committed, giving consideration to factors such as whether the person has given no apparent consideration to the consequences of the behaviour that constitutes the breach. If the Authority decides that the breach was deliberate or reckless, it is more likely to impose a higher penalty on a person than would otherwise be the case;

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(4) When determining the amount of penalty to be imposed on an individual, the Authority will take into account that individuals will not always have the resources of a body corporate, that enforcement action may have a grater impact on an individual, and further, that it may be possible to achieve effective deterrence by imposing a smaller penalty on an individual than on a body corporate. The Authority will also consider whether the status, position and/or responsibilities of the individual are such as to make a breach committed by the individual more serious and whether the penalty should therefore be set at a higher level;

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(5) The Authority may take into account whether there is verifiable evidence of serious financial hardship or financial difficulties if the person were to pay the level of penalty appropriate for the particular breach. The Authority regards these factors as matters to be taken into account in determining the level of a penalty, but not to the extent that there is a direct correlation between those factors and the level of penalty;

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(6) The purpose of a penalty is not to render a person insolvent or to threaten the person's solvency. Where this would be a material consideration, the Authority will consider, having regard to all other factors, whether a lower penalty would be appropriate. This is most likely to be relevant to a person with lower financial resources; but if a person reduces its solvency with the purpose of reducing its ability to pay a financial penalty, for example by transferring assets to third parties, the Authority will take account of those assets when determining the amount of a penalty;

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(7) The Authority may have regard to the amount of benefit gained or loss avoided as a result of the breach, for example:

(a) The Authority will propose a penalty which is consistent with the principle that a person should not benefit from the breach; and

5 (b) The penalty should act as an incentive to the person (and others) to comply with regulatory standards and required standards of market conduct;

(8) The Authority may take into account the degree of co-operation the person showed during the investigation of the breach by the Authority; and
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(9) The Authority seeks to apply a consistent approach to determining the appropriate level of penalty. The Authority may take into account previous decisions made in relation to similar misconduct.

Principles to be applied in characterising behaviour

15 21. It is common ground that the test for dishonesty to be applied in cases of this nature is the test established by Lord Lane in the criminal case of *R v Ghosh* [1982] 2 QB 1053. In *Ghosh* Lord Lane held that the test was a two stage test: the first stage an objective test and the second stage a subjective test. Lord Lane stated at page 1064:

20 “In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, this is the end of the matter and the prosecution fails.

25 If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly.”

22. In relation to recklessness, in *R v G* [2004] 1 AC 1034, the House of Lords held
30 that a person acts recklessly when he acts with respect to (i) a circumstance when he is aware of a risk that exists or will exist and (ii) a result when he is aware that it will occur; and it is in the circumstances known to him, unreasonable to take the risk: see Lord Bingham of Cornhill at page 1057.

23. In resolving this issue, the burden of proof is on the Authority and the standard
35 of proof is on the normal civil standard of the balance of probabilities. See the judgment of the Supreme Court in *Re S-B (Children) (Care Proceedings: Standard of Proof* [2010] 1 AC 678, paragraphs 10 to 13.

24. We shall therefore assess the conduct of Mr Khan against these principles.

25. Mr Khan accepts that if he is found to have acted either dishonestly or
40 recklessly, and he accepts that he acted recklessly in relation to the 2009 and 2010

mortgage applications, then he will have failed to act with integrity for the purposes of Principle 1 of APER. It is important to find the correct characterisation of Mr Khan's behaviour as it may have a bearing on the appropriate level of financial penalty for his breaches of Principle 1, and in particular the question of mitigation of the penalty on the grounds of serious financial hardship.

26. In relation to the certification issue, Mr Khan contends that he acted neither dishonestly or recklessly, but negligently in that he failed to take reasonable care when certifying the photographs in the way he did. He accepts that such behaviour amounts to a breach of Principle 6.

10 **Issues to be determined and the role of the Tribunal**

27. Section 133(5) of the Act provides that, on a reference, the Tribunal must determine what (if any) is the appropriate action for the Authority to take in relation to the matters referred to it, in this case the characterisation of Mr Khan's conduct and the appropriate financial penalty, if any, to be imposed in respect of that conduct. It is well established that this is not an appeal against the RDC's decision as set out in the Decision Notice to impose a financial penalty of £80,000 but a fresh hearing. The Decision Notice, strictly speaking, is not relevant save as to establishing the scope of the matters referred. We will need in this case, for reasons that will become apparent when we consider Mr Khan's behaviour in relation to the certification issue, to consider the Decision Notice in that context.

28. Under section 133(4) of the Act, the Tribunal considers the appropriateness of any penalty taking into account Mr Khan's circumstances at the time of the hearing of the reference.

29. Sections 133(6) and (7) of the Act provide that the Tribunal must remit the matter to the Authority with such directions as the Tribunal considers appropriate for giving effect to its determination and the Authority must act accordingly.

30. We shall therefore approach the issues in this reference as follows:

- (1) We shall first determine whether on the balance of probabilities, Mr Khan's conduct in respect of the alleged Principle 1 breaches in respect of the 2009 and 2010 mortgage applications was either dishonest or reckless. We also consider the relevance of an earlier mortgage application made by Mr Khan in 2007.
- (2) We shall then determine the correct characterisation of Mr Khan's behaviour in relation to the certification issue, whether dishonest, reckless or negligent, on the same basis;
- (3) We shall then determine the appropriate financial penalty to be imposed for the conduct found; and
- (4) Finally, we shall consider whether any financial penalty that we determine to be appropriate should be reduced on the grounds of serious financial hardship.

Evidence

31. The Authority submitted 5 bundles of documents. Not all of these documents were referred to at the hearing but we have considered them where necessary. The Authority called two witnesses: Mr Bill Sillett, the Head of Department in the Retail 3
5 Enforcement and Financial Crime Division of the Authority and Mr Paul Pether, an associate forensic investigator in Mr Sillett's department. Mr Pether was the lead investigator in relation to the case against Mr Khan, and his evidence related to the conduct of the investigation including the investigations into Mr Khan's financial position. Mr Sillett's evidence related to the Authority's approach to imposing a
10 minimum financial penalty on individuals who are found to have been knowingly involved in mortgage fraud. Both Mr Sillett and Mr Pether were cross-examined and answered questions from the Tribunal.

32. Mr Khan gave evidence on his own behalf and was cross-examined and answered questions from the Tribunal.

15 33. Our findings of fact on the basis of this evidence are divided as follows. We set out in paragraphs 34 to 87 below our findings in relation to the characterisation of Mr Khan's conduct and then proceed to make our determinations on that issue. We then proceed to consider the issue of the financial penalty and make further findings of fact in relation to that issue as necessary.

20 **Findings of fact on the conduct issue**

Background

34. Mr Khan graduated with a degree in business studies from Napier University, Edinburgh in 1992. He then worked for a period of approximately 8 years with a
25 number of large financial institutions in various administrative, analytical and management roles. In June 2000 Mr Khan decided to set up his own company, Sovereign, which at all material times was wholly owned by him and of which he was the sole director and employee. Sovereign's purpose was initially to operate in the unregulated sector providing advice and arranging commercial finance for small
30 businesses within the financial sector, but in March 2007 Sovereign was granted permission by the Financial Services Authority("FSA"), the Authority's predecessor, to carry on regulated mortgage and general insurance activities. On 5 March 2005 Mr Khan was approved by the FSA to perform the controlled function of director (CF1) and was approved to perform the controlled function of apportionment and oversight
35 (CF8). He thus became an approved person subject to the provisions of APER.

35. Sovereign's business was relatively small. Its annual accounts for each of the five financial years between 2006 and 2010 showed the following results:

Year ending 30 June	Turnover	Net profit/(loss)	Cash at bank and in hand	Director's loan owed to Mr Khan
2006	£8,913	£4,071	£9,862	£4,502
2007	£25,033	(£1,016)	£4,547	£884
2008	£18,716	£5,136	£18,649	£8,533
2009	£18,016	£2,506	£28,610	£15,643
2010	£14,750	£7,565	£29,408	£25,476

36. Sovereign arranged a total of 16 regulated mortgage contracts on a non-advised basis between March 2007 and March 2011. Mr Khan was responsible for all of those arrangements, acting in his capacity as an approved person of Sovereign, including in relation to the 2009 and 2010 Applications.

37. In addition to this business, Mr Khan continued throughout the period under review to undertake consultancy work under short term contracts with a considerable number of leading financial institutions the income from which was paid into Sovereign. During his consultancy work, Mr Khan would have become familiar with the relevant standards imposed by the financial services regulatory system, which he accepted was the case in his oral evidence, including in relation to the mortgage industry.

38. Mr Khan also personally owns two buy to let properties which during the period under review provided him with rental income.

39. Mr Khan declared the following income in his tax returns to Her Majesty's Revenue and Customs ("HMRC") in respect of the three tax years between 2007 and 2010:

Tax Year	PAYE income from Sovereign	PAYE income from other contract work	Rental
2007/08	£5,200	£6,960	£7,500
2008/09	£3,180	n/a	£7,500
2009/10	£4,170	n/a	£8,500

40. The Authority, using its statutory powers, obtained information about the consultancy contracts that Mr Khan worked on between 2007 and 2009. This information shows that Mr Khan had generated £9,450 from contract work in 2007,

nothing in 2008 and £6,650 during 2009 up to the date of submitting the 2009 Application.

41. At the time of the submission of the 2009 Application Mr Khan did not have a current consultancy contract, but he had received an oral offer of a contract with Northern Rock which was confirmed in writing on 20 November 2009. This contract commenced on 30 November 2009 and was for a period ending on 26 March 2010. If the contract had run its full course it would have generated income of £18,000 but it was terminated after Mr Khan received poor performance feedback on 18 January 2010.

42. It was clear that up to the point that Mr Khan made the 2009 Application that he had not tended to take significant amounts of salary and no dividends from Sovereign. Hence, at the time of the first application, it had cash reserves of £27,196, built up over a period of some four years and most of which was represented by the balance on Mr Khan's director's loan account.

15 The 2009 Application

43. On 13 October 2009, Mr Khan submitted an online mortgage application through Sovereign on his own behalf to Abbey National Plc ("Abbey") for a loan of £237,000 to fund the purchase of a residential property in Edinburgh, namely 1 Leven Terrace. The application disclosed that Mr Khan's marital status was "separated". Mr Khan's unchallenged evidence, which we accept, was at the time this application was made, Mr Khan was engaged in an access dispute with his wife regarding his children which was resulting in considerable stress. Mr Khan was ultimately divorced on 17 December 2012 but he continues to press for the custody of his children in proceedings which are ongoing.

44. The 2009 Application discloses that Mr Khan's current address was 7 Forth View Place, Dalkeith, which was the former matrimonial home and which remains Mr Khan's residence at the present time, Mr Khan sharing occupation with his disabled mother. Mr Khan disclosed that he was employed by Sovereign at a gross salary of £60,000 per annum and that he had secondary income of £14,500, which was explained as income from a buy to let property. Mr Khan also declared that 7 Forth View Place, on which he disclosed an outstanding mortgage of £218,000, would be rented out at £1,200 per month.

45. It is common ground that Mr Khan was not employed by Sovereign at a salary of £60,000 and had never received earnings of that magnitude from Sovereign, as shown by his tax returns. There was also a discrepancy between the rental income shown in respect of the tax year 2009/10 (£8,500) and the £14,000 declared by Mr Khan to Abbey National, although he explains this, which we accept, that the income actually received was reduced as a result of two student tenants leaving during the year having failed their examinations.

46. Mr Khan's consistent explanation as to why he declared an employment income of £60,000 which was given in interview with the Authority during the Authority's

investigation, in his witness statement in these proceedings and in his oral evidence before the Tribunal was as follows.

5 47. Mr Khan's evidence was that he took advice from his accountant as to how to declare his income on the 2009 Application. At the relevant time, Sovereign's cash position and the director's loan account showed that amount in the region of £30,000 could be drawn out of Sovereign and on that basis, Mr Khan contends, his accountant advised him that he could show earnings as an employee of Sovereign via the director's loan account of £5,000 per month, bearing in mind the expected level of consultancy work, including the anticipated contract with Northern Rock, and the sums available for draw down from Sovereign. Mr Khan's evidence was that he included the anticipated rental income in that amount, although it is clear to us that he declared that in addition to the employment income rather than as a component of it.

15 48. Mr Khan accepts that he never drew money from Sovereign to that extent but that he believed, on the basis of the advice he received from his accountant, that he could have done so. He also accepts, he says with the benefit of hindsight, that neither he nor his accountant should have approached the calculation of his employment income on that basis, which he described as "rough and ready".

20 49. He now accepts that he was reckless to have relied on his accountant in this way, but he was not deliberately setting out to deceive the lender, as shown by the fact that without hesitation he voluntarily provided the files relating to his own mortgage applications to the Authority in advance of it being indicated to him that the Authority had concerns about those applications.

50. Mr Khan also contends that his mind was confused at the time, because of the stress of the divorce proceedings.

25 51. It appears that Abbey National asked for proof of Mr Khan's employment. Accordingly, Mr Khan submitted copies of three payslips to Abbey National, for the months of July, August and September 2009. These payslips, which were in the usual form expected for such documents, stated that Mr Khan had received gross pay of £5,000 for each of the months in question, and that deductions for income tax, based on the tax code (647L) shown on the document and national insurance had been made. It is common ground that no such deductions had been made and that the relevant sums had not been accounted for to HMRC. The payslips also showed year to date figures, so on the October 2009 payslips gross pay of £35,000 was shown, indicating that Mr Khan had been receiving pay of £5,000 per month since the beginning of the tax year in April 2009. The copy payslips were certified as true copies of the original by Mrs A Mirza, Mr Khan's sister, who was also Sovereign's company secretary.

40 52. Mr Khan's evidence was that these payslips had been created by his accountant, on the accountant's advice; he stated in interview that the accountant would be able to provide the necessary documentation to verify what sums the accountant had advised Mr Khan he was entitled to draw down from Sovereign. This evidence is consistent

with the accountant's own evidence to the Authority, and we accept it and find accordingly.

53. Mr Khan accepted in his oral evidence that the information on these payslips was misleading, but not that it had been dishonest to produce them as evidence of income to Abbey National. He drew a distinction between creating false payslips from a site on the internet to justify non-existent income, and what had happened in this case, which was that the payslips had been created by the accountant, on the accountant's advice, to justify an income which the accountant had advised he was entitled to withdraw from Sovereign.

54. It is clear to us from the evidence as reviewed above that the employment income declared to Abbey National was false; at no time had Mr Khan been earning an income of £60,000 per year from Sovereign. The declaration that Mr Khan made to that effect relied on a projection of income, based upon advice from his accountant on the existing resources of Sovereign and what Mr Khan had anticipated he might earn in consultancy income. The question for us to determine, on the basis of those facts, was whether Mr Khan's behaviour was dishonest in representing he had an income of £60,000, and on the basis of the test in *Ghosh*, his behaviour will be characterised as dishonest if declaring an income of £60,000 in those circumstances would be considered dishonest according to the ordinary standards of reasonable and honest people, and whether Mr Khan himself must have realised that what he was doing was dishonest.

55. In that context we also have to consider the question of the payslips. It is clear from the evidence that the payslips are false in that Mr Khan had not received the income from Sovereign declared to have been paid to him on these payslips. Neither had the income tax and national insurance contributions declared to have been deducted been so deducted and accounted for to HMRC. The question for us is whether the submission of those payslips to Abbey National in support of the income declaration made on the 2009 Application in circumstances where those payslips had been created by Mr Khan's accountant to support a level of income which the accountant had advised Mr Khan could be supported in the future, would be considered dishonest according to the standards of ordinary standards of reasonable and honest people and whether Mr Khan himself must have realised that what he was doing was dishonest.

56. In our view the correct approach is to look at the circumstances surrounding both the submission of the 2009 Application and the payslips in the round.

57. In our view the evidence that the behaviour concerned demonstrates dishonesty on Mr Khan's part is cogent and compelling.

58. Mr Khan is an experienced financial services professional who on his own admission is aware of the standards expected of persons in that position. Reasonable and honest people would understand the difference between being asked a question about their actual or historic income and what they might be expected to earn in the future. They would have known that stating they had an income of £60,000 from a

particular employer when they had never received that sum in the past and were not expecting to do so in the future would be dishonest, even if advised by an accountant that it was legitimate to proceed on the basis of a projected income. If given that advice, the reasonable and honest person would have challenged it.

5 59. In any event, the evidence shows that an income of £60,000 per year could not
be justified by the financial circumstances of Sovereign at the time; its cash resources
of a little less than £30,000 had been built up over a period of four years and it had no
long term consultancy contracts at the time the 2009 Application was submitted. Mr
Khan must have known that to be the case based on his own tax returns, which he
10 prepared, and the current position regarding consultancy work. Mr Khan must have
known that he had never earned £60,000 per annum from Sovereign and that he was
not at the time he made the 2009 Application expecting to do so. It must have been
obvious to him, based on his experience, that lenders were expecting an answer based
on his actual income rather than his projected income. He must therefore have known
15 when he answered the question on the form that his answer was dishonest.

60. In order for us to be satisfied that Mr Khan's behaviour was reckless rather than
dishonest he would have had to have satisfied us that he was aware that there was a
risk that a figure of £60,000 overstated his income and that if he actually checked the
position more rigorously himself rather than relying on his accountant, he would have
20 discovered that his actual level of income was significantly below that. For the
reasons that we have stated above, the evidence clearly points to the conclusion that
Mr Khan knew that his earnings from Sovereign's earnings did not at the time of the
application amount to him having an income from employment of £60,000 per annum
so he knew more than the fact that there was a risk his income was lower than
25 £60,000 and his behaviour was not merely reckless but was dishonest.

61. An ordinary and reasonable person would also have known that the submission
to a lender of a payslip declaring that he was entitled to £5,000 in respect of a
particular month's salary and that he had received that amount less deductions for tax
and insurance when that had not been the case would have been dishonest,
30 notwithstanding the fact that such a payslip had been created by his accountant to
support a projected rather than actual income of the stated amount. Mr Khan, as an
experienced financial services professional, knows the purpose of submitting a
payslip to a lender to support a mortgage application. It is to verify income actually
earned, not to support a projection of income, and Mr Khan knew that he had not
35 received the income stated in the payslip and that therefore the payslip was false. He
must therefore have known that submitting the payslip to the lender in those
circumstances notwithstanding the advice of his accountant was dishonest.

62. Nor do we believe that the fact that Mr Khan disclosed his mortgage
applications to the Authority voluntarily affects the position. We agree that such
40 action is normally indicative of the behaviour of an honest person, but we find the
evidence surrounding the circumstances in which the 2009 Application and the
payslips were submitted, as found above, to provide overwhelming evidence of
dishonesty that outweighs this factor.

63. It is therefore clear in these circumstances that we must characterise Mr Khan's behaviour in relation to the 2009 Application as dishonest rather than reckless.

64. The purchase of the property envisaged by the 2009 Application did not proceed as a consequence of which Mr Khan submitted the 2010 Application in respect of an alternative property. We now turn to consider that application.

The 2010 Application

65. On 6 May 2010 Mr Khan submitted a further mortgage application through Sovereign on his own behalf to Abbey. This was submitted on what was described on the application form as a "substitute property details application" in that it was supplemental to a previous application (in this case the 2009 Application) which proceeded on the basis of the information provided in the 2009 Application, save that the substitute property was the subject of the mortgage in place of the original property. Mr Khan was required to sign a declaration to the effect that the information provided in both applications was correct subject to any changes notified. The application also required Mr Khan to declare that he or a member of his immediate family intended to live in the property concerned; had that not been the case a buy to let mortgage application would have to be completed.

66. Mr Khan disclosed the property to be funded by the mortgage as 4 West Newington Place, Edinburgh, and a loan of £260,000 was sought. The purchase of this property was completed but Mr Khan did in fact only live in it for a short period, as he was able in due course to continue to reside in the former matrimonial home at 7 Forth View Place, Dalkeith. 4 West Newington Place is still owed by Mr Khan and he rents it out, but he admitted in his oral evidence that he has never, as he is required to do, notified Abbey that it is not occupied by him as a dwelling. Consequently, in effect Mr Khan continues to have a residential mortgage over what has become a buy to let property. It would appear that Abbey has also never been notified that he continues to occupy 7 Forth View Place as his residence, whilst the 2009 Application indicated that this property would be rented out to tenants.

67. In view of the fact that the 2010 Application was supplemental to the 2009 Application, it is clear that all of Mr Khan's representations in that application are equally applicable to both applications. On the basis of our findings in relation to the 2009 Application, we must therefore conclude that Mr Khan obtained the mortgage on 4 West Newington Place on the basis of dishonest representations as to his employment income.

Mr Khan's earlier application in 2007

68. The Authority relies on an earlier mortgage application made by Mr Khan as aggravating Mr Khan's behaviour in relation to the 2009 and 2010 Applications. The application concerned was made on 9 December 2007 to Intelligent Finance in order to finance his purchase of 7 Forth View Place and the amount of the loan sought was

£221,000. In that application Mr Khan declared that he was self-employed and had an annual income of £60,000 gross.

5 69. In the light of our findings of fact based on Mr Khan's activities since Sovereign was formed, we can only conclude that this representation was also dishonest.

10 70. This finding is of limited significance in relation to this case. The application was submitted by Mr Khan personally, rather than through Sovereign and was not therefore submitted in his capacity of an approved person. Consequently, it is not open to the Authority to seek to impose a financial penalty on Mr Khan in respect of his conduct in relation to this application.

15 71. However, in our view it is appropriate for us to take the circumstances of the 2007 application into account when assessing all the circumstances relating to the imposition of a financial penalty in respect of the 2009 and 2010 applications, and in particular when assessing Mr Khan's financial resources and considering whether the appropriate penalty should be reduced because of Mr Khan's financial circumstances. Accordingly, we consider the effect of the 2007 application in that context below.

The Certification Issue

20 72. In relation to two customers' mortgage files Mr Khan had certified on copies of the customers' passport photo pages "I certify this is a true copy of the original and a true likeness of the Applicant".

25 73. It is well known, and was certainly known to Mr Khan as a mortgage broker, that when introducing customers to potential lenders, the mortgage broker is required to obtain evidence of identity of the customer concerned, in order to mitigate the risk of money laundering. Commonly, under guidelines laid down by the Joint Money Laundering Steering Group, sight of a customer's passport is used to establish identity and in those circumstances the broker will see the original passport and produce a copy of it, providing that copy to the lender as evidence that the identity has been checked and certifying that copy to be a true copy of the original passport.

30 74. None of the guidance we were shown specifically requires an individual's identity to be identified face to face, but it would appear that certain lenders may require that to be undertaken. In those circumstances, clearly it would be dishonest if a mortgage broker knowingly certified a copy of a passport photo page to bear a true likeness of the individual when he had not met the individual face to face but there is no reason why the broker cannot legitimately certify a photo page of a customer's passport to be a true copy of the original document even if he has not met the individual concerned as long as he has seen the original document.

40 75. In this case, the Authority contends that Mr Khan's certification of the copies concerned in the manner described in paragraph 72 above was dishonest. Mr Khan contends that his use of the wording was careless; he was aware that in most cases all he was required to do was to certify that the copy document concerned would be a true copy of the original and certify accordingly. In other cases, he was aware that

lenders did require that the customer concerned had been interviewed by the broker face to face and in those circumstances his certificate would need to go further and certify that the photo page certified showed a true likeness of the individual concerned. Mr Khan's contention was that in this case he had carelessly used the wrong form of certification, so that he had certified the document as a true likeness when he meant to certify it as a true copy of the original document.

76. In order to determine that issue, it is necessary to examine what evidence there was as to the particular requirements of the lenders concerned in relation to the two certifications in issue, which we will turn to later.

77. However, before turning to that issue we have to say that the basis on which this issue is before the Tribunal is less than satisfactory.

78. On 17 September 2013 Judge Herrington heard an application from Mr Khan to challenge part of the Authority's Statement of Case, namely the allegation that Mr Khan had acted dishonestly in relation to the certification issue. In the course of hearing that application it was represented to Judge Herrington that the RDC had found, in the Decision Notice, that Mr Khan's actions in that regard were part of its overall findings that Mr Khan had failed to act with due skill, care and diligence in breach of Principle 6 in managing Sovereign's business, thus exposing Sovereign to an increased risk of being used for the purposes of mortgage fraud.

79. Whilst Mr Khan submitted that in those circumstances it was not open to the Authority to plead, as it had in its Statement of Case, that contrary to the findings of the RDC, his behaviour in relation to the certification issue could be characterised as dishonest, Ms Clarke, for the Authority, on the authority of *Jabre v FSA* submitted that it was open to the Authority to take that course as the finding was in relation to matters considered by the RDC in the course of hearing Mr Khan's representations on the Warning Notice and therefore formed part of the circumstances referred to in the Decision Notice, which thus formed part of the subject matter of the reference for the purposes of the proceedings before the Tribunal.

80. Judge Herrington accepted Miss Clarke's submissions but he did so on what it now appears was a mistaken assumption that the Warning Notice issued to Mr Khan contained an allegation that Mr Khan had acted dishonestly in relation to the certification issue but that the RDC had characterised his behaviour as negligent. It would be clear in those circumstances that the question of whether Mr Khan had acted dishonestly in relation to the certification issue would have been put to him and canvassed before the RDC such that it could be regarded as forming part of the subject matter of the reference.

81. However, it emerged during Mr Pether's evidence to the Tribunal that the Warning Notice (which was not put in evidence before the Tribunal) had never contained an allegation of dishonesty on the part of Mr Khan in relation to the certification issue. Neither did the Preliminary Investigation Report, which was in accordance with usual practice sent to Mr Khan for comment and on which the allegations in the Warning Notice would have been based, contain any preliminary

finding that Mr Khan had acted dishonestly in relation to this issue. It is therefore clear that when the matter was put to the RDC it was not asked to make any finding of dishonesty on that issue, either when agreeing to issue the Warning Notice or when deciding, having considered Mr Khan's representations, when it issued the Decision Notice.

82. It is also clear that Mr Pether had not therefore undertaken a full investigation into the evidence that might establish that Mr Khan had acted dishonestly in this regard, such as establishing whether the lenders concerned had specifically asked Mr Khan to confirm that he had met the customers concerned and consequently certify that the passport photographs concerned were true likenesses.

83. The evidence before us was inconclusive on that issue; we had no evidence at all in relation to one of the applications. In relation to the other application, after Mr Khan had submitted the certified document, the lender asked for confirmation as to whether Mr Khan had interviewed the customer face to face. Mr Khan answered this enquiry honestly, confirming that there had not been a face to face interview, but there is nothing to indicate that the lender had required such an interview to have taken place. It seems that the enquiry may have been prompted by the lender having concerns about the customer's passport; it later transpired that the passport concerned, unbeknown to Mr Khan, was a forgery.

84. The question therefore arises as to why the Authority's case on the certification issue changed before the Tribunal. A close examination of the Decision Notice shows that although the RDC's summary of reasons for its decision only referred to Mr Khan having failed to act with honesty and integrity in relation to the 2009 and 2010 Applications, there is a specific finding, in paragraph 71 of the Decision Notice, which was not noticed by Judge Herrington at the hearing of Mr Khan's application, in a section of the notice otherwise dealing solely with the mortgage applications, that:

"It should also be self-evident to anyone, and particularly to a mortgage broker acting in the course of his business that certifying a photograph as having a true likeness to a person without having met the person is dishonest."

85. It would appear that there was some discussion of this possibility at Mr Khan's oral representations meeting with the RDC, but as stated above the allegation was not in the Warning Notice and the discussion was not instigated by the Enforcement Team at the meeting. It would therefore appear to have been raised by the RDC on its own initiative and it appears to have assumed that there was no other explanation as to how the certification came about, such as the explanation Mr Khan has given in his evidence before the Tribunal.

86. It would appear that the Authority has used this finding as the basis of its change of position on the issue before the Tribunal; Mr Pether was unable to advance any other reason.

87. As we indicated above this position is not satisfactory. It is to be expected that in normal circumstances the Authority should maintain the same case as it set out in

its Warning Notice and on which the subject would have framed his representations before the RDC. As the case of *Allen v FCA* (FS/2012/0019) indicates, there can be a departure from this position where new circumstances come to light after a Warning Notice has been issued but we are not convinced that the subject matter of the reference embraces matters that were raised by the RDC on its own initiative but which do not relate to a change in circumstances without those circumstances having been the subject of a full investigation and the Warning Notice procedure.

88. It is not suggested that Judge Herrington was misled in any way at the case management hearing, but it is clear that the full picture was not apparent to him. For future reference it is important that when the Authority seeks to rely on a case which differs from that set out in the Warning Notice that the full picture is disclosed so that the jurisdictional issue can be fully considered, particularly where the Applicant is contesting the position taken by the Authority.

89. In all the circumstances, and noting that the evidence as to the lenders' requirements is inconclusive we are of the view that even if the Authority was entitled to advance the issue, about which we have indicated our doubts, we are not satisfied that the Authority has proved its case on the certification issue. The Authority has not proved on the balance of probabilities that Mr Khan's behaviour in that regard was dishonest as opposed to being careless by using the wrong form of certification as Mr Khan submits was the case. On that basis, since the reference does not relate to any of the findings of negligence made by the RDC, which Mr Khan does not contest, we do not take into account the certification issue on our determination of the appropriate financial penalty.

The appropriate financial penalty

90. We now turn to the question as to whether a financial penalty is appropriate and if so, the amount of that penalty. As a result of our previous findings any penalty will relate purely to Mr Khan's behaviour in relation to the 2009 and 2010 Applications which we have characterised as dishonest.

91. We shall deal first with Miss Hanif's submission that the prohibition order made on Mr Khan, which he does not challenge is in itself punishment and should be taken into account when assessing a financial penalty in relation to the conduct in respect of which the prohibition order was imposed. This misunderstands the purpose of a prohibition order; it is not a disciplinary measure but is imposed in order to protect the public from persons who are not found to be fit and proper from performing controlled functions. We therefore take the approach of assessing the appropriate financial penalty without regard to the fact that Mr Khan has accepted a prohibition order.

92. We do agree, however, with Miss Hanif that there is an important distinction between regulatory proceedings (which are civil in nature) and criminal proceedings, in that in the latter the courts punish offenders, that is they exact retribution. This is not the purpose of financial penalties imposed in regulatory proceedings, the purpose of which is clearly stated in Old DEPP 6.1.2G quoted in paragraph 19 above, the

purpose being to promote high standards of contract to deter persons who have committed breaches from committing further breaches and helping to deter other persons from committing further breaches.

5 93. Our starting position is therefore to consider whether it is appropriate to impose a financial penalty to deter Mr Khan from committing mortgage fraud in the future and deterring others from doing so. This Tribunal agreed it was appropriate to impose a financial penalty on the applicant, Mr Curren, in *Alistair Curren and another v FSA* (FIN/2010/0004) in similar circumstances to the present case. The Tribunal stated at paragraph 34:

10 “The submission to lending institutions of dishonest mortgage applications is, in our view, a very serious matter. Persons in Mr Curren’s position earn commission in return for carrying out enquiries into the veracity of what is said in the application, and lending institutions should be able to rely with confidence on their having done so ...
15 If, as we consider has been established, he knowingly submitted dishonest applications, his conduct merits a severe penalty; it amounts to a breach of trust.”

94. This passage was also approved by the Tribunal in *Mark Anthony Hurst Ainley and another v FSA* (FS 2011/0020): see paragraph 28 of the Decision where the Tribunal observed that there can be no doubt that mortgage fraud is a very serious matter.

20 95. Miss Hanif challenged the premise, in Mr Sillett’s evidence, that in respect of the conduct of mortgage intermediaries, there is a specific cause for concern such that a significant penalty is warranted on the facts of this case. She submits that the documents relied on by Mr Sillett to demonstrate the seriousness and prevalence of mortgage fraud provide no satisfactory information to suggest that with mortgage
25 intermediaries, there is a specific and acute need for credible deterrence.

96. In relation to the material relied on by Mr Sillett, the National Fraud Authority, an executive arm of the Home Office, in its report of June 2013 estimates that the loss per annum arising from mortgage fraud is roughly £1 billion. In June 2011, the Authority’s thematic review of lenders systems and controls describes mortgage fraud
30 having become “a feature of the pre-2007 lending boom and has proved a resilient phenomenon, despite the downturn in lending and tightening of lending standards”. A Fraudscape report of March 2013 (a document produced by CIFAS, a Fraud Prevention Service), refers to “a 5% increase in the number of frauds against mortgages in 2012 compared to 2011” which Mr Sillett relied on to indicate that
35 mortgage fraud continues to be a persistent problem.

97. A guidance note produced by the British Bankers Association in January 2012 states:

40 “Mortgage frauds have been uncovered in the current subdued market. It continues to have negative impacts for lenders, by reducing the quality of their loan books – increasing their provisioning costs and adding to losses. There is also an increased likelihood of regulatory action from the [Authority] as well as reputational concerns.

Mortgage fraud can have significant broader impacts on society, through links to other criminal activity, and the involvement of organised crime groups.”

5 98. This guidance note makes no comment upon the extent to which the conduct of mortgage intermediaries specifically is a problem, in contrast to a specific reference to solicitor fraud being a key risk to lenders.

99. In his oral evidence, Mr Sillett when asked about the risk arising from mortgage applications with inflated incomes replied:

10 “... The risk posed include basically a risk to our strategy objective to – in relation to the integrity of the financial markets in the country. So that, if there is a significant amount of fraud in relation to increasing or exaggeration of people’s income, then that will create effectively a false market, it will tend to create a false market, which would increase prices and would impact on the integrity of the market. It would also impact in relation to the quality of the loan books held by mortgage lenders, so that a large amount of work goes into the prudential health of all financial institutions, including mortgage lenders ...”

15

100. Again, Miss Hanif notes that this does not disclose that mortgage intermediaries were of particular concern, and as far as the “prudential health” of lenders was concerned, that is a matter reserved to the Prudential Regulation Authority (“PRA”) and it was not for the Authority to address concerns of prudential health via conduct investigation.

20

101. We accept that the material we were referred to is generally non-specific as to the particular problem posed by mortgage intermediaries, and the Authority has not demonstrated, nor in our view did it seek to do so, that the conduct of intermediaries was the driving force behind mortgage fraud.

25 102. Nevertheless, it is clear from the material and Mr Sillett’s evidence that mortgage fraud poses a particular risk to the stability of the financial system and it appears to us to be perfectly proper for the Authority to have regard to that issue when assessing the impact of the conduct of mortgage intermediaries. To say that this is only a matter for the PRA is to make an unrealistic and unnecessary distinction.

30 Mortgage fraud clearly remains a significant issue, however caused, so the issue as to the comparative blame to be attached to mortgage intermediaries as opposed to other reasons is not in our view a significant factor. As identified in *Curren*, lending institutions need to be able to have confidence in what they are being told by mortgage intermediaries, and fraudulent representations to them amount to a breach of trust. In those circumstances, the Authority, and the Tribunal, when such conduct is

35 proved, must regard it as a serious matter when that trust is abused which will inevitably result in the imposition of a substantial financial penalty. We accept that a substantial financial penalty is required in this case in order to achieve the necessary deterrent effect, bearing in mind the overall prevalence of mortgage fraud, its potential effect on the stability of the financial system, and the position of trust that a mortgage intermediary finds himself in.

40

103. Against that background we turn to consider the appropriate level of penalty in this case.

104. Ms Clarke sought to persuade us that we should adopt the Authority's approach of applying a minimum penalty of £100,000, an approach which has resulted in at least eighteen penalties of or in excess of that amount being imposed in cases where the Authority has found that mortgage fraud by an intermediary has occurred.

105. We agree that we should have regard to previous penalties imposed by the Authority in relation to similar conduct when considering the appropriate penalty in any particular case, and there is an interest in consistency between cases, but we are not bound to impose any particular amount. Our overriding objective is to do justice between the parties and in doing so we should look at all the circumstances of the case.

106. The Authority contends for a penalty of £100,000 as a minimum, the RDC imposed a penalty of £80,000 in respect of the conduct in relation to the 2009 and 2010 Applications. Both sums are significant sums for individuals with limited resources, and we have therefore considered, as the Authority's policy in Old DEPP 6.1.2G recognises, that enforcement action may have greater impact on an individual. Nevertheless, as that policy also recognises, the position and responsibilities of the individual are to be taken into account, and, as we have identified mortgage intermediaries are in a position of trust and a breach of that trust justifies a higher level of penalty

107. We therefore agree that a penalty within the range of penalties previously imposed in mortgage fraud cases is justified in this case. That is not to say that we endorse the Authority's approach that the penalty imposed should be a minimum of £100,000 regardless of the individual circumstances of the case. The role of the Tribunal is to consider all the relevant circumstances, and in our view in this case a powerful factor is that the RDC set the penalty at a figure lower than that sought by the Authority in this reference.

108. It is not clear from the Decision Notice why the RDC reduced the penalty sought in the Warning Notice for the conduct in relation to the 2009 and 2010 Applications from £100,000 to £80,000. Nevertheless, as the Tribunal indicated in *Ainley* (see paragraph 38 of the Decision) it is reluctant to increase penalties save in clear cases, such as where the evidence before the Tribunal reveals the conduct to be more serious than was known to the Authority when it set the penalty, since doing so may deter those with meritorious references from pursuing them for fear that the penalty may be increased.

109. We have not seen any evidence that Mr Khan's behaviour was more serious than previously thought. We have also dismissed the Principle 1 breaches alleged in relation to the certification issue. In those circumstances in our view the appropriate penalty to be imposed on Mr Khan in this case is £80,000.

Should the penalty be reduced on the grounds of serious financial hardship?

110. Paragraph (5) of Old DEPP 6.5.2G, as quoted in paragraph 20 above, makes it clear that the Authority may take into account whether there is verifiable evidence of serious financial hardship or financial difficulties if the person were to pay the level of penalty appropriate for the particular breach. Paragraph (6) of the same provision
5 makes it clear that the purpose of a penalty is not to render a person insolvent or to threaten the person's solvency, but if a person reduces his solvency with the purpose of reducing his ability to pay a financial penalty, for example by transferring assets, those assets will be taken into account.

111. There is no further guidance in Old DEPP as to what is meant by "serious financial hardship", for instance whether there is any minimum level of assets which an individual should be entitled to regard as not being at risk of being available to meet a penalty. New DEPP does give more detailed guidance on that; it provides that the starting point for serious financial hardship is capital below £16,000 or net income below £14,000. We were told that in practice the Authority applies these thresholds
15 even to cases determined under old DEPP as they provide a yardstick which is equally applicable to the old and new penalty regimes, and we were urged to take a similar approach, were we to consider that serious financial hardship was an issue in this case.

112. In this case Ms Clarke submitted that whether account should be taken of serious financial hardship is a matter of discretion. Mr Sillett's evidence was that because mortgage fraud remained prevalent, its approach was to impose a minimum financial penalty of £100,000 even in cases where there was verifiable evidence that such a penalty would cause an individual to suffer serious financial hardship or become insolvent. His view was that the fact that such a penalty would, or may,
20 render the approved person bankrupt was outweighed by the need to promote high standards of regulatory conduct in relation to mortgage brokering and the need to deter approved persons at approved mortgage brokering firms from committing mortgage fraud.

113. Mr Sillett's evidence was that Mr Khan's circumstances did not warrant a departure from this approach in this case, because of the need for wider general deterrence.
30

114. The Tribunal has recognised that the fact that a person will experience serious financial hardship does not necessarily mean that a penalty should be reduced. In *David John Bedford v FSA* [2011] UKUT B42 (TCC) it observed at paragraph 36
35 that:

"It is inevitable that the imposition of only a modest penalty because of the offender will diminish the deterrent effect, since the amount finally determined becomes the "headline" figure."

115. The Tribunal has also made observations on the question whether it is appropriate to impose a financial penalty in circumstances where the effect will be to render the subject insolvent. In *Atlantic Law LLP and Andrew Greystoke v FSA* (FIN/2009/0007) at paragraph 110 the Tribunal stated:
40

“The fact that the purpose of imposing a financial penalty is not to bring about insolvency does not mean that the Tribunal cannot and should not fix a penalty which may have that unfortunate result”

5 116. In that case, the Tribunal declined to take into account Mr Greystoke’s financial position in circumstances where the behaviour concerned was particularly egregious. It involved the approved person having approved financial promotions of boiler rooms which had resulted in vulnerable consumers having lost considerable amounts of their savings, possibly resulting in insolvency on the victim’s part.

10 117. However, in Bedford the Tribunal observed that the course suggested in *Atlantic Law* should be adopted only in a “clear case”, and it decided that in the particular circumstances of that case, it was appropriate to consider Mr Bedford’s financial circumstances.

15 118. Bearing in mind what we have previously said about the role of the Tribunal and its need to look at all the circumstances of the case, we are not persuaded that we should follow the Authority’s approach of a starting position that the prevalence of mortgage fraud justifies us not taking regard of Mr Khan’s financial circumstances. We do not rule out the possibility that there may be cases of mortgage fraud where it would be appropriate to take that course, for example if the actions of a particular broker were on a large scale or the solvency of a particular lender was threatened as a result of the actions of that Broker. The circumstances here do not fall into that category; we are concerned with two relatively small applications and whilst for the reasons we have given these justify a substantial penalty we do not think the matter is so egregious, such as in *Atlantic Law* where vulnerable consumers suffered substantial losses, that we should not take into account Mr Khan’s financial circumstances.

25 119. Neither do we believe that we should follow the Authority’s guidance in new DEPP on serious financial hardship. We should assess this question in the light of the overall position with regard to Mr Khan’s assets and liabilities, and consider whether taking into account his family commitments in the light of the assets that would remain available to Mr Khan if he were called upon to pay the full amount of the financial penalty, he would in our view suffer serious financial hardship and his ability to maintain his family commitments would be compromised to an unacceptable degree. The imposition of a strict guideline as to the value of the assets or the level of income which is maintained in our view would be unnecessarily inflexible in relation to an assessment to be made under the less specific provisions of Old DEPP.

35 120. Against that background, we consider Mr Khan’s submission that the payment of any significant financial penalty would cause him serious financial hardship.

40 121. It is clear that the burden is on Mr Khan to satisfy us that there is verifiable evidence of serious financial hardship, and his submissions must be supported by independent and verifiable evidence.

122. It is clear that a full picture of Mr Khan’s financial position did not finally emerge until after the filing of Mr Khan’s second witness statement in these

proceedings on 13 January 2014. Mr Khan exhibited to that witness statement an asset and liability statement. On the asset side Mr Khan discloses ownership of three properties, his two buy to let properties at Marchmont Road, Edinburgh and West Newington Place, Edinburgh and his residence which he shares with his mother at
5 Forth View Place, Dalkeith. There is verified evidence to show that the net equity in these properties, having deducted the outstanding mortgage liabilities capital gains tax, early repayment charges and selling costs would be £17,093, £44,806 and £56,451 respectively. Mr Khan's other assets, including a motor vehicle, amount in total to £15,331. The Authority does not now dispute these figures.

10 123. The question arises as to the extent to which these assets should be regarded as being available to meet the financial penalty. Miss Hanif submits that, due to ill health which makes it difficult for Mr Khan to work at present, the only modest income he has is the rental income from the two buy to let properties in Edinburgh, and if he was forced to sell these properties he would have no income at all and would
15 be reliant on social benefits. In those circumstances, it would be punitive to require these properties to be sold.

124. With regard to the Dalkeith Property, Miss Hanif submits, forced sale of that property would render his disabled mother homeless and would defeat Mr Khan's current custody application as he would have nowhere for his children to live with
20 him.

125. In any event, it is submitted that there are further liabilities that should be taken into account in assessing his ability to pay the financial penalty. In particular, there is an outstanding loan to his mother, currently £68,800 which is secured by second charges over the Edinburgh buy to let properties, outstanding legal fees and ongoing
25 costs for mortgage interest, Council Tax, home insurance, child residential maintenance costs, and monies borrowed from his mother to meet some of these liabilities. After deducting all these liabilities Mr Khan's net assets are reduced to £18,270.

126. The position of the loan to Mr Khan's mother requires careful analysis. The
30 evidence shows that on 10 June 2000 Mr Khan and his mother executed an Agreement and Deed of Trust relating to a property known as 16 Buckstone Lea, Edinburgh, which was then Mr Khan's private residence. The document contains an acknowledgement by Mr Khan that his mother provided part of the purchase price of this property, which gave her a 32% ownership of the property. This property was
35 sold in 2008, but Mrs Khan was not paid her share of the proceeds of sale, which on the basis of the consideration received on the sale amounted to £100,800.

127. The evidence also shows that although it was contemplated that Mrs Khan's interest would be "rolled over" into Mr Khan's new residence at 7 Forth View Place, Dalkeith with Mrs Khan being granted a second charge over that property to secure
40 her interest, this did not materialise as Mr Khan was going through his divorce proceedings and as under Scots law the property would be regarded as "disputed matrimonial property" a charge could not then be placed on that property. Mr Khan's then solicitor has confirmed that to be the current position.

128. It would therefore appear at this stage Mrs Khan had no property interest in any of her son's properties, but would have an outstanding loan of £100,800 which it appears had no specific repayment terms and carried no security.

5 129. However, on 19 March 2012 Mr Khan executed a document in favour of his mother in which he undertook to pay all sums due and that may become due to his mother, and in respect of which he granted his mother standard securities over his two Edinburgh buy to let properties, subject to the existing charges over these properties.

10 130. We note that the standard securities do not give Mrs Khan a property interest in the buy to let properties, as she previously had in respect of the Buckstone Lea property. We also understand that Mrs Khan's securities are not registered in the property register in Scotland. In these circumstances it creates no interest having any priority over those two properties and would not in itself trigger a repayment of the loan without specific provision in that regard, which on the evidence we have seen is not provided for. On that basis, in our view this charge would not preclude a sale of
15 the buy to let properties or require Mr Khan to repay his mother's loan, which would continue on its current terms, out of the proceeds of sale.

131. It is also clear, as confirmed by Mr Khan in his evidence, that on 17 November 2011 Mr Khan paid his mother the sum of £32,000, such sum being funded out of Sovereign's cash resources, representing the payment of substantially all of Mr
20 Khan's loan account with Sovereign. Mr Khan maintained that this had the effect of reducing his mother's debt to approximately £68,800. This payment, the evidence shows, was made on the same day that Mr Pether had telephoned Mr Khan and provided him with an update of the investigation, including the fact that the enforcement team may recommend that he pay a substantial financial penalty.

25 132. Mr Khan admitted in his oral evidence that these matters were connected; it having been indicated that there may be a financial penalty, he took steps, as he explained it, to protect his mother's interests and decided to use the money in the director's loan account towards paying off some of his mother's loan and securing the rest with second charges, as he ultimately did in March 2012. Mr Khan stated that his
30 reasoning was that his mother's loan was historic and took priority over any financial penalty imposed by the Authority.

133. It is clear that in 13 February 2012, when Mr Khan first provided a statement of his means to the Authority, that he did not disclose the repayment of the £32,000 and he represented that the debt owed to his mother was approximately £100,000. Mr
35 Khan denied that he deliberately misled the Authority on this point and that the failure to disclose was due to an oversight, which resulted in him failing to update the spreadsheet on which he had set out his assets and liabilities, although he had entered the sum of £100,000 manually in handwriting on the statement of means provided to the Authority.

40 134. Mr Khan repeated this representation in November 2012, when he came to make his written representations to the RDC on his Warning Notice. However, the day before his oral representations meeting before the RDC, where he was to be

represented by a solicitor, he submitted an updated statement of his means and disclosed that he had paid the sum of £32,000 to his mother.

5 135. We cannot accept Mr Khan's assertion that the failure to disclose the payment was due to carelessness; whilst it might have been so simply to have submitted an out of date spreadsheet, he took the deliberate step of entering the sum of £100,000 on the statement of means and we find it implausible that he would have forgotten at that point that he had repaid his mother £32,000 just a few months before. Likewise we cannot accept that he was careless for a second time in November 2012. We therefore find that not only did he repay these sums with the intention of ensuring that these monies would not be available to meet any penalty, but he also executed the second charges on the same basis in order, as he put it, to protect his mother's interests with a view to ensuring her debt took priority, these actions taking place shortly after he had been informed that a substantial fine was a possibility.

15 136. We understand that Mr Khan's close ties to his mother and his desire to protect her interests informed these actions and his deliberate decision not to inform the Authority of these actions on two occasions when he had the opportunity to do so. However, these considerations do not excuse his dishonest behaviour in this regard. In these circumstances, we must regard the payment of the £32,000 as a dissipation of Mr Khan's assets which otherwise would be available to pay a financial penalty and the granting of the second charges as creating no priority in favour of Mrs Khan for the same reason. In assessing the amount available to meet the financial penalty we shall therefore regard the £32,000 as being available as well as the equity in the buy to let properties, subject to our consideration below as to whether it is appropriate to expect the properties to be sold. We do however accept, on the basis of the evidence that we have seen that the debt owed to Mr Khan's mother should be regarded as a genuine liability.

30 137. We turn to the question of Mr Khan's projections of future expenses. We accept the Authority's submissions that future personal expenses, such as his ongoing mortgage interest and child maintenance costs should not be taken into account given the uncertainty as to how they will materialise in practice and the uncertainty as to what additional income or assets may be available to meet such liabilities at the time the liabilities fall due.

35 138. In our view the correct approach is to assess Mr Khan's means to pay the financial penalty by reference to his verified assets and outstanding liabilities at the time the assessment falls to be made.

40 139. On that basis we consider the extent of Mr Khan's net assets available to meet the liability to pay the financial penalty. In Mr Khan's family circumstances, namely his responsibility to provide accommodation for his mother and his children if he were successful in obtaining custody we should not regard the equity in the Forth View Place property as being available for this purpose.

140. With regard to the buy to let properties, normally we would see strong force in the argument that we should not put an applicant in a position where he is deprived of

his sole source of income. However, it is clear that one of the buy to let properties, West Newington Place, was able to be purchased because of the fraudulent representation that Mr Khan made on the 2009 Application. It is also the case that Forth View Place was funded in 2007 through a mortgage application which we have
5 found to have been obtained with the help of a fraudulent misrepresentation. We regard it as a powerful factor that Mr Khan should not be able to retain a benefit obtained through his own wrongdoing when making our overall assessment of serious financial hardship, and whilst notwithstanding the fraudulent misrepresentation we are prepared to accept the equity in the Forth View Property should not be taken into
10 account because of Mr Khan's personal circumstances, as a result we should regard the equity in both the buy to let properties as being available to meet the financial penalty, the combined value of which is £61,898.

141. To this sum we must add the £32,000 paid to Mr Khan's mother for the reasons we have set out above, and the £15,331 worth of other assets that he has available.
15 The total sum of £109,229 is on that basis more than adequate to cover the financial penalty and meet Mr Khan's other existing outstanding liabilities.

142. It is not for the Tribunal to direct that any particular asset should be realised to meet the liability for the financial penalty that we have assessed Mr Khan has the available assets to meet, but we anticipate that property realisations will be necessary.
20 In those circumstances, in our view it would be appropriate to give Mr Khan a period of time to pay the financial penalty.

Conclusion

143. We therefore dismiss the reference. Our decision is unanimous. We direct the Authority that the appropriate action for it to take in relation to the reference is to
25 impose a financial penalty of £80,000 on Mr Khan, such sum to be paid during the period of twelve months following the date of the Authority issuing a Final Notice to him at a time or times to be agreed with the Authority.

30 **TIMOTHY HERRINGTON**
JUDGE OF THE UPPER TRIBUNAL

RELEASE DATE: 8 April 2014