14c Adamson Road
London NW3 3HR

Tel/Fax: 020 7586 1938
E-mail adamsamuel@aol.com
Web site: www.adamsamuel.com

January 2005

news

Dear Friends...

2004 was the year of the two books. In December, I handed City & Financial the manuscript for Complaints and Compensation: A Guide for the Financial Services Market. This should provide readers with a guide to what I have been doing in that area since September 1991. It covers three things: whether the firm should uphold the complaint, compensation and the Financial Services Authority's complaint rules, DISP. It should be out in the springtime. Go out, buy and enjoy!

Hopefully, early 2005 should also see the appearance of a workbook that I wrote for Taxbriefs on the Mortgage Conduct of Business Rules.

Apart from that, the business has continued to grow since 2002. I have found myself writing more and more over this period, producing regular columns for Compliance Online and Compliance Monitor and one-offs elsewhere, notably for Financial Adviser. I also wrote a Compliance Officer Bulletin for City & Financial on Treating Customers Fairly, which ranges from Lenin and the Daily Star to the role of 'ticky-tacky' in financial advice.

My website designers unwittingly reminded me of the vast range of work that I do when, early in the year, they asked me to list all the types of customer that I have, all the challenges they face and the solutions that I can offer them. The list of customers for this year appears on the left side of the front page of www.adamsamuel.com. Last year it ranged from High Street banks and international law firms to small independent financial advisers (IFAs), an international genealogy company and as usual a charity helping farmers to replant Senegal!

The website contains a new feature, an e-book entitled "Guide to the Perplexed", containing brief key points about such things as how to draft final response letters to complaints, time bar rules for mortgage endowment cases, client agreements and the like. All readers have to do is supply their e-mail addresses. Next year I plan to expand the book to cover the arbitration or dispute resolution field. I hope that people who look at the e-book will tell me what they think of it and what topics that they want it to cover.

In the past year, the Golden Eagle Pub in Marylebone Lane has welcomed a number of new customers, friends and contacts from the financial services and dispute resolution world who have come in for a good sing on a Thursday night. This could explain why the Permanent Court of International Arbitration organises so many hearings in London on Friday mornings. In addition, my local café, Arabesque, has provided the pleasant backdrop for a number of client and not-so-client meetings.

Adam Samuel

Complaint Handling and business reviews

I have had a really strange year in this area. The big news is that thanks to the Association of Independent Financial Advisers (AIFA), I have a new business line: saving IFAs. AIFA has sent me a couple of cases where the survival of the business concerned might have depended on a positive result.

The first involved a claim for death benefits which, if it had failed, could have generated an extremely unpleasant complaint or court case for the IFA. The product provider cancelled the life cover it had issued as part of an executive personal pension plan because of a failure to return the forms promptly for a triennial review. A careful reading of the policy and the Inland Revenue's guidance 76 (IR76) revealed that there were no time-limits for returning the form and that the company had no right to decline the claim. I brought all the material together and wrote two opinions on the case, which ended up with the product provider paying the six-figure claim in full and a substantial amount for the firm's expenses.

The second case, a direct complaint against the firm, is still in progress and it is probably wrong to talk about it. Both files have some features in common. The IFAs in each case initially went to a law firm whose performance was less than stellar. There was no document on file which set out in detail exactly

Continued on page 2

Compliance with financial services regulations

My in-tray has also been inundated with other problems that the FSA is generating

Most of my work with companies in this area in 2004 concerned the "perimeter fence." For the uninitiated, the Financial Services Authority (FSA) uses this term to refer to the types of activity that lie on the fringes of regulation, where its authority is doubtful. This subject appears to be arcane and obscure until your client steps onto the wrong side of the divide.

In particular, a website that provides product analysis and a click-through facility to enable customers to purchase best-buy recommendations might be held to be "arranging" the purchase of regulated products. This problem will become particularly acute now that general insurance intermediaries have become regulated. The common practice in that area is for the website to receive a share of all revenues that are derived from click-throughs.

On the same theme, I was asked to look at a tip-sheet for consumers which is still in circulation. It says that it is published by a regulated firm, but the real publisher is not listed as one of the firm's representatives on the FSA register.

Other compliance problems abound. More common and perhaps more worrying is a widespread lack of awareness about the less obvious effects of the Insurance Mediation Directive. This piece of European law requires all firms that introduce customers for the purposes of buying insurance policies to be regulated. The regulator has, very reasonably, devoted most of its attention on this subject to insurance brokers. However, pension scheme administrators introduce trustees to IFAs for the purposes of buying life and disability-related insurance, not to mention annuities. They also tend to hold client money accounts to pay for ongoing administration.

The FSA has never issued a consultation paper about applying the rules in this area to pension scheme administrators, which is unfortunate. Some of these client money accounts do not appear to be connected in any meaningful sense to the relevant regulated activities and

Complaint Handling continued.

what had happened. This made it much more difficult for everyone to understand the issues in the case.

More generally, where the survival of a business is in jeopardy, complaints have to be handled in a slightly different way. First, the firm must tell the regulator of the threat to its existence. Secondly, it must be entitled to argue all the points that FOS or a court might find acceptable. The rulebook must have an implied provision about turkeys and Christmas! Nevertheless, I turn away work of this type if the basic argument is not one I feel comfortable supporting publicly. So, no mortgage endowment cases please.

Much of my 2004 complaints work has been done behind the scenes...

At the IFP Annual Conference, I did a case study session entitled "Keeping out of jail". This included a complaint case I had worked on with an impressive sole practitioner IFA. A major bank had "re-poached" a client of his and persuaded her to complain about a fee. The first problem was identifying the correspondence as a complaint. We worked together on the final response which had to de-personalise the dissatisfaction since it almost certainly came from the bank, not the client. We also had a session together looking at how similar complaints could be avoided in the future. This flushed out an IFA Network client agreement that referred to a non-existent body called the Financial Services Ombudsman. We looked at the need for fee-based advisers to estimate fees in advance. (Increasingly, I cap fees or segment work to ensure that customers do not receive surprising invoices.) What was so impressive about the client was his desire to learn from what had happened. I rang him before the conference and discovered that to our mutual surprise he had been paid for the work. So, good complaint handling does have a pay-off.

Much of my 2004 complaints work has been done behind the scenes, training or advising consultants and sorting out individual case problems for firms. I persuaded FOS that it had no jurisdiction over one of my customers because it had shut its IFA function before PIA started. When the firm came to consider whether to sign up for voluntary jurisdiction, the FOS could not make up its mind as to whether such an application would be accepted!

Inevitably, the main area of interest has been mortgage endowments. The second fine in this area in the spring did have some impact and led to me giving a presentation to Derek Adams's forum on how to avoid similar treatment in the future. Nevertheless, by the end of the year, FOS was complaining publicly that firms were just dumping endowment cases on them.

I have been asked for opinions on mortgage risk and limitation. Curiously, on the first topic, there is a clear divergence, at least in print, between PIA Regulatory Update 72

probably fall outside the rules. In other cases firms will have to remove their ability to own or control the accounts or they will need different regulatory permissions with other consequences in terms of fees and capital adequacy.

My in-tray has also been inundated with other problems that the FSA is rightly generating with its clampdown on advertising. Firms may avoid disasters by employing competent outsiders to read their copy. Once the regulator spots a bad advert, it may just be a case of showing how seriously the firm is taking the problem to avoid more than a "telling-off". Generally, the regulator's emphasis on balance in

Continued on page 4

and the John Tiner Letter on one side and FOS on the other. The regulators make it clear that the principal problem with endowment sales is that the adviser tended not to establish whether the customer was willing to accept and should have accepted the risk of the policy not repaying the interest-only loan at maturity. FOS, by contrast seems to focus exclusively on investment risk, analysing the customer's risk profile by reference to existing investments. The regulator is right on this one. The problem with an endowment mortgage is that the client depends on investment performance reaching a particular level sufficient to repay the loan. This effectively "doubles" up the risk involved. It is not just concern that the customer will lose money or fail to beat inflation or building society rates. FOS Decision Tree 3 needs urgent amendment.

2004 saw the FSA change its timebar rule for endowments for the second time in two years, having received an appropriate "going-over" by the Treasury Select Committee. The Committee focussed on the fact that investors were not told about the need to complain.

So, one now has a rule requiring a six months warning for all investors who wisely failed to complain before June 1st this year. For the precise rule, readers should have a look at the paper on the subject on my website and the brief summary in the Guide to the Perplexed. It seems to have escaped the regulator's attention that it would not involve treating customers fairly to rely on a red letter mailing which does not tell the customer that he has suffered a financial loss. While some companies have announced that they will not rely on the time-bar rule, its very existence causes problems even to these companies. There has been talk that firms who do not try to block cases on this basis may be given lower solvency assessments by the rating agencies.

Amidst all the complications in the rules, there remains concern that individual staff members do not know the basics about complaint handling. Recently, I had to complain to my bank three times in the space of a month. I have yet to receive an acknowledgement within 5 working days. I am not sure that I have received one at all. The first and only final response to date did not contain a reference to FOS or a copy of the Ombudsman leaflet. I am lobbying hard for the chance to do some basic training in that organization.

On a more positive note, in January, I have been booked to run a course for trading standards officers on a new scheme for handling consumer complaints against specifically approved local contractors. I am hoping that this will expand my range beyond endowments, mortgages, general insurance and the like.

Compliance continued

advertising means that the information in a financial promotion increasingly resembles what an adviser has to tell his customers generally in this area.

In its run-up to depolarisation the FSA is generating yet more verbiage for firms to read. This unnecessary change has come at a time when firms are struggling to comply with the existing rules. In my work with small IFAs and with the Institute of Financial Planning, I find myself struggling harder and harder to persuade firms to describe the services that they are offering their customers clearly. By the summer, each adviser, before doing any work, will have to provide his clients with this information in fragmented form in three different documents, the initial disclosure document (IDD), menu and terms of business or client agreement. The key is to reproduce the information in the first two in the last document. Otherwise, the client will have no chance of understanding what is being offered to him.

As it is, we are all having to learn the mortgage and insurance conduct of business rules (MCOB and ICOB). Some of the former are particularly intriguing. Every mortgage intermediary is now required to tell his customer to seek advice if his client asks him for help with a loan which he knows is inappropriate. This could have a significant impact on insistent customer cases if applied generally. There are also some serious concerns about the clarity of the ban on unsolicited real-time promotions for home loans. The definition of a "client relationship" and "express agreement", the requirements for the two main exceptions to the prohibition, are less than clear.

Lawyer's lawyer service and arbitration

More and more I find myself helping out other lawyers. This either happens when they run into trouble or when they need to call on the expertise of someone who operates in different areas. This year, I have answered requests for help in fields as varied as occupational pensions and international arbitration work.

This usually involves producing legal materials to answer clients' questions or fill gaps in the relevant firm's submissions. Occasionally, I have to go further. I was recently asked to come up with cross-examination points about an expert witness in a computer system arbitration. In the library I noticed that (a) his expertise was not quite right for the case, but also (b) that he had a pathological inability to cite his own publications accurately in his CV. He was not exaggerating them; he was just writing down inaccurate titles and journal numbers. Very strange.

This year I joined the Practice Committee at the Chartered Institute of Arbitrators. Its

guideline for Jurisdictional Problems in International cases which appeared in November's issue of Arbitration is written in a style with which some readers may be familiar! I am going to be keeping an eye on the Chartered Institute's members' forum when it starts up next year. So please, if you are a member, look up this service on the website and join in.

My "legal" publications this year include an in-depth article on the European Convention on Human Rights and dispute resolution and an essay on the strange Swiss Supreme Court decision in Fomento about the effect of foreign court proceedings on arbitration. My paper on xenophobia and international arbitration also appeared in a book to celebrate the 20th anniversary of the Swiss Institute of Comparative Law.

I attended a surprisingly good workshop at the World Intellectual Property Organisation (WIPO) on domain name cases in Geneva this autumn. I may not be an IP lawyer in the conventional sense, but this year I did a considerable amount of business resolving computer-related legal problems. I am on WIPO's panel of "neutrals", so I thought that it would be a good idea to further my connections with and knowledge of that organisation. I met some fun people and learnt a great deal, although a traditional Adam Samuel cheap restaurant recommendation for Geneva remains as elusive as ever.

Wishing you, as always, an enjoyable 2005.

I am going to be keeping an eye on the Chartered Institute's members' forum when it starts up next year