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as news

Dear Friends...

As ever, at this time of year, I hope that you all had an excellent second Eidh, Hanucah, Divali, winter solstice and Christmas. After the huge growth in my business in 2005, last year produced the highest turnover in its history. Since 2002, the biggest contributor has been writing. The notion that publishers will pay for good copy has worked well.

There has also been a revival in the original product of the business: training. The participants in an old-fashioned misselling complaints course were wildly enthusiastic about what they received. One of my original life assurance customers helped me develop a course on financial promotions which they liked so much they have already re-booked it twice. Strangely, this programme is gradually "morphing" into another course I run on complaint handling. Both focus on the need to produce client material in the language of the intended recipient. This has become a key theme for much of the work done this year.

Smaller businesses need more help than training. They have kept me busy this year, fixing their client agreements, helping them improve their suitability letters and financial plans, deal with complaints made against them and help their clients pursue grievances against other firms. The Association of Independent Financial Advisers (AIFA), the Association of Mortgage Intermediaries (AMI) and the Institute of Financial Planning have passed their members' problems over to me for a mixture of hard solutions, a shoulder to cry on and help in preventing a re-occurrence.

A few years ago, I decided that, rather than complain about the way organizations ran themselves, I would do something about it. Membership of the Practice Committee and the Arbitration Sub-Committee of the Chartered Institute of Arbitrators (CIArb) and a couple of Chartered Insurance Institute committees has produced rich non-monetary rewards. On an autumn trip to Hong Kong, Sydney and New York, fellow CIArb members gave me the warmest of welcomes in all those cities. The recent internationalization of the Institute has brought be some delightful friendships.

At the same time, the World Intellectual Property Organization (WIPO) has continued to use me frequently to deal with the domain name disputes it resolves. The results can be found on the internet.

Amidst all this, I ran my first race in over thirty years: the 5 kilometre Serpentine run and knocked 1 minute 58 seconds off my personal best the second time. A friend and I have been gradually walking the Thames Path to help her prepare to walk to the North Pole. After a move into the West End, I am now comfortable walking distance to the Golden Eagle pub where the great Tony Pearson continues to allow us to sing to his elegant piano playing. Come along in 2007.

Finally, in March, thanks to AIFA which hosted the event, my cousin Douglas (it was his idea), Lucy and everyone who came, I celebrated 10 years in business. A version of my speech appeared on the website shortly afterwards.

Drafting The Agreement

The last couple of years have involved me increasingly in looking at the way we put together crucial documents. The financial services industry is now suffering from many years of talking to customers in its language, rather than theirs. At its most extreme, my work on the Chartered Insurance Institute's book on contract certainty exposed me to a world in which nobody knows what is in the contract before it starts. The Financial Services Authority has kept away from insisting that the insurance industry uses clear language for its agreements, although that must logically be the next step. The unofficial contract certainty group at the CII (to which I belong) assumes that and constitutes a source of pressure to achieve clarity and coherence in communication in the future.

Early in the year, I managed to persuade a major life insurer to allow a penalty-free transfer of a pension (which it had promised) without having to transfer the rest of the customer's holding. The original transaction stemmed from a special deal offered to a client that nobody had ever documented. The conditions produced by the company probably did not relate to the right policy and, to the extent that they

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Drafting The Agreement contd.

were coherent on the subject, favoured my client's position. Essentially, the independent financial adviser (IFA) understood the deal but had no written record of it. Nobody at the insurer's end had any idea of what had happened.

I later studied the material that the same provider issues now. The key features document for the product was clear. The policy conditions, though, failed to set out the parties' agreement. As such, they did little to help the company and broke the Unfair Contract Terms in Consumer Contracts Regulations (UCTCR). Since the contract often becomes legally binding before the customer sees the policy conditions, these provisions can almost never be used to protect the insurer effectively. A new approach is needed. Insurers need to use their marketing material to draft their agreements, not the other way round. One effect of the UCTCR and other developments in contract law is to apply a reasonableness test to virtually all consumer-related contract terms.

Businesses need to review all their draft agreements and remove provisions that are not part of the core deal with the customer and which do not satisfy a test of reasonableness. Having them reviewed externally may be necessary before the FSA changes its current tune. At the moment, the regulator regularly publishes undertakings given by firms not to rely on unfair terms. At some point, it will issue enforcement proceedings under its Principle 6 (treating customers fairly) if firms do not take pre-emptive action.

With-profit companies now have a further challenge: producing a customer-friendly version of the Principles and Practices of Financial Management (PPFM) which each of them has to have. Sometimes, the non-customer friendly version is easier to understand. With all these documents, one can use a technique that people use when replying to complaints: say aloud what you want to say and then write it down. With the PPFMs, insurers must describe the with-profit funds. Then, for each of them, they need to set out the investment policy and asset allocation currently in place and any plans to change either of them in the future. The company must also to explain how it adjusts each customer's share of the fund to cope with investment fluctuations. Showing these PPFM documents to an IFA who is supposed to use them to give advice should be essential.

Small IFAs are often happy to change their agreements to reflect what they offer their clients. The result can be far superior. This year, though, saw a painful encounter with a longstanding sore in the independent financial advice sector: exit agreements. It is astonishing how many advisers leave their firms with promises of receiving commission from clients who remain customers of their old firms. This creates the risk of disputes arising about whether their former employers have accurately accounted for the commission promised or lost the income stream through neglect or churning. Equally, these contracts almost never contain any dispute resolution mechanism. These agreements do not need to be drafted in legalese. They should just be sensible reflections of what the parties can agree.

Financial Promotions

most firms probably need a thorough review of their promotions

The "clear language" message becomes all the more important when one looks at various promotional efforts made by firms. An cynical outsider can spot most financial promotion problems in a quick read. If his reaction is "what, really?!", the material needs to be sent back. However, that alone is insufficient.

Gradually, regulatory notions of clarity and fairness have dictated that anything remotely positive about a promotion has to be balanced by a risk warning. The Financial Services Authority proposes to abolish some of the finer distinctions between promotions of different types in November. Instead, it just urges firms to consider the intended audience and the means of communication involved when deciding what warnings are required. The reference to the intended audience does not work because one cannot control access to websites and most other forms of promotion. Safety in this area may involve drafting succinct but fairly drastic warnings to appear all over published material. That will probably render it unreadable. Compliant firms will then face the frustration of seeing their competitors break the rules only to be told not to do so again.

Further changes brought about by the Markets in Financial Instruments Directive and, for tipsheet firms, the wonderfully acronymed Market Abuse Directive mean that most firms probably need a thorough review of their promotions before November.

With that all in mind, I have agreed to help an old University friend, Tamasin Little, with the second edition of her book on Financial Promotions. The publisher is City & Financial which published my book on Consumer Complaints.

Advice Standards

For all the talk of principles-based regulation and treating customers fairly that have dominated the FSA's language in the last year, one stark fact stands out. Every study that the regulator has made of advice standards in whatever area has produced dreadful results. Although the sample sizes are often too small, the overall impression is bleak. Advisers are just failing to do basic fact-finding the way regulators told firms to do it in 1993.

Too many advisers neglect to find out enough about customers or at least write down what they do know. The Financial Ombudsman Service (FOS) is only beginning to appreciate that using a tick-box approach to understanding customers' risk appetites is inappropriate. Before they make recommendations, advisers must note the customers' attitude to a long list of subjects: average asset allocation, the limits of the types of investment that they will tolerate, the attitude to taking chances with particular areas of their finances, their willingness to accept an investment not reaching its objective, and their general objectives and the timescales for them.

This year, I have worked with advisers to develop suitability letters that grow from the histories of their client relationships, recent reviews and current fact-finding. Each recommendation must emerge from the information held by the adviser, rather than be justified by the suitability document. This helps the letter to explain the advice and disclose the risks much more succinctly.

One IFA wisely sought advice before recommending a client to put an investment in the name of the latter's wife even though the adviser had never spoken to her or discussed the subject with the client. This was not a mistake because the adviser asked for advice first!

Another IFA was not quite as smart. He rang the Institute of Financial Planning indignant (who told him to ring me saying) that FOS had upheld a complaint against him brought by a man who wanted an equity fund recommendation for funds he wanted to use within a year to buy a property. The adviser confused his function with "order-taking". All consultants have to give advice that their clients do not want to follow. The uninsured compensation bill of £16,000 could have been avoided by a £200 telephone conversation. Advice must be objectively sensible as well as meeting the client's wishes.

Although I have written extensively about the unfolding payment protection insurance scandal, that has been the extent of my involvement. A few years ago, I advised a provider against using most of the features of its plan. Ever since then, my "hostility" to the product has apparently kept me on the sidelines - oh well. Scandals tend to emerge from complicated products which contain significant exclusions. Staff who are poorly trained to give proper advice and clear explanations in this area make disaster inevitable.

Something similar and potentially more damaging affects lifetime mortgages and equity reversions (which involve the customer selling his home while retaining the right to remain in the property for life). Plans sold to customers which produce capital when the consumer needs an income create the risk of a major scandal. If the money is invested, market falls can wipe out the value of the customers' equity. Equally, sums received by customers from these plans may go into home improvements that the Council would pay for if it was asked to do so. Similarly, the provision of income to customers can reduce their state benefits. A consumer with a reasonable income and a home in good condition with no dependant family could be a perfect candidate for a drawdown lifetime mortgage designed to improve his general standard of living. However, the adviser must take care to ensure that the product he is recommending really is suitable for the customer. The participants on a course I ran on handling complaints in this area towards the end of the year took these messages on board with relish.

Sometimes, the quality of advice depends simply on product knowledge. The problem is that the FSA sometimes lacks that. So, in a mystery shopping exercise, the regulator failed to criticise some advisers who recommended investment bonds even though unit trusts would probably involve better returns due to the different taxation of the two products.

An IFA approached me with a far more difficult problem: how much does the adviser need to know about the funds he is recommending? Every firm should have a protocol for doing this which may vary depending on its knowledge of the fund managers and others involved. Asset allocation, gearing in the fund, intended changes to both, any contingent liabilities, the structure and the taxation of the underlying assets all have to come into the mixture. So must the identity of the custodian of the fund's assets, fund expenses and other factors. Increasingly, IFAs are tempted to pay others to select the funds that they recommend to customers. However, unless an adviser's client has appropriate separate agreements with both the fund selector and himself, the adviser's legal responsibility for the funds' selection remains unaffected. Even here, it would be unwise for the adviser to remain uninvolved in the choice of investments. This is not a straightforward area. Advisers need a properly documented process and professionally drafted agreements before they seek to outsource the fund selection process.

On a lighter note, I won one FOS case for an IFA who argued that the customer entered into a transaction on an execution-only basis and am well on the way to winning another. I generally support the Ombudsman's view that execution-only transactions entered into with ignorant customers relating to complicated products are likely not to be as execution-only as they seem. What made the difference in the decided case (worth a significant amount to the firm) was the considerable volume of evidence that the customer really did not ask for or want advice and purely wanted the best commission terms. A series of inconsistencies in the client's story, a proposal form with the commission number (legitimately) scrubbed out (suggesting that the proposal form had been originally produced for another firm), the sale of one product complained of through a different execution-only broker was good enough to persuade the Ombudsman to offer the firm a hearing.

In the other case, an IFA put business recommended by a Scottish solicitor through his agency without ever seeing the client or giving advice. He only produced a few quotations at the solicitors' request.

Both clients are fairly contrite at having failed to make a clearer distinction between their advisory businesses and the execution-only work they did. Neither, though, actually gave advice and, unusually, both could prove it.

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Delivering What's Promised

Most people can only honour their promises if their agreements are clear and coherent from the start. Parties regularly have difficulties identifying what the deal was. Some firms also have a tendency to think they have agreed to things that no reasonable person would ever have consented to if they had given the matter any sensible thought. The first problem has been discussed above.

The second cries out for an objective view. All too often the company makes an initial decision and feels bound to support it even though something looks wrong with it. It may be following a time-honoured approach or relying on a much-beloved policy condition. When significant numbers of customers appear blissfully unaware of a modest charge and complain about it, firms should hesitate to levy it until they are sure that customers know the implications of what they are doing. The FOS and increasingly the law applies a "reasonableness" filter to all contract terms. So, digging in heels is rarely the right approach.

Complaints

The little research that exists in this area indicates that the complainant's principal concern is to be taken seriously. Unfortunately, in its new proposals for the reform of complaint rules, the FSA is moving away from a formal approach to every complaint in favour of informal resolution. It emphasises this by continuing to allow companies to leave out of their processes cases resolved by the end of the next business day. This undermines the credibility of the regulator's complaint statistics.

At a recent training course, I picked up a couple of gems in this area. Someone suggested that the use of an exclamation mark in a letter could help to indicate that a customer was expressing dissatisfaction with the company and was, therefore, making a complaint under the FSA rules.

The same course participant also argued rightly that every complainant should receive a final response by suggesting that this represented a thankyou letter from the company. If companies are supposed to be grateful for the opportunity to resolve their problems through the complaints process, every client who contacts the business in this way should be entitled at least to a proper thankyou.

I continue to help IFAs with complaints but almost invariably at too late a stage

In spite of dire warnings from the Inland Revenue a couple of years ago, some firms still fail to deduct tax at source from interest payments. The Income and Corporation Taxes Act requires firms to make this deduction from all amounts paid that represent compensation for late payment regardless of how they are labelled.

In the Garrison case in the summer, the High Court - unwittingly or otherwise - supported a suggestion in my book about compensation. It concluded that the Ombudsman was illegally taking a short-cut in awarding a refund plus interest when it did not know what the customer would have done with money that an adviser had told it to invest in the wrong place. The High Court concluded that if the Ombudsman took the view that the only thing wrong with the investment was an excessive concentration of the customer's money in one investment, awarding a refund was irrational. Sadly, extracts from the judgement indicate that the FOS's decision on liability was not right either – the whole complaint should have been upheld on the basis that the customers did not want a guarantee (in a precipice bond) that collapsed when the relevant index breached a certain level. However, in order to derive any benefit from the process, the customer had to accept the Ombudsman's decision on that point as binding.

I continue to help IFAs with complaints but almost invariably at too late a stage, not untypically after an Ombudsman has issued a provisional decision against the firm or an adjudicator has already indicated that the complaint will succeed. This is a pity. Miracles can, however, be achieved and I had a hand in a few last year. It is, though, much easier for me to help firms before they issue their final responses to the customer.

Dispute Resolution Generally

WIPO continued to send me a steady trickle of domain name disputes to resolve in 2006. Many of the techniques I have developed when drafting Ombudsman decisions and the like have proved invaluable in this area. WIPO wants sound, efficient performance rather than intellectual brilliance in its rulings. Gradually, I am developing standard approaches to particular topics. This helps me issue decisions within an hour or two in most cases.

The most spectacular ruling I made in the last year was against a claimant. I made a declaration of "reverse domain name hijacking". A legally represented business pursued a complaint after being told clearly by the respondent's lawyers precisely why the claim would fail, namely that their client had identical registered trademarks in the relevant name and had been using it for its business longer than the claimant. Sadly, the proceedings are administrative and nobody can make an order for costs. However, questions of ethics do arise which the relevant Bar authorities might wish to consider.

On the Chartered Institute of Arbitrators Arbitration Sub-Committee, I have been mainly involved in a project to update and internationalize the Institute's Practice Guidelines. The Sub-Committee has been producing these for years and they represent a valuable source of help for arbitrators. They can either be bought as a looseleaf or viewed on the members' part of the Institute website. The new draft should be accepted early in 2007. It will, though, remain a permanent work in progress, needing regular updates or the addition of more international material.

On the Practice and Standards Committee, my main involvement has concerned the removal of the anti-solicitation provision in the Code of Ethics. Bad-taste ambulance chasing can always be punished by the equivalent of a "bringing the Institute into disrepute charge". Otherwise, though, an ethical provision that few observe in practice seems unfortunate. More importantly, any restriction on the ability of members to solicit business is fundamentally anti-competitive and so must be justified by a higher reason. Here, none exists.

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The Future

2006 proved to me that the growth in my business in 2005 was not a fluke. Its re-building after the tough period following 2001 seems to be complete. I have been re-writing my business plan to gain a sense of the future direction. It is much easier to identify areas where customers need help than to spot those where they are prepared to pay for it. Bright ideas have been welcome for the last decade. There is no reason why that should change!

All the best

Adam Samuel