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February 2011

news

Dear Friends...

On 6th January 1996, I ran a training course in Edinburgh on how to handle consumer financial services complaints. While in the previous decade, I had done a fair amount of freelance lawyer-ing, January 2011 marked the real 15th anniversary of me working for myself.

Eleven years ago, tired of addressing meaningless 'seasons greetings' cards in December, I wrote my first newsletter. It developed into the nearest thing to an annual report to shareholders that any self-employed person can produce. After all, working for oneself generally requires enormous amounts of support from a disparate group of customers, friends, suppliers and critics with many of these people playing more than one role.

Everyone is entitled to find out how their help worked out and, at the same time, people may be curious to know what I have been up to in the past year. Equally, though, I have to bear in mind the principal feedback received from the first newsletter: whatever you do, keep the restaurant reviews and travel information!

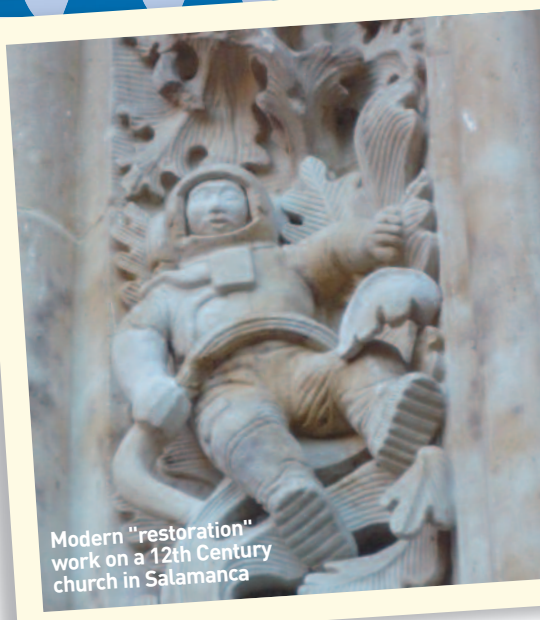
2009 was a really tough year for many people including me. My business had grown by about 22% in 2008 but the signs of a downturn were already there at the end of the year. In 2009, things went backwards alarmingly with the compliance writing and consulting markets drying up. 2010, though, surprisingly saw a return to the record highs of 2008 with the second half accounting for about two-thirds of revenues.

2010 saw me working in the usual range of improbable places. Historically, I have had something of a client gap in the East side of England. Now, I found myself buying tickets to stations as exotic as Ipswich, Loughborough and Newcastle and working again for a Leeds client. I found that I had clients on opposite sides of the main town square in North Shields in the North-East. In June I lectured in the ancient Spanish University of Salamanca after which Professor Llalas took me and Julio Betancourt of the Chartered Institute of Arbitrators to the best restaurant of the year, Momo . The three of us repeated the experience in January, going instead to the sister restaurant of the same name located in what used to be the local prison. At the same time, I continue to find the unimaginatively named "The Sandwich Bar" in Paignton, Devon consistently the best at what it does in Britain.

The highlight of my year was an extraordinary week in Hong Kong as August turned into September. The Hong Kong Securities Institute asked me to write a mini-book on the Securities and Futures Code for Intermediaries and then present 12 lecture/seminars in HK in four days. The Institute's Chief Executive, SF Wong, took fabulous care of me and we laughed far more

> **2010, though, surprisingly saw a return to the record highs of 2008...**

than one should be able to do while discussing financial services compliance. I received some wonderful hospitality from people like Philippe Consentino, Joe Kenny, Russell Cohen and cousins, Jeremy, Debbie, Ellie and Kate. A particularly memorable and thoughtful gesture came from Keith Choi and Jimmy Chan of the Enforcement Division at the Securities and Futures Commission. Knowing that Hong Kong can be quite awkward for me from a food perspective, they decided to take me and SF to the Jewish Community restaurant. I hope that they have all forgotten the ferocious going-over we received from the Gurkha security guards and that Jimmy is still recovering from his first encounter with a Matza ball.



Modern "restoration" work on a 12th Century church in Salamanca

Nearer to home, the Scandinavian Kitchen with its friendly atmosphere and Smorgasbord continues to be an unofficial extension of my office although for morning coffee it is having to cope with competition from its antipodean neighbour, Kaffeine. Dave and Bertie of the Watermill who designed my much-admired American Psycho-style business cards frequent both. Rhian of Ruby Design keeps my website in order having re-invented it some years ago. I do wish some of my clients would ask her to re-do theirs. An alternative would be Richard Herman of Arta Creative Solutions who has been laying out this newsletter with just one interruption since 2000.

Although its massive echo and excellent location make the café at the British Library an excellent place to meet clients, I remain devoted to the Golden Hind fish-n-chips and Tony Pearson's piano playing and everyone else singing at the Golden Eagle pub as the ultimate form of client entertainment. Tell me when you would like to come along. Finally, for almost as long as Richard has been designing the newsletter, Chris Hamblin has been editing it, quite apart from being the person who introduced me to both "Golden" institutions.

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FINANCIAL SERVICES COMPLIANCE

There were some signs of a nervous recovery in this market in 2010. I found myself breaking most of the rules of publishing by writing for competitors, such as Complinet and Wolters Kluwer and Financial Adviser and Money Marketing. Nobody was prepared to pay the type of money that would have stopped me contributing to the others. So I happily supplied and invoiced all of them.

I continue to write my regular monthly column for Compliance Monitor something I have been doing since September 2003. In 2010, Timon Molloy who I met singing with his friend, Chris Hamblin, at the inevitable Golden Eagle moved upstairs within CM's publisher, Informa and I've been having fun working with the new editor, Esther Martin. In the background, I am doing increasing amounts of writing for Lexis-Nexis commentaries on the Financial Services and Markets Act and the Financial Services Authority's Conduct of Business rules. There is talk of me doing more.

One of the joys of what I do on the consulting front is the variety of people and organizations I find myself working with, ranging from multinational institutions to sole traders with almost everything in between. Last year, alone, I have been helping insurers, lenders, insurance intermediaries, independent financial advisers, solicitors and contractors selling complaint handling services. Banks and other firms keep sending their staff to seminars that I run on this and similar subjects, organized by conference companies like Infoline and other consulting businesses. One of the banks concerned re-emerged as a direct client of mine just before the end of the year after a gap of over a decade.

Some of the most enjoyable and productive work has involved small independent financial advisers (IFAs). I received a startling insight into the way in which the Financial Services Authority regulates these types of businesses when an existing client called me in to prepare him and his partner for their telephone interview about the long-running regulatory initiative, Treating Customers Fairly (TCF). I looked at what they were doing in the business and suggested some improvements but fundamentally found nothing wrong. However, my real role was to teach them to speak 'TCF' in FSA dialect.

I continue to check files for independent financial advisers, helping them to improve their suitability reports and develop the discipline required to cope with a regulatory or Ombudsman-related investigation. Teaching some advisers to put in writing what they know continues to be challenging.

Sometimes, though, the rules just do not stay up to date with technology and product development. An interesting debate with one adviser centred on how one should compare different pensions where a customer is contemplating a switch to a self-invested personal pension (SIPP). This often occurs without either of them considering in advance what the client is going to do with the money once it arrives in the new product. How should one compare the charges in a traditional pension which include the cost of investment management with a SIPP which does not include the investment management expense that will inevitably be incurred in the future? An adviser can make a reasonable estimate of the cost of the investment strategy that the customer wants to pursue or that of the one that is likely to be pursued. It is essential, though, that the adviser explains which basis is being used.

> **Banks and other firms keep sending their staff to seminars that I run on this and similar subjects**

I recently heard that some insurance firms may be providing inaccurate projections of future benefits, perhaps to prevent transfers from their more expensive pension products. Independent financial advisers may have to re-do these calculations but they should call in an external actuary to check the methodology used. The FSA might like to have a look at this.

One firm had the clever idea of asking me an impossible question: how can we reduce the number of times that we lose clients when we win complaint cases at the Financial Ombudsman Service? Since by the time the customer has decided to pursue an Ombudsman case, the relationship is usually beyond recovery, it was difficult to see how I could help. The "solution" was to look at some complaint files from the start to the end of the customer relationship including the client agreement, advice given and the handling of the resulting complaint to see if anything could be improved. Unsurprisingly perhaps, in one case, the biggest mistake made was in client selection.

As already indicated, the compliance highlight of the year for me concerned Hong Kong. It was fun putting together the first handbook ever written on the Securities and Futures Code for Intermediaries. This is heavily based on IOSCO (International Organization of Securities Commissions) work. So, much of the handbook text applies equally in Europe and other parts of Asia. I especially enjoyed running twelve workshops in four days, with the invaluable support of SF Wong, the Hong Kong Securities Institute's Chief Executive. He organized three public lectures and nine private sessions within companies as part of a two-week programme for which 1600 people signed up. Leaving aside the fact that the meetings were free and counted for continuing professional development purposes, the levels of enthusiasm were extraordinary. Hong Kong has many of the problems faced elsewhere in the world, notably the need to make the transition from commission-based selling to advising on investments.

With SF Wong after one of the Hong Kong Securities Institute workshops

A discussion of the Goldman Sachs Abacus case in a number of the workshops led to a debate about the similarities between wholesale and retail compliance. In the wholesale markets, customers do not expect to receive advice and full disclosure in the same way as consumers. They do, though, have a right to have their reasonable expectations met and not be misled. This all feels like a version of Treating Customers Fairly adjusted to fit the nature of the parties involved.

FINANCIAL SERVICES COMPLAINTS AND DISPUTES

My IFA clientele keep calling me in to look at cases where their customers appear to have reason to complain against their former advisers. Strangely, my membership of the New York Bar grants me exemption from the Compensation Act and allows me to do this work without being registered with the Department of Justice (when regulation began, I sent the cheque and it was never cashed!).

People, though, only consult me on complex suitability problems. Sadly, these seem to take years to resolve at the Financial Ombudsman Service even if the firms in question have already been fined for doing very similar things. How many elderly pensioners could withstand a case now entering its third year at FOS involving both investment risk and pension fund withdrawal without some form of external help?

The logical next step from that line of work is writing expert witness reports. I did some of that too, analysing the risk elements of a particularly complex structured product. I was concerned to see in the recent Barclays Bank Final Notice a report of an independent expert asserting that a product was at the upper end of the "balanced" spectrum. These categories are notoriously meaningless. One person's "balanced" is another's "high risk". It makes more sense to describe the risk features of the product and the customers' needs, feelings, fears, wishes and aspirations and try to match them up.

On the subject of complaints, I have seen most sides of the story in the past year. I worked with a major international insurer to re-draft its complaints procedures and train staff on how to use them. One of my bigger assignments involved effectively managing a small litigation team and providing compliance support to a lender and intermediary. There, I encountered the excellent, the incompetent and the outright unethical sides of the legal profession. It was fun, though, working with a tiny team and saving the client a fortune by halving the team's workload in three months.

Otherwise, IFAs who have the courage to ask for a straight answer regularly ask me to look at complaints brought against them. This all contrasts pleasantly with my "BBC practice" in which I look at complaints viewers send into them. Even the FSA invited me in for coffee (but no biscuits) to talk about complaints and PPI problems.

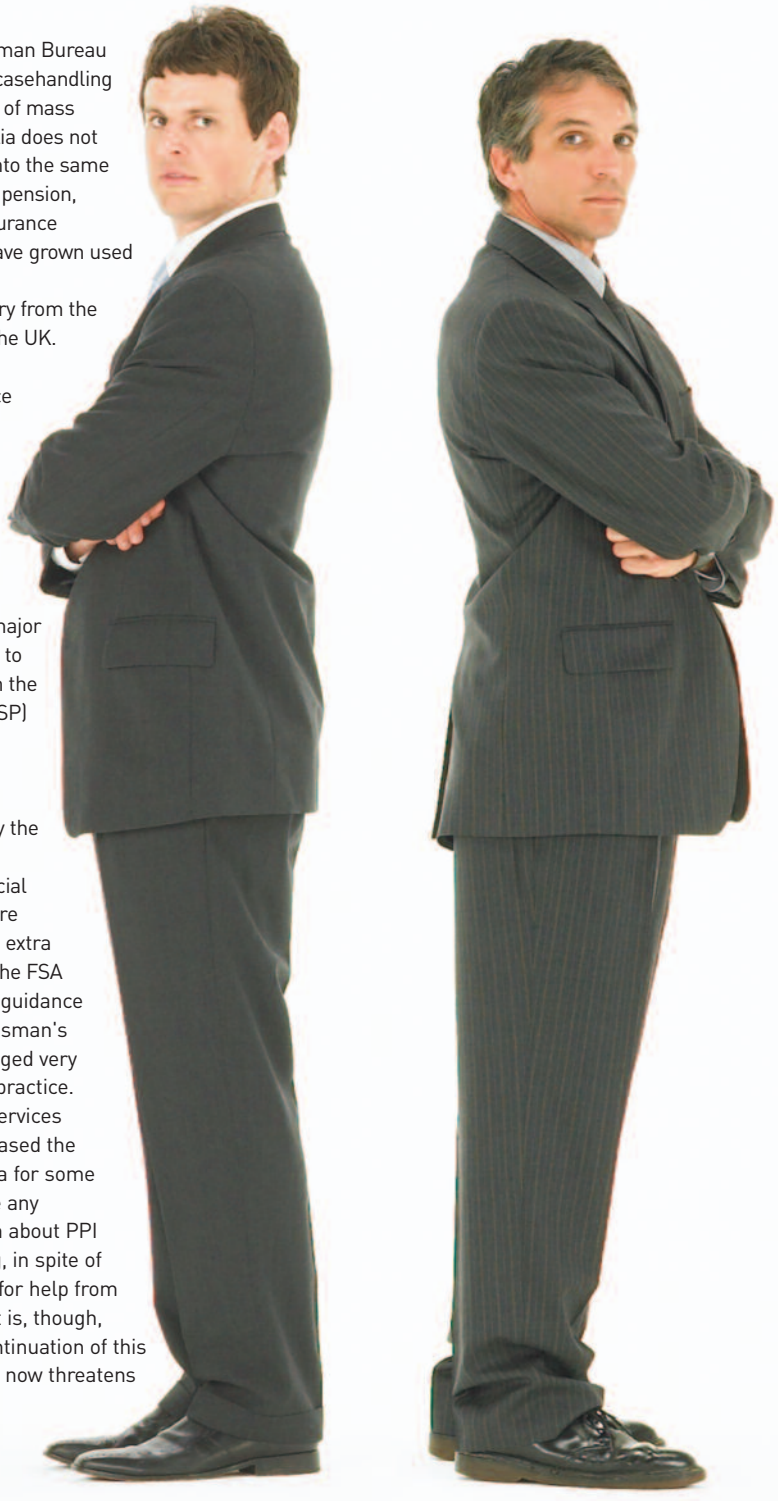
During my autumn visit to Australia, I was lucky to meet both the outgoing Financial Ombudsman and one of his adjudicators separately in a single day. Both were delightful and gave me a different view of the complaints process. It was very much like my days at the

... I encountered the excellent, the incompetent and the outright unethical sides of the legal profession

Insurance Ombudsman Bureau in the early 1990s, casehandling without the spectre of mass complaints. Australia does not seem to have run into the same string of consumer pension, investment and insurance scandals that we have grown used to in Britain.

It was all a far cry from the chaos that has hit the UK. Here, the Financial Ombudsman Service recently suggested that the payment protection insurance (PPI) crisis could give it some serious liquidity problems after a number of major institutions decided to stop complying with the complaint rules (DISP) and paying its case fees. This was "justified" by an application made by the British Bankers Association for judicial review not of the core complaint rules but extra material added by the FSA and a two year-old guidance note on the Ombudsman's website. Both changed very little if anything in practice.

The Financial Services Authority has appeased the industry in this area for some time, failing to take any enforcement action about PPI complaint handling, in spite of repeated requests for help from the Ombudsman. It is, though, shocking that a continuation of this regulatory strategy now threatens the liquidity of the Ombudsman scheme.



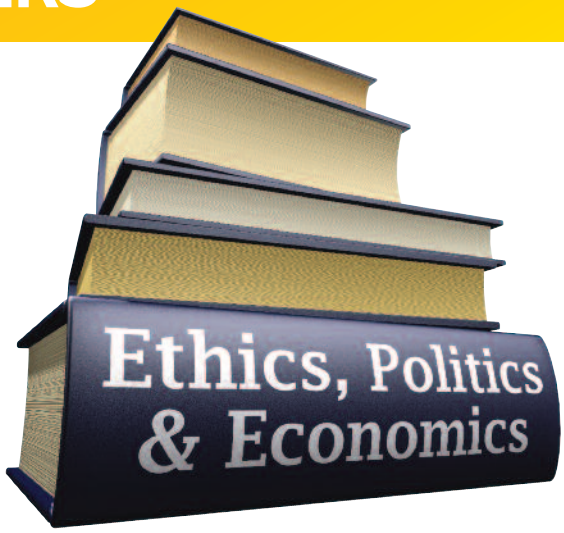
REGULATORY REFORM AND OTHER FINANCIAL SERVICES MATTERS

Being a keen but uncommitted follower of both politics and financial regulation, it has been hard to keep away from the UK's current proposed changes in both areas.

The Labour and the Liberal Democrat parties essentially promised no change to the regulatory architecture in their 2010 election manifestos. The Conservatives wanted to take prudential regulation of banks and insurers away from the FSA and give it back to the Bank of England whose disastrous supervision of BCCI had led it to lose this power in 1997. As part of the Liberal-Conservative Coalition Agreement and in spite of the electoral arithmetic, the Government agreed to move "macro-prudential supervision" to the Bank of England. Bank prudential regulation was not supposed to move from the FSA, under the Agreement, but was going to be supervised by the Bank. In breach of this, the Government has decided to create a subsidiary of the Bank of England to deal with both bank and insurance prudential matters. It has also decided (also in breach of the Agreement) to abolish the Financial Services Authority and rename it the Financial Conduct Authority (FCA). The renaming of the FSA is particularly pointless, particularly as it is not being accompanied by the sensible Conservative proposal to move the Office of Fair Trading's consumer-related powers to the new organization. That would have brought the regulation of all consumer lending under one roof.

> **I am honoured to be a member of the Institute of Financial Planning's Ethics Committee**

I am honoured to be a member of the Institute of Financial Planning's Ethics Committee. The Institute was the first professional body in the UK financial services sector to welcome me and I have "enjoyed" dealing with their disciplinary and other professional issues. I played a major part in in re-drafting their Code of Ethics which, before I looked at it, was far superior to its competitors in the field. Above all else, it states as an ethical obligation a duty to learn about an individual's ethical responsibilities. The Chartered Insurance Institute also continues to invite me onto some of its internal panels and I still write chunks of its course-book on contract certainty in insurance.



I was also delighted to welcome Derek Adams on a few visits to London for some fish and chips and singing. Through his excellent forums on the pensions and FSAVC reviews and endowment complaints, Derek did a great deal to build up my business in its early years. I still share a beer or two and even the odd curry reasonably regularly with Bruce Clark, a business consultant who predicted in 1997 that my financial services business had a good future ahead of it.

DISPUTE RESOLUTION AND OTHER LAWYERING

Dispute resolution has largely been a case of business as usual with an entertaining smattering of almost old-fashioned lawyer work.

The World Intellectual Property Organization (WIPO) continues to appoint me regularly as a panellist to judge their cyber-squatting cases, with the Hong Kong International Arbitration Centre throwing in the odd case as well. I had an amusing first experience of being on a three man WIPO panel with an Australian and a Chicagoan. I represented the mid-point between them in more ways than one. Curiously, the case concerned US common law trademarks on which perhaps the leading 2nd Circuit judgement, Centaur Communications, concerns a client of mine four minutes walk away.

For the best part of 25 years, lawyers have been asking me for help on esoteric aspects of arbitration and other law. This year featured a successful attempt to extricate a client from a potential $50 million arbitration claim unscathed and some fun French and Nigerian law in an International Chamber of Commerce arbitration. My knowledge of Nigerian employment law is now probably far superior to its English equivalent.

This year was my first as co-chairman of the Chartered Institute of Arbitrators (CIArb) Arbitration Sub-Committee. Now that the Institute's Arbitration and Mediation Practice Guidelines are available in the public section of the CIArb website, the sub-committee has become the somewhat nervous guardian of this unusual legacy of 14 years work. The job of keeping these guidelines up-to-date takes a disproportionate amount of our time.

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The issue of whether Institute guidelines constitute quasi-regulatory material has started turning up as a talking point at arbitration conferences. The suggestion is sometimes made that a failure to comply with one of them could be evidence of a breach of

arbitration law in the relevant area. This autumn, the Swiss Arbitration Association, of which I have been a member for over 20 years, kindly included, in the delegate pack for a conference on quasi-arbitral regulation, an e-mail exchange I had on this subject with the Association's President, Michael Schneider. Our sub-committee really does not want to be making law while trying to help arbitrators deal with practical issues.

With my hat on, as the person responsible for the Institute's Learned Society Activities on the Practice and Standards Committee, I found myself lecturing in the summer (on my first trip to Spain) and again in January to the University of Salamanca programme for South American post-graduates. The topics were the modern history of arbitration and its theories and the recognition and enforcement of annulled awards. This all happens, accompanied by some delicious meals and insider guided tours of the University, courtesy of Salamancar's Professor Llallas and the Chartered Institute's Head of Research Julio-Cesar Betancourt.

After doing a couple of lectures to Richard Earle's international arbitration class at the Unversity of Westminster, I have found myself teaching a full course there on Comparative International Arbitration Law (curiously following in my father's footsteps who taught medical audit there in the 1990s).

On my travels, I was able to have delightful lunches with Peter Caldwell in Hong Kong and Alan Limbury, Malcolm Holmes and John Wakefield in Sydney and enjoyed a variety of other refreshments with Colin Wall, Dennis Cai, Ricky Wong and Chris To in Hong Kong and Jeff Waincymer in Melbourne. Alex Blumrosen and Guido Carducci were similarly welcoming in Paris where I met Charles Jarrosson for the first time in almost 20 years.

On a sadder note, one of my oldest friends in the arbitration world, Claude Reymond, died in January this year. A great arbitrator, lecturer and enthusiast for all things English, Claude, along with Jean-Francois Poudret and Ines Feldman, did a great deal to welcome me into the Lausanne arbitration scene in the1980s. Claude and I had a delightful coffee there for the last time together in October in the Abbaye de l'Arc near his office. This was the scene of some of the best arbitration meetings I attended in the 1980s and the starting point for some truly heroic post-conference eating and drinking. A kindly man who played an enormous role in setting up the Hermitage art gallery and who had a hand in much that was cultural in Lausanne, Claude taught me many things. Throughout his life, he was always generous towards young people, often involving them in his work. One result was that he never seemed to lecture to an empty audience in his home town. He also felt that enjoying things other than work was crucial, passionate as he was about art, history, music and his family.

Claude and I also shared a passion for the idea that lawyers need to learn the history and basics of the arbitration-related concepts that are so widely bandied around not always accurately. It is worrying how often key terms in this area such as "competence-competence" and "separability" are used incorrectly even, in 2010, by the US Supreme Court.

And finally...

It only remains to thank my many friends around the world for their kindness, support, encouragement and criticism (mainly of the constructive variety). I like to think that I have travelled a long way since January 1996 when John Semple at Standard Life told me that my original financial services complaints course was great although the visual aids left a great deal of room for improvement. What has not changed is my commitment to providing independent advice and help to clients in all walks of life and making friends and enjoying myself along the way.

Wishing you the very best in 2011