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news

Dear Friends...

It is that time of year again. When I first started working for myself in 1996, I thought that one ought to send copious numbers of Christmas cards to clients or potential ones. Then, the penny dropped with me; people did not associate me with Christmas in the slightest. They did, though, expect me to tell them what I was doing regularly and above all else, where I was eating. This gave birth in 1999 to this Newsletter, a sort of Annual Report to people involved in what I do in a variety of ways - as clients, advisers, interested onlookers and friends.

2012 was the fifth consecutive year in which the UK and much of Europe spent time in recession. It has not been easy to run a consulting business, focused mainly on the financial services industry, in such a period, although it has produced my two best years.

In the last twelve months or so, I have been a little more collaborative than before, engaging Bruce Clark to act as my business adviser and Jan Meek to spend the odd Herculean day sorting out my paperwork. In 1997, Bruce did a review of my business and we have stayed friends ever since. I first met Jan at the monthly Serpentine 5K race in London's Hyde Park some years ago (when I ran what is still my personal best for that distance). We started walking up the Thames Path as a result and finally reached the source this year. This was despite much of the last leg resembling a swimming pool more than a footpath.

31st December marked the end of a 10-year period as a member of the Chartered Institute of Arbitrators, Arbitration Sub-Committee, 7 of which were also spent on the Practice and Standards Committee. The sub-committee which I chaired for the last four years finished its project of converting all but two of the Institute's practice guidelines for arbitrators into versions for English and international users. I am still happily a member of the Institute of Financial Planning's Ethics Committee.

All this committee work stemmed in part from a conversation I had many years ago with some former colleagues from my Insurance Ombudsman Bureau days. We agreed that we were no longer young enough to qualify to be "angry young things" and that it was about time we started running something.

I continue to do a large dollop of cybersquatting arbitrator work for WIPO and the Hong Kong International Arbitration Centre. At the same time, I am becoming more involved in my local University, Westminster, where my father taught medical audit many years ago. I have just started running my comparative international arbitration course there for the third time while doing "guest" slots on other courses. Apart from running a really good programme, our course leader, Simon Newman, shares my vision of academia as something to be achieved over a pleasant meal or a glass of

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something - or is it the other way around?

I still treat my local coffee shops, notably the Scandinavian Kitchen and Kaffeine, as extensions of my office. The Golden Hind, in Marylebone Lane, is now consistently voted the best fish-n-chippy in London. Its regulars could have told you that fifteen years ago. It has the additional merit of being just around the corner from the Golden Eagle where I still sing songs from musicals and music hall with a crowd of old friends on Tuesdays and occasionally Thursday evenings. The London Review of Books café behind the Chartered Institute of Arbitrators off Bloomsbury Square has been the scene in the last year of meetings about Barbados, financial planning, as well as arbitration. Probably the best restaurant meal I ate on my travels in 2012 was at the Pine Marten in Harrogate.

In the south-west of England, I ran my first training course ever this year in Exeter, a city where one my ancestors came to live in about 1800. It was a lovely excuse to spend the afternoon with cousins, David, Margot and Chris. Up north, I gave a talk on the retail distribution review to the local branch of the Chartered Insurance Institute and enjoyed a lovely dinner with its president and my old friends, Veronica and Stephen Wilkinson and Tom and Rosemary Bellin. In the late 90s, Tom hired me to run complaint handling training courses for a major life assurer that he worked for at the time and introduced me to his wife whose insurance brokerage (which she sold some years ago) has been finding me my professional indemnity insurance ever since.

Journeying south, I managed some trips to Switzerland to see my old employer, the Swiss Institute of Comparative Law, and attend the annual meeting of the World Intellectual Property Organization cybersquatting panellists in Geneva. This enabled me to see the special friends I have in that part of the world, like Nicolas Ulmer, Douglas Reichert and Ines Feldman, not to mention my successors at the Institute, Karen Druckman and Martin Sychold and former colleagues like Christiane Serkis, Andreea Braendlin, Karolina Stransky and Martine Do-Spitteler.

I managed a trip to Paris two days after knee surgery to meet my cousin Viva Hammer (tax lawyer but also an extraordinary writer for the Jerusalem Post) and her wonderful mother, Gael. This enabled me to enjoy my usual arbitration lunch there with Alex Blumrosen (another I first met in Lausanne in the 1980s) and Guido Carducci. It was lovely that Laurie Craig and Charles Jarrosson also joined us to enhance the esprit de corps.

I do appreciate feedback from these newsletters. My personal favourite from last year referred to "your knack of turning law into a series of lunches and something that sounds interesting and a journey of exploration in a Chandleresque world".

As ever, this newsletter is divided into the various work areas in which I operate. You can always skip to the bits that interest you although, hopefully, you will find the whole thing diverting.

FINANCIAL SERVICES

The two key developments in the UK financial services world were the passing of the Financial Services Act 2012, a piece of legislation designed almost gratuitously to complicate lives and the retail distribution review (RDR), a fundamentally good idea not well executed in places. My work this last year has operated against the background of the muddle created by both.

The Financial Services Act amends the already tortuous Financial Services and Markets Act by replacing the current Financial Services Authority (FSA) with two regulators. The Financial Conduct Authority (FCA) will regulate all firms as to their conduct of business. The Prudential Regulatory Authority (PRA) will be responsible for the solvency of banks, insurers and key investment firms, leaving the FCA to regulate this aspect of other businesses. Previous newsletters have railed against the fairly obvious breach of the Coalition Agreement that this entails.

The sheer act of replacing "Services" with "Conduct" in the FSA's name has cost vast fortunes in fresh logos, new publications, rulebooks and sheer annoyance.

For firms, supervised by both the PRA and the FCA, banks, insurers and major investment firms, handling two regulators with no central clearing house seems likely to add extra layers of needless bureaucracy with everyone trying to work out which applications and notifications have to go where. The co-ordination and consultation work required between the two entities is mind-boggling.

Perhaps naively, I had hoped that the legislative process could have cleared out some of the more annoying mistakes in the Financial Services and Markets Act. This has not happened. There were lengthy pointless Parliamentary debates about the objectives of the regulator and how the Governor of the Bank of England was going to be selected. My local MP tabled three amendments that I put together to straighten out known problems with the complaint handling provisions and the notorious section 166 under which the regulator can order a firm to appoint a person to investigate the firm itself. The fate of each proposed amendment was curious.

The simplest change would have been to delete from Schedule 17 of the Financial Services and Markets Act the obligation on the part of the Financial Ombudsman Service to register awards before they can be made enforceable. In the *Heather Moor* case, the Court of Appeal remarked that the FOS' internal data base was not really a register since it was not open to the public. Removing the requirement would have cost nothing and eliminated a possible unmeritorious ground for refusing to honour Ombudsman decisions.

My next proposal would have made it clear that, whenever the Financial Ombudsman Service orders a firm to pay the maximum amount that the regulator allows it to award (for complaints filed at present £150,000 plus costs plus interest on both figures) and then recommends further payments, the successful complainant should be allowed to accept the decision, receive the payment and sue for the difference. This would have reversed the decision in the *SBJ* case which applied the obscure "merger" doctrine to Ombudsman decisions. This meant that the FOS decision transformed the customer's right to bring a claim against the firm into a right to enforce the Ombudsman's award and nothing else.

Then, just before the end of the year, Mr Justice Cranston (better known as the author of a leading text on consumer law) decided that the merger doctrine did not apply to Ombudsman's and that anyone whose complaint the FOS upheld was entitled to sue for any amounts above the maximum award limit. There is a possible problem here with the wording of section 228(5) of the Financial Services and Markets Act which reads: "If the complainant notifies the ombudsman that he accepts the determination, it is binding on the respondent and the complainant and final." It was assumed by Sir Michael Barnes who used to deal with complaints against FOS that this meant that, since the determination was final, no further litigation could follow. I campaigned unsuccessfully when I was a PIA Ombudsman for the regulator to create what is now the Mr Justice Cranston result.

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Perhaps, Mr Justice Cranston is right on both points. First, the notion that the determination is "final" in section 229(5) only relates to the maximum award. Section 228(5) does not refer to the recommendation made by the Ombudsman or any other amounts. Secondly, it is highly doubtful that an Ombudsman's decision is a judgement for the purposes of the merger doctrine when leading experts in this area (Mustill & Boyd) do not believe that the doctrine applies even to arbitration awards. In any event, the merger doctrine cannot apply to an Ombudsman's decision as regards a part of the case which the Ombudsman was never entitled to decide.

At the very least, Parliament should

have made a decision on the point when it was offered the chance. The problem is not purely academic either. In the past year, both the FOS and the Court of Appeal have upheld claims brought by investors in connection with the AIG enhanced fund which exceed the relevant award limit. The FSA now has to deal with increasing evidence of swap misselling to property developers. These involved the sale of highly complicated derivatives to businessmen who knew about property but not about this type of thing. The FSA seemed to order the banks to make compensation offers last summer but payments are taking a long time to materialise.

The Act does change section 166 of FSMA for the better. It gives the regulator the choice of appointing a "skilled person" to investigate the firm itself, instead of having to require the firm to make the appointment. The Authority can then charge the cost of its own "skilled persons" appointments to the firm if it so chooses. My amendment would have gone further and removed the regulator's power to order a firm to appoint its own "skilled person" and allowed the FSA to charge only those against whom it subsequently took successful enforcement action. This would have reduced the current potential for abuse in this area. The regulator needs to move away from its current practice of ordering firms to obtain assessments from outside "skilled persons" on how badly these businesses have behaved. The whole idea is riven with conflicts of interest. People I respect have told me that I will never receive a section 166 appointment from a firm that knows what it is doing. I would, they think, be far too likely to uncover problems or "areas for improvement".

It is unfortunate that the retail distribution review (RDR) rule changes came into force on 1 January 2013 while the Financial Services Authority was splitting up. I am basically in favour of the RDR. The key reform is the ban on product providers buying distribution by fixing the rates at which the advisers are paid. Advisers can still take commission (now called an adviser or consultancy charge) but they will have to agree it with the client. While this is unlikely

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ever to become a really freely negotiated arrangement, the RDR puts the onus on the adviser to decide how he or she will be remunerated and forces him or her to come clean about the value and cost of what the client receives. Many firms have been doing something similar for years. For some, teething problems are inevitable. In 2012, I have been updating client agreements for existing customers to take into account the new changes and have drafted a few more.

Another element of the RDR that I strongly support is the need for advisers to pass exams of the kind that I did many years ago. A key element of giving financial advice is the writing of suitability reports which contain the reasons for the recommendations made. This is a very similar task in practice to putting together an essay under exam conditions. The FSA signalled the increase in the qualification requirements six years ago. So, there is no real excuse for advisers not having the correct exam passes. One effect, though, of this new rule is the increase in the number of advisers who are not entitled to advise any more.

Tell-tale signs of individuals advising while not approved by the regulator are suitability reports signed using an electronic signature or "pp" the actual adviser. Another give-away is a suitability report referring to "my meeting" with a client whom the approved person named at the end of the letter has never met.

The RDR changes have not done so well in widening the definition of independent adviser to require such a person to advise on the entire range of investments including products such as individual shares that most IFAs are quite ill-equipped to recommend. The idea that an independent adviser reviews every possible option when giving advice is something of a myth anyway. Competent firms in this area have preferences for particular products. So long as these are kept under regular review, this does not matter. Anyway, some compliance officers have become over-twitchy as to whether their firms are really independent advisers in the sense of reviewing the entire retail market every time they give advice. As long as everything relevant to the business' clients is kept broadly under review and recommendations are actually suitable and tailored to the customers' needs, wishes and aspirations, there really should not be a problem. There should be more concern about advisers automatically recommending one platform on which to hold investments,

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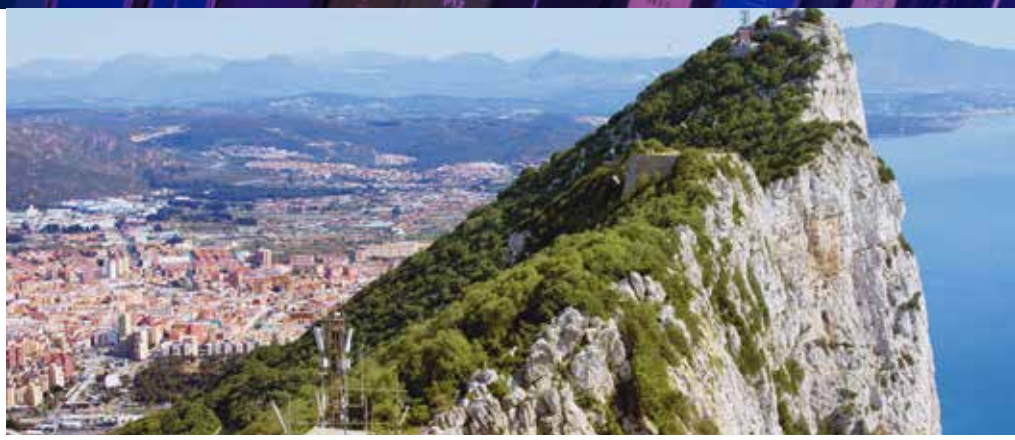


given that some clients would be better off without one and others need particular providers in this area.

One side-effect of the RDR has been an increase in interest in ethics. As a member of the Institute of Financial Planning's Ethics Committee, I spent a fair amount of 2012 on our second revision in recent times of the Code of Ethics. This has brought me a number of invitations to speak at events on this subject, notably at the Institute's Annual Conference where I shared the 9 AM slot, the morning after the annual dinner, with our new chairman, Andrew Brooks-Dobson. The room was surprisingly full and the biggest criticism I heard afterwards was that the session was not long enough. (Both speakers fulfilled their traditional obligations by being in the Bar until after 2AM the night before.)

The nervousness of compliance officers about the detailed application of the complaint rules reared its head on a number of occasions in 2012. Fortunately, through an old friend at the FSA, I was able to obtain clear and accurate replies to a couple of questions that firms wanted me to ask the regulator without revealing their identities. The first answer was that a letter containing complaints about three different things is one complaint (it is only one expression of dissatisfaction) and the second was that 5PM is the end of the business day for the "end of the next business day" rule (I originally guessed that the answer was 5.30 but it is a subjective thing).

When I handle complaints, I insist on providing an explanation of what I think has gone wrong and suggesting improvements to avoid a recurrence of what has happened. As a development from this, I created a new product in 2012: "why did this go wrong and what can we do prevent a recurrence" reports for major compliance problems. If I am allowed proper access to all the paperwork, this can be a very fruitful and fascinating activity. One has to avoid the mistake of assuming that every small slip was the reason why something went wrong. It probably was just an insignificant error. The key is to identify each of these problems and work out a programme, typically of procedures reviews and training to prevent a recurrence without trying to work out exactly what caused which concern. Even better, this type of review can put the business on much more secure foundations. I have always done some procedures drafting but the last few months have involved a large quantity.

A feature of my compliance work in 2012 was my increasing use of materials from outside the UK to advise UK clients and the other way around. Early in 2012, I finished writing an "expert report" on Gibraltar financial advice standards where the relevant material could be found in a combination of the Rock itself, the UK, Hong Kong and the Channel Islands. We are approaching the position where expert evidence on UK compliance would have to consider material published in other major financial centres. Those instructing me in Gibraltar were pleased to find that the key to the dispute was in a case study presented on the Hong Kong Securities and Futures Commission website and the Court decisions there, in the *Barber Asia* case.

Otherwise, my year has been the usual mix of file reviews to ensure that advisers are up to scratch, fixing problems within firms and training them to handle issues that they face. I have worked with not just financial services practitioners but also software developers keen to develop their expertise and thereby improve what they offer their clients. This has included training and advice delivered directly to these businesses' customers.

In February, I delivered a London Insurance Institute lecture in the Lloyd's Old Library on the new media, financial promotions and compliance. My childhood friend and advertising guru, Rob Norman, kindly supplied me with his client presentation on the range of new media and how they work from an advertising perspective. The financial services industry does not seem to appreciate the compliance problems that it generates when talking about products on "twitter" and other "flash" media.

For many years, I have worked happily with Infoline on its conferences and workshops on subjects such as complaints, advice standards, financial promotions and increasingly product development. Companies who have never been my clients send their staff to my Infoline workshops. Richard Horsler and his team of people like Rhys Davies and Theresa Mann have kept me on the straight and narrow and we will be working together on more workshops on these types of subject in 2013.

Infoline's sister company, Informa, publishes my articles monthly in Compliance Monitor under the stern but delightful editorial eye of Esther Martin. Mary Stevens at Compliance Resource Network (Wolters Kluwer) commissions most of my regular writing on financial services compliance and laughs almost as loudly as I do. I still do the odd piece for Complinet as well. Lexis-Nexis have me writing its Butterworths Regulatory Service commentaries on complaints, the code for approved persons and large chunks of the Conduct of Business Sourcebook (mainly the fiddly bits). I also write large swathes of their online commentary on the Financial Services and Markets Act. You might expect me to write their material on the Financial Ombudsman Service, authorisation, disciplinary measures and the Upper Tribunal. For some years, though, I have also tackled the infamous Part 6 of the Act on the listing, prospectus and disclosure rules for companies and am now doing the parts on insolvency and investigations as well.

Finally, a client suggested to Bruce Clark (my extra business eyes and ears) that I ought to send out 4 compliance tips each month. If you are not receiving copies and would like to see them, tell me. Past issues of the "tips" appear on my website's writing page along with this Newsletter and my lecture on new media.

ARBITRATION AND OTHER LAW-RELATED STUFF

I have continued to judge or arbitrate a regular stream of cyber-squatting domain name cases for World Intellectual Property Organization (WIPO) plus the occasional case for the Hong Kong International Arbitration Centre. My experience of diving around in comparative law libraries still brings me work finding obscure cases and materials on various African countries.

The big news for me is that, on 31st December, I finally came to the end of 10 years on the Arbitration Sub-committee and 7 on the Practice and Standards Committee of the Chartered Institute of Arbitrators. The sub-committee, which I have chaired in recent years, completed its work of producing and updating three sets of versions of the various Institute practice guidelines for arbitrators. Two were left out of this, one (on interviewing arbitrators) which applies universally and another (Proceeds of Crime Act) which requires specialist input from around the world on the important issue of how an arbitrator handles money laundering issues. At the time of writing, Institute politics has prevented the updates from going up on the Institute's website. Contact me if you want copies.

In recent years, the Institute has greatly strengthened its support for the sub-committee with a new Director-General and the excellent committee secretary (now sadly departed for Dublin), Naoimh McNamee. The bookshop luncheon club, consisting of me and some Institute staff, met countless times in 2012 in the London Review of Books shop behind the Institute.

This year, for the third time, I am teaching my comparative international arbitration course at the University of Westminster. Simon Newman and Richard Earle are really unsung heroes here. Richard is my boss and is relentlessly encouraging. He also invites me annually to speak to his class. This year, I fulfilled an odd ambition to do a talk on SEEE v. Yugoslavia, a case which essentially lasted from 1950 until the late 1980s and triggered a whole string of good (mainly efforts to prevent a repetition) and bad developments in modern arbitration. It was fun to discover that the railway line which was the subject of the

dispute is still running in Macedonia.

Simon organizes excellent social evenings and encourages students and faculty alike, through various social media, to show up for a whole range of good academic events. Simon's deputy head of the Commercial Law LLM programme, Catherine Pédamon, let me loose on her corporate responsibility students and I duly delivered what felt like a two-hour rant about how the FSA has wasted its excellent idea of Treating Customers Fairly. (Professor Dalvinder Singh of Warwick University invited me to do something similar in January this year.)

Elsewhere in London, there is a growing scene of lectures and mini-conferences on arbitration which are free and open to outsiders. Jan Kleinheisterkamp of the London School of Economics has continued to host arbitration events of interest and Loukas Mistelis at Queen Mary and Westfield College has now joined in. Perhaps, this is extending to financial services. I ran into Catherine Pédamon and Professor Eva Lomnicka of Kings College London, at a University College London event on treating customers fairly in the wholesale markets. Eva and I regularly meet to chew over financial services developments and pizza broadly simultaneously.

I am always delighted to maintain my old Swiss arbitration friendships and make a few more. Nicolas Ulmer and I have worked on a variety of cases in various different capacities over the years. He and Douglas Reichert have been successfully persuading me to eat dessert for years. Doug was a great help on the sub-committee in the last few years. The same is true of Sebastien Besson with whom I managed to catch up on my October trip to Geneva. On that occasion, I took up Pierre Lalive's offer of lunch which was delightful. He and I could also share memories of our mutual friend, Claude Reymond. Claude believed strongly, as I do, that lawyers need an intellectual grounding in arbitration and its stories.

When my old employer, the Swiss Institute of Comparative Law, finds itself short-handed, I join it to work on a glorious range of strange research projects typically commissioned by the Swiss Government on foreign law.

THE OLYMPICS

I could not end this newsletter without saying something about the biggest show in my home town last summer. I have written about it in more detail in my excellent free local newspaper, Fitzrovia News, which you can find online.

25 years ago, I was prowling the English section of the Swiss Institute of Comparative Law library when I met Karin Sinniger who was preparing for law finals at my old University. We swiftly became friends and have stayed in regular contact ever since, in part due to our wonderful mutual friend, Kent McKeever, of Columbia University in New York. Karin works for a certain oil company that sponsored the London Olympics and received a merit award which included three sets of Olympic tickets and a programme of related events for her and a spouse, partner or friend. In the absence of the first two, she selected me as the third.

We went to water polo, beach volleyball and fencing. The beach volleyball was enormous fun with real world-class athletes. The highlight, though, was the sensational venue, essentially just behind the Prime Minister's back garden.

At a corporate reception, Karin and I met a certain Michael Johnson before he gave a typically polished speech. Although Karin had absolutely no idea who Mr Johnson was when they first met (I had to pull her aside for a quick list of Olympic gold medals and world records, past and present), she has since met Mr Johnson in Angola where she works and now sends me photos of her and her new friend.

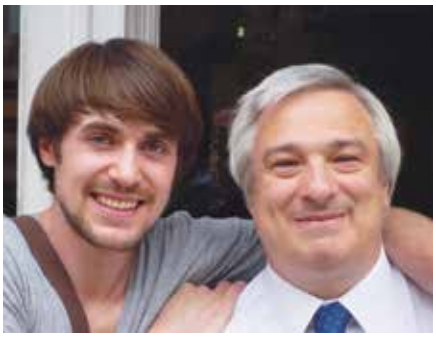
After that, I made it to more beach volleyball and the ladies' open water swimming. Sadly, though, I did not manage to obtain a ticket for the Paralympics although I watched it with almost religious fervour on the telly. The ticketing was truly appalling for both Games, leaving me with a strong sense that if we had had two tries at the Olympics and Paralympics, it could have been (even more) sensational. I really loved the fact that the founder of the Paralympics was a German Jewish refugee with the fabulously appropriate name of Dr Guttman.

And finally... A FEW THANKS

I am lucky to have a crowd of friends in London, Paris, Lausanne, Geneva , New York and a variety of other places around Britain and the world. The financial services compliance world can be a lonely place for the self-employed.

The Scandinavian Kitchen, Great Titchfield Street, has hosted regular meetings between me and most of the cast of characters mentioned in this newsletter. Sebastian who has run the counter at the Scandi since it opened is going back to Sweden this year. His unfailing kindness, customer-hugging and ability to fix mobile phones are legendary in this neighbourhood.

Malachy McClelland goes back to my Insurance Ombudsman Bureau days and regularly shares with me the loneliness of the long-distance compliance person. From those tough days in the early 1990s handling complaints, I still treasure delightful friendships with him, Elisabeth Bingham and Catie Keynes. The wonderful Andreea and Jean-Nicolas Braendlin, their sons and Andreea's mother, Rodica continue to provide



Sebastian from the Skandi and Chris Hamblin

me with a family in Lausanne. It is now more than a quarter of a century since I used to play monopoly regularly with Andreea. They have regularly put me up in their second flat in Lausanne (across the corridor from the rest of where they live) for many years. So, it seemed only reasonable that I should do the same for them for the Olympics.

Rhian of Ruby Design helped me re-design my "compliance tips" and keeps my website in as good condition as I allow her to. Dave and Bertie of the Watermill suggested that I should substitute a sports quiz for the compliance tips (even then they could not answer the cricket question I set them). Dave designed the original American Psycho cards I use. Richard Herman of Arta Creative Solution has been responsible for the newsletter design since my late mother introduced me to him through his friend, Gavin, with whom she was working at the Jewish Free School about 12 years ago.

Chris Hamblin edits anything of mine that he can grab hold of before it is circulated, including this newsletter, and tolerates me nagging him to finish whatever he is writing, often in my sitting room (sometimes called the "writing sweatshop" or the "compliance factory").

It remains only to wish you a successful and enjoyable 2013.