The Attic,
117 Priory Road,
London NW6 3NN.

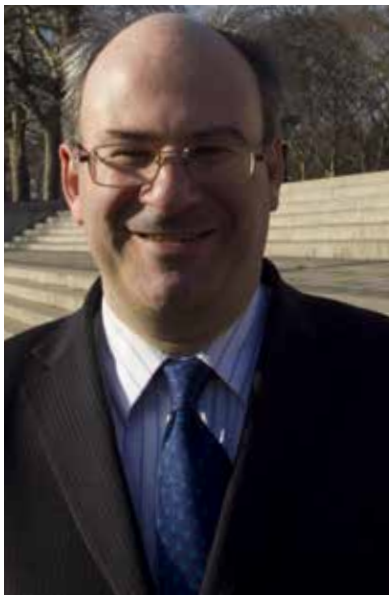
0207 625 4743
07900 248150
E: adamsamuel@aol.com
W: www.adamsamuel.com

April 2016

Adam Samuel News

Dear Friends...

It was twenty years ago, on 6 January 1996, that I started my current business. Standard Life hired me to run a training course on financial services complaint handling in Edinburgh. On the actual twentieth anniversary of the date, completely oblivious to its significance, I climbed Table Mountain in Cape Town and, on the top, ran into Mario d'Sa, a member of the Nationwide pensions review team I ran several workshops for in the late 1990s.



The date, 6 January 1996, is actually slightly misleading. I have actually been doing bits of freelance work since the late 1980s, helping arbitrators and lawyers with fiddly international disputes and doing some broadcasting on a combination of banking and sports law.

2015 was not the easiest year I have ever had. This was largely due to the huge effort required to write the second edition of my complaints book. The Financial Conduct Authority (FCA) did not make matters any easier by announcing rule changes in the summer which came into force in July and more alterations which will only be implemented in June 2016. The real problem, though, is the sheer volume of material and variety of issues that have emerged on retail compliance problems since 2005.

In January 2016, my travels finally took me to Africa for the first time. The nearest I had come to this was receiving a text message welcoming me to Morocco while walking the rock of Gibraltar in 2014. Karin Sinniger, a friend who I met in the English section of the Swiss Institute of Comparative Law Library in the late 1980s chose to marry reasonably near the stunningly beautiful Cape Town in January. In that part of the world, though, the lingering horrid scars of apartheid force the visitor to think every moment about the price one pays for beauty. The District Six Museum, near the centre of Cape Town, which commemorates the area of that name designated all-white in 1966 is, for all its many flaws, definitely in my top-ten to visit in the world.

As with so many previous years, the kindness of two friends from the late 1980s enabled me to enjoy trips to Switzerland. Andreea Braendlin and Myriam Valette actually studied together at Lausanne University when I lived there. They and their families continue to give me a home away from home. If you are ever in Sion, Myriam's home town, you should definitely visit the surprisingly good history museum. Otherwise, my most exotic work venue was probably the Lowry Center in Salford Quays, near Manchester which provided an on-site art gallery of match-stick men during lunch breaks in a week's training I did there in the summer. My connection with the University of

Designed by Arta Creative Solutions Ltd 020 3857 4170 www.artacreative.com

DEAR FRIENDS CONTD.

Westminster provides me with library and online facilities near my old base in Fitzrovia. In Great Titchfield Street, near the University Law School, the Scandinavian Kitchen continues to be rightly regarded by many as "my office". This spills across the road to Kaffeine. Both provide excellent informal lunches as well as coffee. I ought to mention also the long-established HT Harris in the same street. I have known Giovanni who runs it for over 25 years. He and his son, Danny, administer to the neighbourhood Kaffeeklatsch and provide the best and probably cheapest expresso in the area. The top croissants encountered in 2015 and good competition for Paris' best, were made by Aux Pains de Pappy, in Grays Inn Road, near Kings Cross station.

On the restaurant front, Sarracino, my local Italian in West Hampstead, can hit real heights. People, though, still come from the various corners of the globe and demand to be taken to the best fish n' chippie in London, Mr Christou's Golden Hind, in the West End's Marylebone Lane.

Through all this, I have to keep in some type of shape. Michael Burgess still leads the best fitness class I have ever attended, at the University of Westminster Gym in the gorgeous early 20th Century main building of the old Regent Street Poly. His extraordinary encouragement of the less mobile mixed in with hissy-fits that only a real ex-dancer can do is one of the lesser known high spots of London's West End.

As usual, my work is split reasonably neatly into the worlds of financial services and dispute resolution. These two areas sometimes collide in an odd way.One effect of an increasing proportion of grey hair is the way in which people ask me for quite general help with their businesses and personal "disputes". It is difficult to put a monetary value on insight or commonsense. However, this type of work often involves highly entertaining issues and generally calls for an understanding of people rather than the applicable rules and laws. Often enough, doing the exact opposite of what conventional legal practice would suggest is the only way to resolve the problem.

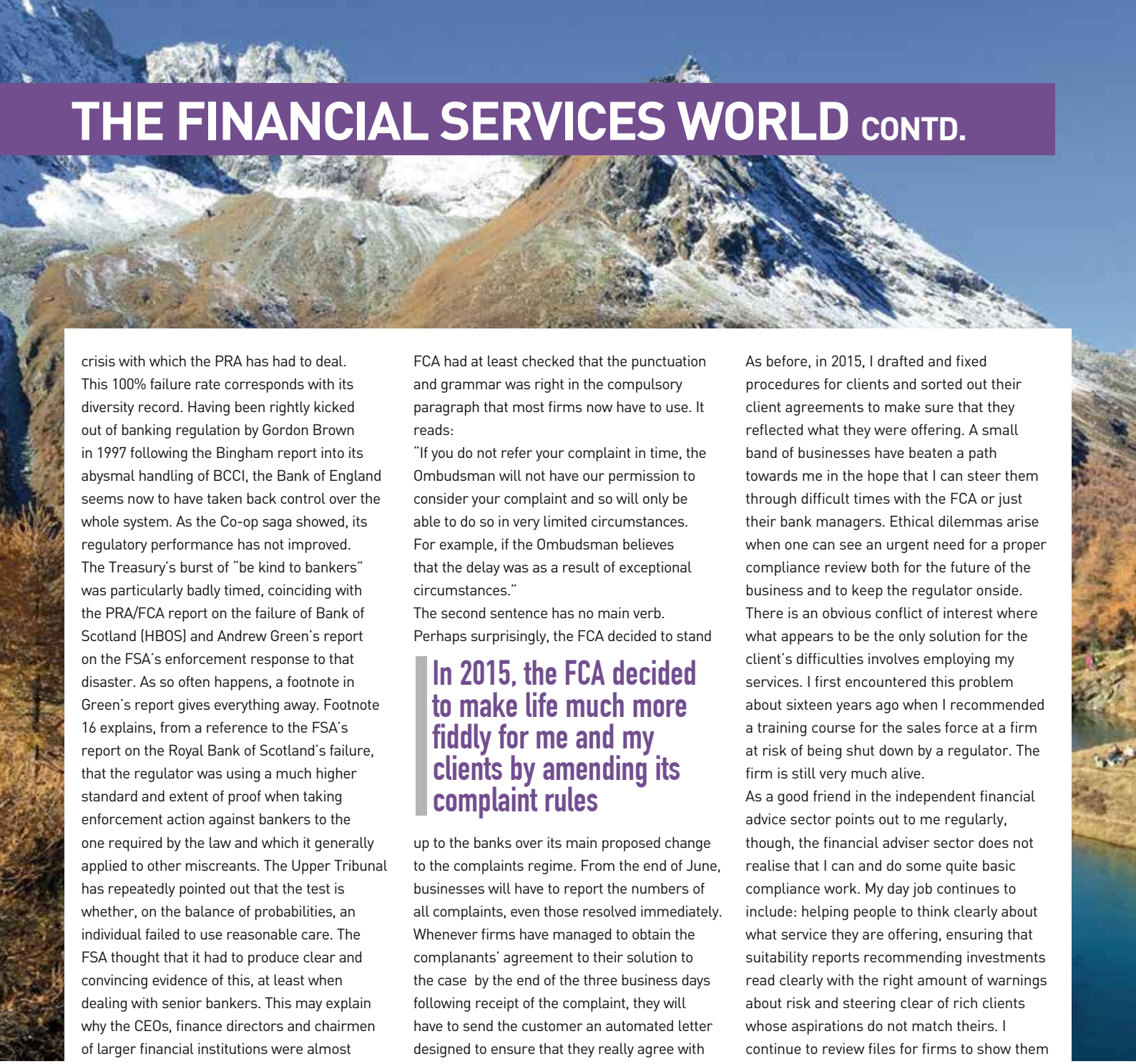
THE FINANCIAL SERVICES WORLD

From a bigger picture viewpoint, the last year has been shocking for financial regulation. The Simon Davis report, discussed in the last year's newsletter, found that the Financial Conduct Authority (FCA) had acted irresponsibly in pre-briefing a market sensitive part of its Business Plan and dithered when share prices started to move as a result. This made it impossible for the Treasury to offer a new contract to Martin Wheatley, the now departed chief executive of FCA. He left early in the autumn with no regrets on anyone's part.

Unfortunately, the same Government department thought that it would be clever to tell the world that it felt that its regulator should now be gentler with the banks. Since the only version of regulation to which the banking industry responds positively is the threat of personal enforcement action, this behaviour constituted a form of regulatory vandalism. There are previous precedents, notably a particularly dim letter from Tony Blair to the then Chairman of the Financial Services Authority in 2005 which he accused of being "seen as hugely inhibiting of efficient business". The events of 2007-8 made everyone regret that the regulator had not been more "inhibiting".

Wheatley's departure led to another re-shuffling of departmental heads at the FCA. The new acting Chief Executive (and there has been quite a bit of "acting" at the FCA in the last few years) ended up as head of both enforcement and supervision before making it temporarily to the top job in less than a year. Wheatley had even given her responsibility for dealing with the regulator's appalling (or to be precise, amongst senior management, non-existent) diversity record. This smacks of John Major whistle-stop tour of major Government posts that ended up in 10 Downing Street in 1990. Unlike the "honourable" member for Huntingdon, Ms McDermott is now looking for a proper job, following the Treasury's permanent appointment of Andrew Bailey as the FCA's Chief Executive.

The Treasury has just shuffled Bailey from being the head of the Prudential Regulatory Authority (PRA) at the Bank of England into running the sister regulator. This is in spite of the fact that Bailey has no experience of customer-facing regulation and ran the PRA when the Co-operative Bank was allowed to bid for a sizeable number of Lloyds Bank branches without being able to afford them. The subsequent failure of that bank represents the result of the only part of the banking



THE FINANCIAL SERVICES WORLD CONTD.

crisis with which the PRA has had to deal. This 100% failure rate corresponds with its diversity record. Having been rightly kicked out of banking regulation by Gordon Brown in 1997 following the Bingham report into its abysmal handling of BCCI, the Bank of England seems now to have taken back control over the whole system. As the Co-op saga showed, its regulatory performance has not improved. The Treasury's burst of "be kind to bankers" was particularly badly timed, coinciding with the PRA/FCA report on the failure of Bank of Scotland (HBOS) and Andrew Green's report on the FSA's enforcement response to that disaster. As so often happens, a footnote in Green's report gives everything away. Footnote 16 explains, from a reference to the FSA's report on the Royal Bank of Scotland's failure, that the regulator was using a much higher standard and extent of proof when taking enforcement action against bankers to the one required by the law and which it generally applied to other miscreants. The Upper Tribunal has repeatedly pointed out that the test is whether, on the balance of probabilities, an individual failed to use reasonable care. The FSA thought that it had to produce clear and convincing evidence of this, at least when dealing with senior bankers. This may explain why the CEOs, finance directors and chairmen of larger financial institutions were almost immune from enforcement action by the FSA. The rest of the Green report shows that the regulator only went after what it perceived as the easy targets at the banks that failed in 2008. It took action only against the heads of department that lost most money. They did not even do this competently with respect to HBOS, failing to divide the losses by the amount of capital invested . If they had done the calculation properly, the FSA might have gone for the head of HBOS International Division rather than the boss of its Corporate equivalent.

In 2015, the FCA decided to make life much more fiddly for me and my clients by amending its complaint rules, DISP, in two goes. The first, in July was designed to comply with the Alternative Dispute Resolution Directive. It goes much further than the directive, notably by laying down standard paragraphs for responses to complaints. It would have been better if the FCA had at least checked that the punctuation and grammar was right in the compulsory paragraph that most firms now have to use. It reads:

"If you do not refer your complaint in time, the Ombudsman will not have our permission to consider your complaint and so will only be able to do so in very limited circumstances. For example, if the Ombudsman believes that the delay was as a result of exceptional circumstances."

The second sentence has no main verb.

Perhaps surprisingly, the FCA decided to stand up to the banks over its main proposed change to the complaints regime. From the end of June, businesses will have to report the numbers of all complaints, even those resolved immediately. Whenever firms have managed to obtain the complanants' agreement to their solution to the case by the end of the three business days following receipt of the complaint, they will have to send the customer an automated letter designed to ensure that they really agree with the outcome.

> **In 2015, the FCA decided to make life much more fiddly for me and my clients by amending its complaint rules**

These changes to both complaint handling and reporting requirements at the same time has left firms collecting data about the way in which they handle cases under rules not yet in force. Otherwise, they will not be able to submit accurate reports to the regulator once the implementation date in June comes along. As a result, the regulator will probably need to give an unofficial amnesty for defective complaint reports filed in 2016. Most of the data it collects in this area is useless anyway.

Overall, the various changes to the complaint rules have required businesses to implement extensive alterations to complaint procedures on two and in most cases three different dates. This, along with the numerous other changes to the complaint rules since 2005 does not help compliance (let alone an author trying to write a book on the subject).

As before, in 2015, I drafted and fixed procedures for clients and sorted out their client agreements to make sure that they reflected what they were offering. A small band of businesses have beaten a path towards me in the hope that I can steer them through difficult times with the FCA or just their bank managers. Ethical dilemmas arise when one can see an urgent need for a proper compliance review both for the future of the business and to keep the regulator onside. There is an obvious conflict of interest where what appears to be the only solution for the client's difficulties involves employing my services. I first encountered this problem about sixteen years ago when I recommended a training course for the sales force at a firm at risk of being shut down by a regulator. The firm is still very much alive.

As a good friend in the independent financial advice sector points out to me regularly, though, the financial adviser sector does not realise that I can and do some quite basic compliance work. My day job continues to include: helping people to think clearly about what service they are offering, ensuring that suitability reports recommending investments read clearly with the right amount of warnings about risk and steering clear of rich clients whose aspirations do not match theirs. I continue to review files for firms to show them how to improve their standards. The key is for businesses to remember what they do. Advisers advise; they do not take instructions from clients. So, if a firm only wants to process transactions, it must make this clear to customers and avoid anything that might be construed as advice.

After my appearance in two courtrooms as an expert witness in 2014, I have had some further requests for expert reports from solicitors representing a bank and two consumers. It is important not to be cast as the expert for one side. Where firms instruct me, I sometimes have to give them unpalatable views. However, these situations do present an opportunity for me to help them improve their advice and complaint handling standards for the future and reduce their risks of being sued. When instructed on behalf of consumers, all too often I am really helping people make claims to the

THE FINANCIAL SERVICES WORLD CONTD.

Financial Services Compensation Scheme in connection with the efforts of now-bankrupt adviser firms.

More generally, expert report writing can raise some awkward questions about deciding what reasonable practice was at the relevant time. In one case, I am the only person who has ever written about the subject and did so in a trade paper and my complaints book some years before the events in question. An expert can say what he thinks someone should have done at the relevant time but determining the state of the art at the time in an industry which does not publish material coherently is not straightforward.

The financial services industry continues to buy what I do in a variety of ways. Much of my work comes to me directly. However, increasingly, firms buy training through workshop providers often knowing that I will be in charge of the course. The obvious reason to do this is for staff to attend occasions where people from other company are present. For some years, I have been doing Infoline workshops of this type on complaint handling, root cause analysis, the compliance aspects of manufacturing products, advice standards, financial promotions and systems and controls. More are in the diary for 2016.

Companies also buy in-house bespoke courses through Infoline or CTP (run by Richard Horsler and Andrew Hilton respectively who worked together at Infoline in its early days) When all goes well, these conference and training businesses bring a degree of smartness to printed materials and some welcome support with logistics and sometimes venue bookings. The great benefit of private training is that the company can pick the brains of the trainer outside course hours, often in exchange for food and the occasional libation.

At the end of 2015, I started work with Julie Ayton and other members of the University of Westminster Business School on devising an LLM on Banking Regulation, Risk and Law. The plans have some way to go before being finalised. However, if it happens, this programme could add a further chapter to the training story that began in 1996.

Since 2002, writing has represented a large part of my output. This last year, hanging over it all has been the second edition of my complaints book. The subject has mushroomed since the first effort in 2005. Then, the story was all about mortgage endowments and pension transfers and opt-outs. The financial services industry had essentially stopped selling the former by the time the book came out. Although pension transfers continue to represent a serious compliance problem, tax and regulatory changes have lowered the profile of the subject since 2005. Instead, the horrors of payment protection and other similar insurance products have since completely overwhelmed the Financial Ombudsman Service.

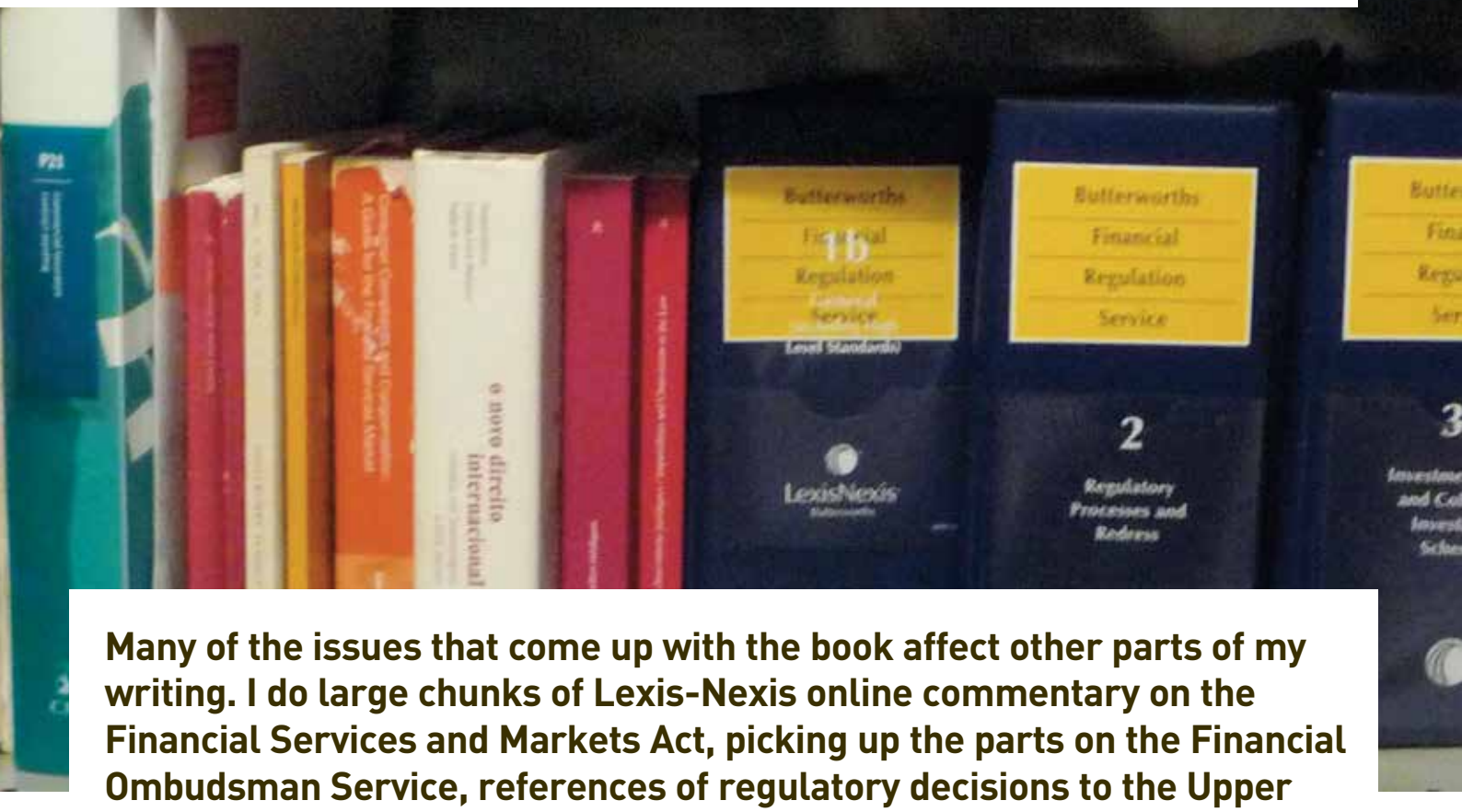
As one of a number of compliance consultants who told major sellers of PPI not to do this, I find it hard to be sympathetic to the banks in this area. They tend to bleat to the press about the high numbers of complaints where it turns out that no policy was ever sold. In the middle of all this, though, the FCA last year fined Clydesdale Banking Group for presenting these arguments where they could trace the sales concerned and Lloyds for telling its staff that they should assume that the sales process was robust when its senior management knew that the opposite was true. My experience in helping friends with valid complaints tells me that the record-keeping of some of the banks is awful and that they throw out as "no policy cases" complaints where they simply cannot be bothered to search for the evidence (a view backed up by the Clydesdale case). Where claims management companies bring phoney cases to them, it is tempting to say that each side deserves the other.

The sad thing is that PPI in its original form saved a considerable number of families from having their homes repossessed in the early 1990s. However, the single premium version sold with personal loans and the add-on product marketed with credit-cards has never been an appropriately designed thing except for the purposes of lining the pockets of those selling it. Neither the FCA nor FOS has completely grasped the fact that one cannot sell a defective product in a compliant way. Now, the FCA is proposing to reward the banks for their industrial mishandling of PPI complaints by introducing a two year time-limit for bringing such cases. I have long thought that one way of encouraging firms to handle complaints correctly would be to remove the time-bar protections from firms who do not comply with the rules. It seems very odd (or worse) that the regulator should want to make life easier for banks who abused the original insurance conduct-of-business rules and now still regard compliance with DISP as an optional extra. The regulator (and the Treasury which is behind this) will only suffer in the long-run from the usual price of appeasement.

Work on the book has required me to look again at some of the other insurance issues that have come up in recent years. The way in which some insurers have mass-marketed useless or over-complex products through hard-selling over the telephone is deeply disturbing. It all forms part of a piece with PPI and the small loans market.

In the summer, I chaired the 'treating customers fairly' section of a consumer credit conference. This left a similar haunting feeling that firms were ignoring the CONC rulebook because it was just too difficult to reconcile with their own business models. The payday loan providers are already experiencing a major shake-out which should extend well beyond that area.

WRITING



Many of the issues that come up with the book affect other parts of my writing. I do large chunks of Lexis-Nexis online commentary on the Financial Services and Markets Act, picking up the parts on the Financial Ombudsman Service, references of regulatory decisions to the Upper Tribunal, investigations and enforcement, as well as less likely parts, notably the notorious Part 6 on company listings, prospectuses and corporate transparency. I also write the loose-leaf chapters of the Butterworths Financial Regulatory Service on complaints, the approved persons regime and chunks of the Conduct of Business Sourcebook.

For more than a decade, I have written a monthly piece for Compliance Monitor. Its editor, Esther Martin inherited me from her boss, Timon Molloy, and routinely persuades me to burrow deeply into a particular product area or aspect of compliance. She also occasionally asks me to look at subjects such as market abuse and other financial-crime related-problems. The workshops I run on systems and controls invariably take me into that area anyway. Although the Compliance Factory has suffered a little from Chris Hamblin's responsibilities editing his own range of wealth management publications, Chris and my near neighbour and former colleague, Malachy McClelland, regularly force me to combine my risk management knowledge with their vast amounts of anti-money laundering experience.

This year, I persuaded Esther to publish a more personal piece this year on the horrors of dealing with the financial services industry as an executor. Some companies could not have been better, notably Standard Life. However, other insurers put executors through ridiculous hoops to identify themselves and some then make a mess of administering the claim. The FCA urgently needs to launch a competition enquiry into what seems to be an agreement among banks not to open executor accounts where the deceased did not have an account with the bank. This inevitably affects the terms offered and the service provided.

Selling individual shares as an executor offers its own horrors. Essentially, one has to transfer the shares into the name of one of the executors to do this – an obvious invitation to fraud. These are all intriguing arguments in favour of individuals using platforms or wrappers to hold all their investments, a point of which the FCA might usefully take note.

During 2015, Mary Stevens who has known me for almost 20 years, handed the job of editing my Compliance Resource Network (CRN) copy to Gabby Stevenson. She has already published some of my best writing on the new complaint rules. I have written for CRN and its predecessor for well over a decade. Equally, my on-off association with Complinet, now "Compliance Complete" stretches back to 2002. Financial Adviser's Features Editor, Melanie Tringham continues to ask me to produce 1100 words when major news affecting financial advisers breaks. What is noticeable about all these relationships is their longevity. All go back over a decade except for Lexis-Nexis and that is in its eighth year.

ARBITRATION AND OTHER DISPUTE RESOLUTION

My official activities in solving disputes continue to revolve around the World Intellectual Property Organization (WIPO) and the Hong Kong International Arbitration Centre (HKIAC) both of which regularly appoint me as a panellist on their cybersquatting cases. I have done 118 WIPO cases in just over ten years. A regular but intriguing issue at that organization's annual panellist meetings is: how should panellists interpret the ICANN Uniform Dispute Resolution Policy (UDRP), a document on which there is an enormous established caselaw and which was probably never intended to deal with mass purchases of domain names and the use of parking pages? There is a fine line between panellists re-writing the UDRP and the risk that it will fail keep pace with changes in the way in which the internet operates.

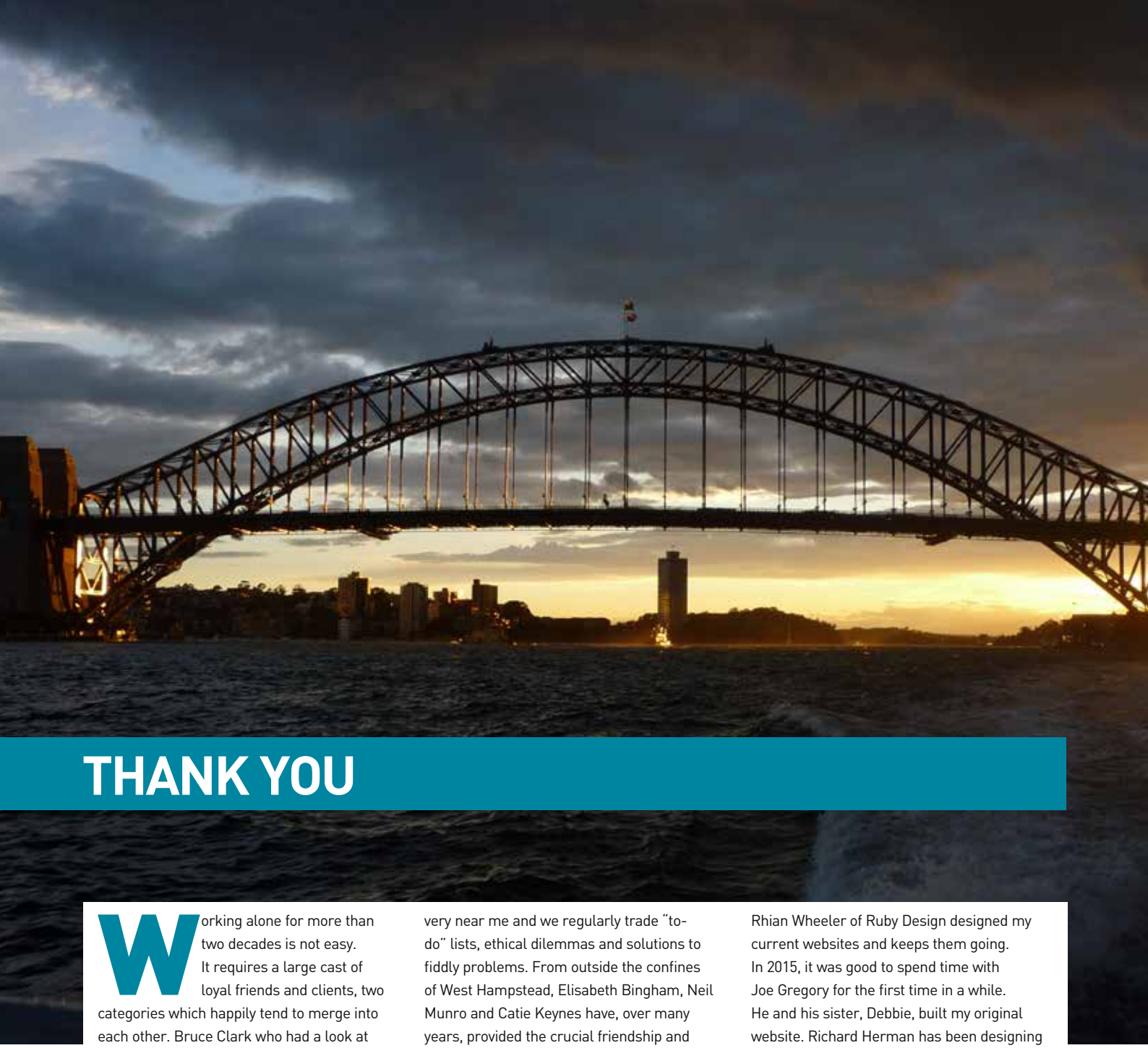
The annual panellist meeting in Geneva continues to give me an excuse to catch up with my old monopoly partner from the 1980s, Andreea Braendlin and her delightful family in Lausanne. When I am there, I usually manage a trip to the Swiss Institute of Comparative Law (the ISDC) where I worked in the late 1980s. This year, things did not seem quite right since the retirement of Martine Do-Spitteler who kept us all in order when I was in my late 20s. Nevertheless, during my visit to the ISDC, Karen Druckman who essentially does the job I used to do there, brought back happy memories by setting up an impromptu seminar in the coffee room on compétence-compétence and separability. My first book, Jurisdictional Problems in International Commercial Arbitration, written in the Institute in the late 1980s, has this as one of its main features.

Whenever I am in Lausanne, I like to meet my dear friend, Inès Feldmann. She worked as the late great Jean-Francois Poudret's assistante when I lived in Lausanne. She occasionally sends me intractable problems from her friends and occasionally clients. Some of this involves dispute resolution or avoidance well beyond anything one finds in the textbooks. On one such occasion, I found myself drafting a very short contract with a much longer commentary to explain to the other side why it was in everyone's interest to agree to every bit of it. The whole thing was held together by an arbitration clause that nobody was ever going to be able to afford to use. Apparently, it all worked!

> **Teaching a course on international arbitration practice there keeps me focused on the actual tasks involved in the arbitral process**

The University of Westminster, situated around the corner from both the BBC and where I lived between 2006-2013, continues to hire me to teach comparative commercial arbitration. Richard Earle, my boss and his close colleagues, Simon Newman and Catherine Pedamon, form a team that students and I adore. They have a level of commitment to students that is hard to match. In turn, some of the feedback about them, notably Richard, borders on the fanatical. In preparation for a lecture that I gave at the University on 18 February this year, I filmed some short talks on the UNCITRAL Model Law. Leon Cole from the University video department kept asking me classic arbitration questions. So, we recorded some question-and-answer pieces too. Hopefully, students and teachers can use these items which you can find by searching "Adam Samuel arbitration" on youtube.com.

In 2016, I acquired Brunel University as a new customer. My connection with the campus goes back to the early 80s when I used to cycle over there to study in its library during University holidays. Teaching a course on international arbitration practice there keeps me focused on the actual tasks involved in the arbitral process from the agreement to attempts to enforce an award. After the first few weeks, I noticed that my Brunel teaching is improving the focus and interactivity of what I am doing at Westminster. Last year, the Vis Moot teams of City University and LSE used me as a panel member on their practice sessions and this has now extended to the official Vis Moot organization at Pace University, New York which has asked me to do a couple of practice sessions this year. At Westminster and Brunel, we probably need to organize our own teams.



THANK YOU

Working alone for more than two decades is not easy. It requires a large cast of loyal friends and clients, two categories which happily tend to merge into each other. Bruce Clark who had a look at my business in 1997 and told me that it was probably going to survive, watches over me through regular meetings in the Scandinavian Kitchen and by attending various events I speak at in the financial services industry. Jan Meek helps me to cope with the fire-storm of my paperwork and is the brains behind my efforts to ensure that everyone pays me on time. I worked at the Insurance Ombudsman Bureau between 1991 and 1995 and a group of friends from that time provide vast amounts of support and encouragement. Of these, Malachy McClelland runs his own highly successful compliance consultancy very near me and we regularly trade "to-do" lists, ethical dilemmas and solutions to fiddly problems. From outside the confines of West Hampstead, Elisabeth Bingham, Neil Munro and Catie Keynes have, over many years, provided the crucial friendship and understanding needed to keep me going. My friends from the legal community date back to my first encounters with law libraries in 1979. No trip to Geneva is complete without lunch with Nicolas Ulmer and Doug Reichert who I have known since the mid-1980s. Kent McKeever at New York's Columbia University keeps me up-to-date on US arbitration law more than anyone has any right to expect while providing one of the best spare rooms in Manhattan. One could name a great number of other people whose supplies of company, meals, coffees and occasionally something a little stronger provide the needed fortification.

Rhian Wheeler of Ruby Design designed my current websites and keeps them going. In 2015, it was good to spend time with Joe Gregory for the first time in a while. He and his sister, Debbie, built my original website. Richard Herman has been designing this newsletter since 2000. My "American Psycho" business cards, designed by Dave of the Watermill as a result of yet another Scandinavian Kitchen encounter, continue to generate admiration and amusement in equal measure.

Finally, Chris Hamblin who persuaded me to write for a living in 2002, has been mercilessly editing this newsletter in exchange for fish and chips at the Golden Hind (with some help from my father) since its early days.