

# Chapter 20

## The Final Response

### 20.1 The function and objectives of the final response

When the investigation is complete, the case-handler has to make a decision. In the final response, the company presents that decision to the customer and anyone else who may have to consider its merits. It represents the work product of the process of identifying and investigating the complaint. Consequently, problems with it often reflect failings at earlier stages. Above all else, though, the final response should be the key document on file after the customer's complaint.

This is typically the last chance that the company has to put right the problem about which the customer was complaining. It is also its final opportunity to impress the client with its professionalism and the seriousness with which it has taken his expression of dissatisfaction.

The key objective of the final response is to persuade the reader that the company's conclusion is correct. If it cannot succeed in that, it should at least impress the client with the quality of the complaints process. The firm may wish to impress a number of different people in this way. The customer and any advisers he has are the most important. Ideally, they will consider the reply to be so convincing that the client will accept any offer made and not refer the matter to the Ombudsman. Any firm with professional indemnity ("PI") insurance may have to submit the final response to their insurers for approval before sending it. The draft may have to convince them, although it is possible to add to the submission to a PI insurer a further explanation as to why it is necessary to uphold the complaint. This could be useful if this explanation contains relevant material that the firm would prefer the customer not to see and be able to comment on. (The subsequent imprisonment of the adviser for fraud would be a good example of this.)

Financial Ombudsman Service ("FOS") adjudicators and ultimately the Ombudsman see the final response as representing the company's position on the complaint. So it has to be couched in terms that an outsider to the case will find easy to understand. The Financial Services Authority ("FSA") fined Friends Provident in part because of their over-long and inaccurate letters.<sup>1</sup> As it said:

"Overall, Friends Provident's decision letters were excessively long, often running to three or four pages in length, and were very technical. As a result, in cases of rejected complaints, the decision letter frequently failed to make the rationale for rejection sufficiently clear. Furthermore, the

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<sup>1</sup> Final Notice to Friends Provident Life & Pensions Ltd, 15 December 2003 at paras. 3.3(e) and 7.9(d).

rejection was often not immediately apparent from the decision letter in that it was not communicated until page three or four.

In addition, decision letters frequently contained references to the likely views of the Ombudsman that could discourage the customer from taking the complaint further.”<sup>2</sup>

To be more positive, a key function of the final response letter is to write the FOS’s adjudication for it. The letter should present the case as the adjudicator would set it out, reasonably and judiciously. In this way, the case-handler at the Ombudsman Scheme can just read the company’s view, check that the papers back up the description of the facts and conclude that it represents what he wants to say about what has happened. All he has to do then is to change some of the words and the ending in particular and FOS has adopted the company’s view. The client receives a document which shows how closely aligned the firm’s view is to that of the Ombudsman. The end result is that the company has to do the minimum amount of work that it is possible to do on a FOS referral and this enhances its reputation with both that organisation and the customer.

## 20.2 The rules

### 20.2.1 *Dispute Resolution: Complaints rulebook (“DISP”)*

DISP 1.2.16 requires the firm’s “responses to complaints to address adequately the subject matter of the complaint and, where a complaint is upheld, to offer appropriate redress.”<sup>3</sup>

The FSA Glossary defines the “final response” as “the response from the firm which either accepts the complaint, and where appropriate, offers redress, or offers redress without accepting the complaint, or rejects the complaint and gives reasons for doing so, and contains information about the right to refer the complaint to the Financial Ombudsman Service.”

Otherwise, DISP 1.4.12 which is headed “The final response” just says:

“When a firm sends a complainant its final response, the final response must:

- (1) inform the complainant that he may refer the complaint to the Financial Ombudsman Service if he is dissatisfied with the final response and that he must do so within six months; and
- (2) enclose a copy of the Financial Ombudsman Service’s explanatory leaflet (unless it has already done so”.<sup>4</sup>

From these three provisions, it is possible to put together a summary of the regulatory requirements. The final response must address adequately all the points raised by the client. It must state whether the complaint is upheld in full or in part or rejected and give reasons for its conclusion. Finally, at least for reportable

<sup>2</sup> Final Notice to Friends Provident Life & Pensions Ltd, 15 December 2003 at para. 7.9(d).

<sup>3</sup> DISP 1.2.6(3) and CRED 17.2.11(3).

<sup>4</sup> CRED 17.5.5 says the same.

complaints, it must inform the complainant of his right to refer his complaint to FOS within the next six months. The firm has to enclose within the envelope the explanatory leaflet. This is all very sensible although it would be good to see everything in one place within the rulebook.

Clearly firms will want to add other elements to the final response. When considering how the letter should be drafted,<sup>5</sup> the compulsory and voluntary elements have to be distinguished.

### 20.2.2 *No jargon and certainly no Latin*

The final response letter aims to persuade or impress the reader. It can only achieve this if the customer understands it and feels a connection to the person writing to him. The individual drafting the company's decision must express himself in plain English. Only a tiny percentage of the population are comfortable reading insurance or financial services jargon and even fewer enjoy Latin. So expressions like "*ex gratia*" have no place in a letter addressed to a consumer.

Jargon and Latin create distance between the writer of the final response and its reader. They communicate the message that the firm knows better or more than the customer. People are not persuaded or impressed when they are made to feel small or uninformed.

The use of jargon may also have a negative effect on the clarity of the decision-making process. For example, firms often describe offers as "*ex gratia*" payments that do not actually fall into that category. DISP 1.2.16(3)<sup>6</sup> requires firms to offer appropriate compensation. In this context, a payment for distress and inconvenience is not being made voluntarily, contrary to the suggestion made by the use of the Latin term. The company is making the offer because it has to do so or could be required to by either the Ombudsman or the FSA.

The English language contains a wide variety of expressions. The writer of the final response has to use words that the reader will find easy to understand and agree with.<sup>7</sup>

## 20.3 Beginning the final response

### 20.3.1 *The introduction to the letter – thanks and apologies*

Since the main function of the letter is to persuade and impress the reader, it is important to begin by trying to establish some rapport between that person and the company. The start of the letter should aim to achieve that.

As part of that process, the first sentence should thank the customer for complaining and, if relevant, for his assistance with the investigation. Where a

<sup>5</sup> The approach taken to drafting the final response is similar to that put forward in *Ombudsman News*, February 2002 at p. 13. This suggests that it meets FOS's needs as well as the company's.

<sup>6</sup> CRED 17.2.11(3).

<sup>7</sup> Readers of this section might suspect hostility towards Latin from the author. Actually, Latin was his best subject at school from the age of 10 to 18!

customer has drawn the firm's attention to a problem and so enabled it to resolve the difficulty or find out other areas where the company could improve, there is genuine reason for gratitude. Companies cannot tell customers of their openness policies and then not thank those who seek to support them by drawing attention to deficiencies (real or imagined) within the company. Similarly, a customer who has cooperated with the investigation has typically given up his own time without being paid for it.

Gratitude is also a powerful weapon for companies dealing with customers who are trying to upset the company or the case-handler. It will disarm and dishearten such complainants to learn how unsuccessful their efforts to disturb the individual concerned have been.

Often, the letter can usefully contain an apology early on. This could be for any or all of three things:

- (1) delays with the investigation;
- (2) the fact that the customer has had to complain;
- (3) the error of the company that led to the complaint.

The first obviously makes sense if there has been any delay. The second is fairly neutral and so could probably be used in the same way as the opening "thank you" in every final response. The third could create a problem if the firm has PI insurance. This could forbid any admission of fault. For this reason, the second apology is particularly useful. It does not admit anything. However, the customer may well read an apology for the fact that the customer has had to complain as going some way towards an expression of regret for the company's failures.

### **20.3.2 *Setting the scene***

There is much to be said for indicating clearly at the start that the letter is the final response to the complaint. The firm does not want protracted correspondence to begin with this letter. It intends to persuade the customer to accept the conclusions reached without further discussion. In any event, it is a good idea to indicate clearly the function of every item of correspondence at the start of the document. In this way, the recipient knows the role that the letter plays in the complaints process. It may also remove an argument that the customer might raise later that he did not appreciate that the six months time-limit for going to the Ombudsman began from this point.<sup>8</sup>

DISP 1.2.16(3)<sup>9</sup> requires the final response to address adequately the grounds for the complaint. Consequently, it makes sense, early on in the letter, to list all the points raised by the customer and any other matters that have been investigated. Some complaints ramble extensively. Consequently, some degree of distillation or summary may occasionally be necessary. However, a customer, particularly a difficult one, may use any point left out of the letter to demonstrate the

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<sup>8</sup> Insurance Ombudsman Annual Report 1995 at p. 53. The six months warning should reinforce this anyway. It should be repeated in all subsequent correspondence.

<sup>9</sup> CRED 17.2.11(3).

inadequacy of the investigation. Case-handlers should err on the side of listing the points made by the customer when in doubt. The list of all the grounds for the complaint should match the list of conclusions later in the letter. Where it does, this strongly suggests that the final response addresses adequately the client's allegations.

## 20.4 The facts

### 20.4.1 *Reasons to set out the facts*

In order to persuade the reader of the correctness of the decision, the final response letter must set out the basis for its conclusions. The most important element of this is the facts revealed by the investigation. The final response cannot address adequately the client's complaint unless it sets out the company's view of what happened. Any process of reasoning starts with observable fact and then draws conclusions from it. If the firm leaves this element of the letter out, it makes the rest of the letter appear incoherent and arbitrary. For these reasons, it is rare to see a court judgment that does not begin by setting out what happened.

The decision-maker may find that the process of setting out the facts using the information on the file including statements from those involved helps to form a clear picture of the case. Given a clear statement of what has happened, he can now decide on the outcome. In addition, the development of a narrative in this way will expose gaps in the investigation. These emerge where the case-handler does not know what to write next when trying to describe the relevant events. The investigation can now be safely concluded without the embarrassment of the firm sending out an incomplete final response.

Sometimes, case-handlers argue that it is unnecessary to present the facts to the customer who already knows them. However, this provides an excellent opportunity for the client to check that the company has correctly understood what has happened. An accurate presentation of the relevant events suggests to the customer that his complaint has been taken seriously. He can also correct errors that otherwise may emerge later in a reference to the Ombudsman.

In any event, the external reviewers of the case, a FOS adjudicator, regulator, internal or external audit staff, need the facts to gain an instant view of what the case is about. An Ombudsman adjudicator may rely heavily on a clear statement of this type at the start of the final response letter to understand the type of case that is involved. If the account of what happened makes sense and tallies with the papers on the file and the company's conclusions, he will write to the customer with his view that the complaint should be rejected. The ease with which any external reviewer can verify the coherence of a final response also improves his view of the company.

A firm may ask FOS to dismiss a complaint without considering its merits on the basis that it is frivolous and vexatious<sup>10</sup> or fits one of the other grounds in

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<sup>10</sup> DISP 3.3.1(2).

DISP 3.3.1.<sup>11</sup> This normally saves the firm a case fee. The idea is that the Ombudsman can reach this conclusion without investigating the case. If the final response does not set out the facts that bring the case within DISP 3.3.1, it is difficult to see how FOS can dismiss the case summarily.<sup>12</sup>

#### **20.4.2 *Setting out the facts***

The final response letter needs to tell the story of the dispute. It should be done chronologically and with as little comment as possible.

A different approach will be necessary depending on whether the complaint is being upheld in full or not. If, as far as the firm knows, it is offering the customer all he could have asked for, there is no point in setting out the facts in great detail. All that is necessary is a brief outline of what happened. This may just consist of a recapitulation of the complaint with some dates and numbers added. It is always a good idea not to disagree with the client except and to the extent to which it is necessary for the purposes of reaching the firm's conclusion.

Where the firm is rejecting a complaint in any way, it makes sense to go into things in much more detail. The firm will look bad if it later relies on a point that is not made in its final response letter.

The final response may have to be detailed in order to persuade PI insurers to authorise the payment of the claim. In that situation, the firm may choose to write a separate opinion for this purpose, rather than say a great deal to the customer on issues not in dispute between him and the company.

The description of the facts should finish with a brief mention of what the firm has done to investigate the complaint and what it has discovered as a result of that investigation unless this has already been covered earlier.

#### **20.4.3 *Establishing the facts***

When describing the facts, the material that has emerged from the investigation must be used. Where contradictory views of events that remain in dispute and need to be contested by the firm appear from statements or the documents, these should be set out in detail.

Firms sometimes express irritation at the fact that a complaint made many years after the event leaves them in no position to defend themselves. Typically, they cannot trace the advisers or members of staff involved and they have no file. Companies argue that previous regulators' rules only required them to keep files for six years.

This is all correct. Unfortunately for the firms, it does not help them. The regulator laid down minimum lengths of time for which papers had to be retained. If companies chose to destroy them after that time, they were taking a risk of subsequent complaints being hard to defend. They should now be considering ways of retaining or retrieving records some years into the future.

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<sup>11</sup> DISP 3.3.1(2).

<sup>12</sup> See *Ombudsman News*, February/March 2004 at p. 20.

This problem will not disappear. Essentially, during a minimum of the potential lifetime of a contract and six years after that, there is a clear need to retain evidence of what was done at the start and during it.

In the absence of a file, it is possible to put together a picture of what happened at the point of sale by asking the customer what happened and what their circumstances were at the time and checking the details given with mortgage lenders, employers and the like. Nevertheless, the absence of a file places the company at a serious disadvantage. The customer's recollection, if it does not clash with other documentation, will have to be believed.<sup>13</sup> *Ombudsman News* dealt with a query from an independent financial adviser ("IFA") which had destroyed its papers and asked whether it could just respond by rejecting the complaint, by saying:

"No. You cannot dismiss the complaint out of hand, just because you no longer have records of the sale. If you can't get the information you need from the life office, you should still be able to build up a picture of the factors that should have been taken into account at the time of the sale. These will include the customer's financial position and her plans for the future at that time. You will find the type of questions you may need to ask in our on-line mortgage endowment complaints assessment guide.

We do, of course, expect all firms to co-operate with each other in sharing information like this. After all, the firm from which you need information might – in turn – need information from you in future. This type of co-operation helps make the complaints process more efficient for everyone."<sup>14</sup>

## 20.5 The analysis and conclusion

### 20.5.1 *The function of the analysis*

The next part of the letter explains how the facts found during the investigation lead the firm to the conclusion that it has reached. In complicated cases, when upholding a complaint, it may make sense to set out in one place the facts, analysis and conclusion relating to liability and then do the same thing for compensation. This can make the letter easier to read and understand.

In some cases, the analysis may take no more than a few lines. Nevertheless, the letter needs to give a clear impression that the case has been thought about by reference to the firm's obligations towards the client. Sometimes, these are so obvious that they do need repeating or discussing. All that has to be said is that the complaint is upheld and an offer made of compensation to put the customer in the position in which he would have been if the firm had carried out its duties. In general, though, the firm should explain why the offer of settlement makes sense.

Where a calculation is complicated, the company should explain the basic features of what is being offered and include an expert report in an annex. The

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<sup>13</sup> *Ombudsman News*, February 2003 at p. 4.

<sup>14</sup> *Ombudsman News*, September 2003 at p. 16.

sight of a respected actuarial firm's notepaper in the supporting documentation inspires confidence that the matter has been looked at objectively.

### **20.5.2 Weighing the evidence – standards and burdens of proof**

#### *20.5.2.1 The standard of proof*

In civil cases the conclusion is reached on the balance of probabilities. This means that the side that is 50.1 per cent likely to be right on any given point wins. So, usually, it is necessary to gather together what evidence exists and weigh it.

The customer's recollection, if it cannot be contradicted, will usually prevail.<sup>15</sup> The Tiner letter on handling endowment complaints<sup>16</sup> and both complaint-handling final notices<sup>17</sup> have made this abundantly clear. The former stresses:

- “3. The need to recognise that oral evidence can be good and sufficient evidence, avoiding too ready a dismissal of evidence from the consumer which is not supported by documentary proof . . .
4. The need to investigate the issues diligently, in particular so as to take into account the selling practices at the time, the training, instruction, sales scripts and incentives given to advisers at the time and the track record of the particular adviser.

This and the next point are particularly relevant to a fair reconstruction of what might have been said to the consumer on the issue in point 3 above, having regard to what the consumer says now and to all of the contemporaneous evidence.

5. The need to go the extra mile to clarify ambiguous issues or conflicts of evidence before finding against the consumer.”<sup>18</sup>

Allied Dunbar was criticised expressly as part of its fine for making an assumption in favour of the adviser's version of events.<sup>19</sup> The Friends Provident Final Notice made a similar point:

“Friends Provident's specific procedures were not in accordance with TP 3 as they failed to recognise that the oral evidence of the customer can be good and sufficient evidence and they encouraged too ready a dismissal of evidence from the customer which was not supported by documentary proof.”<sup>20</sup>

Often the picture may be far from complete. In one case, the complainant alleged that his now ex-partner had forged his signature on the surrender form and that as a result the company had to keep the policy in force, at least as far as he was concerned. The form contained the signature of two witnesses both of whom the

<sup>15</sup> PIAOB Annual Report 1995–1996 at p. 29; Insurance Ombudsman Annual Report 1992 at p. 7.

<sup>16</sup> April 2002.

<sup>17</sup> Final Notice to Friends Provident Life & Pensions Limited, 15 December 2003 at para. 6.7 and Final Notice to Allied Dunbar Assurance plc, 18 March 2004 at para. 3.69(d).

<sup>18</sup> John Tiner letter, 4 April 2002, Annex 1.

<sup>19</sup> Final Notice to Allied Dunbar Assurance plc, 18 March 2004 at para. 3.69(d).

<sup>20</sup> At para. 6.7.

Insurance Ombudsman Bureau (“IOB”) case-handler traced and who claimed to have no recollection of witnessing the complainant signing. The version of his name on the surrender form did not look to the naked eye like his signatures that appeared elsewhere on the file. The company sought to delay the case until the police had finished their investigation. A check with the police station revealed that nothing was being done on that front anyway. The IOB persuaded the firm to end the delay and agree to reinstate the policy. Essentially, it said that the evidence on file pointed towards a forgery. Unless the insurer could come up with a professional handwriting expert’s opinion to support its case, it would lose.

It is sometimes possible to test the credibility of a customer by checking what he says with a third party, an employer or mortgage provider. Similarly, low persistency rates and other complaints for an adviser may affect his credibility.<sup>21</sup> So will a badly completed fact find or other problems with the documentation on file. A firm that has been fined or asked to do a proactive business review because of widespread misselling has to take this into account when weighing the likelihood that a policy falling within the disciplinary action or in a similar area was missold. Likewise, where the company has a particular pattern of behaviour, such as failing to complete fact finds properly, this must count against it.<sup>22</sup>

A product provider may assert that it has sent out a lapse notice to a customer. However, where a lender to whom the policy is assigned has not received a copy, that casts doubt on the existence of the mailing. A history, in the case, of misaddressed correspondence should also have a bearing.

#### 20.5.2.2 *The burden of proof*

Much is often made of the burden of proof in cases. All it means is that when the balance of probabilities is exactly 50–50, the side that has the onus, or burden, loses. Where one side’s case appears very slightly more likely to be true than the other’s, this subject becomes irrelevant.

The general rule is that the party that asserts something has the burden of proving it. So, typically, the complainant has the onus of proving a breach of an obligation and the fact that it caused a loss for which compensation is now being claimed. The company seeking to rely on an exclusion in a policy typically has the burden of proving its existence and the facts required to fit the case within it. It has to prove policyholder non-disclosure or fraud.

#### 20.5.2.3 *Evidential burdens or the burden of non-persuasion*

When considering burdens of proof, firms often fail to understand the weight of evidence and how it affects the conclusion. To give a dramatic example, when a company representative or complainant goes to gaol for an offence of dishonesty, this tends to make their recollection less believable. This does not change the burden of proof. It merely makes it impossible in practice for the side against whom the evidence is provided to win without providing some striking material

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<sup>21</sup> John Tiner letter, 4 April 2002, Annex 1, para. 4; Final Notice to Allied Dunbar Assurance plc, 18 March 2004 at para. 3.68.

<sup>22</sup> Final Notice to Allied Dunbar Assurance plc, 18 March 2004 at para. 3.67.

in its favour. In effect, it tips the “evidential burden” to that party requiring it to produce more material or lose on the point in question.

Although the standard of proof in fraud cases is the same as it is for any other civil dispute, there is a strong assumption that people are not dishonest.<sup>23</sup> Consequently, any attempt to prove fraud has to be supported by strong cogent evidence. In this sense, the evidential burden to prove dishonesty is greater than the standard of proof would suggest. As was shown in Chapter 14 above, this has given rise to considerable concern where firms with some material to support their case argue that a claim was made knowing that it was false.<sup>24</sup>

### **20.5.3 *Analysing the rules to be applied***

#### *20.5.3.1 The applicable rules*

This was discussed in detail in Chapter 2 above. Firms are required to handle complaints fairly<sup>25</sup> and offer appropriate redress.<sup>26</sup> Firms are strongly urged to apply DISP Appendix 2 in calculating mortgage endowment compensation.<sup>27</sup> They are invited to consider any guidance issued by the FSA, FOS and any of the former schemes.<sup>28</sup> FOS applies the law, regulatory guidance and any relevant statements of practice applicable at the time when the events in question occurred.<sup>29</sup> It can be assumed that firms are under a similar obligation.

#### *20.5.3.2 Applying the relevant rules*

In the vast majority of cases, the rules to be applied are straightforward and known to consumer and firm alike. They do not need to be set out unless there is any dispute about them. Customers do not want to receive a detailed analysis of the law of obligations. They just need a statement that their dissatisfaction was justified and that the problem caused them a particular loss for which compensation is being offered.

However, where a dispute arises, it may be necessary to describe the firm’s view in some detail. Rules and guidance may have to be quoted. This again shows that the company has taken the customer’s grievance seriously. Nevertheless, it is important that the final response is written in a persuasive, not confrontational, style. A friendly explanation of why a complaint fails can retain a customer. An aggressive approach may lead him to believe that he has been accused of lying.<sup>30</sup> This is likely to lead to the escalation of the complaint.

Where a point is particularly in dispute, there is no reason why the firm cannot send copies of the relevant rules or guidance with the letter. Again, openness is persuasive since it gives the impression that the firm has nothing to hide and is quietly confident of its position.

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<sup>23</sup> *Ombudsman News*, October 2002 at pp. 3–4; *Re H (Minors)* [1996] 15 A.C. 563 at 586.

<sup>24</sup> *Ombudsman News*, October 2002 at pp. 3–4.

<sup>25</sup> DISP 1.2.22 and CRED 17.2.14.

<sup>26</sup> DISP 1.2.17 and CRED 17.2.11.11–17.2.11.12.

<sup>27</sup> DISP 1.2.20.

<sup>28</sup> DISP 1.2.18.

<sup>29</sup> DISP 3.8.1.

<sup>30</sup> Annual Report of the Complaints Commissioner for 2003–2004 at p. 45.

### 20.5.3.3 *Misusing Ombudsman precedents and Decision Trees*

With the rising tide of endowment sales complaints in the late 1990s came an increase in firms telling customers not to pursue their cases at FOS because they were bound to lose. In making these suggestions, some companies referred to previous decisions of the Ombudsman and the Decision Trees which the Financial Ombudsman Service issued in 2000.

The Decision Trees contain some technical errors. Most spectacularly, Decision Tree 3 refers only to investment risk. It omits the key ground for upholding complaints, namely that the customer was not prepared to or in a position to take the risk that the policy would not repay the mortgage. In doing so, the Decision Trees miss the key points in both PIA Regulatory Update 72<sup>31</sup> and the Tiner letter itself.<sup>32</sup>

The trees also seek to maintain a balance between the consumer and the firms by containing parallel branches leading to the upholding and rejecting of the complaint respectively. The unfortunate effect of this is that sometimes the "rejection" side can be read in a way that is too heavily slanted in favour of the company.<sup>33</sup> John Tiner picked up on these points in his letter to firms on 4 April 2002 and they have since been mentioned in the two final notices relating to endowment complaint handling.<sup>34</sup>

The now-Chief Executive of the FSA made some scathing remarks about the way firms were using Decision Trees:

"2. Complaint handlers in many firms are using the decision trees process for complaints published by the Financial Ombudsman Service in June 2000, but there seems to be some misunderstanding about how to interpret and apply this material. The decision trees were developed by the FOS as a skeletal route map to support its own needs, although they also issued the trees to firms as a contribution to development of firms' own procedures. They were not intended to be applied in isolation nor were they designed to cover every possible situation, whether for the entirety of firms' processes or for resolution of individual cases. By their very nature the trees require at each stage the use of judgement in the light of the facts of each individual case. In addition the trees are not mutually exclusive so, for example, cases running into retirement would need to consider both affordability and suitability in terms of risk."

Again on the use of Ombudsman precedents, John Tiner makes some apparently anodyne points. However, the context makes it clear that firms should not be referring to past cases in their final responses:

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<sup>31</sup> RU72 at pp. 2, 4–5.

<sup>32</sup> Annex 1 para. 1.

<sup>33</sup> The third box of the left-hand side of Decision Tree 2 is a good example that seems to indicate that a customer can be sold an endowment without needing any life cover as long as he was told of the extra charge for the cover. A best advice case cannot be defended on the basis of consent and/or disclosure.

<sup>34</sup> Final Notice to Friends Provident Life & Pensions Limited, 15 December 2003 at para. 4.14(b) and Final Notice to Allied Dunbar Assurance plc, 18 March 2004 at para. 3.13(b).

"3. Firms rely, as a guide to their general approach, on reasoning and explanations given in final decision letters issued by the Ombudsman. It is entirely proper and reasonable that firms should be informed by Ombudsman decisions, both for and against the firm, and should absorb any lessons to be learned. However, the Ombudsman makes specific decisions in individual cases, based on the circumstances of each case. What is said in a decision letter does not, and is not meant to be, a generic ruling to be applied indiscriminately to other cases which may be broadly similar but which on close examination may not be on all fours with the decided case. I am sure you will agree that, as in other spheres of activity, application of precedent without due regard to the facts of the individual case represents poor complaint handling."

There are two distinct problems here. First, decisions of FOS are not always correct. All Ombudsman schemes become more aware of the key points with the passage of time. In any event, some firms are in the habit of calling adjudications "Ombudsman's decisions". In fact, they may represent the view of what may be a junior (or not very good) member of staff in what is now a large organisation. The second issue is the way in which some firms use Ombudsman material to dissuade customers to refer their cases to FOS. Friends Provident appear to have been criticised for both of these aspects. The final notice says:

"Friends Provident's complaints-handling procedures improperly prompted complaint handlers to apply Ombudsman decisions in specific cases generically. In addition, the standard letter template included a paragraph which potentially deterred customers from exercising their right to refer the case to the Ombudsman."<sup>35</sup>

In practice, firms should use Ombudsman material, including the decision trees, as a non-exclusive list of cases where they will have to uphold complaints. They can take guidance from the material specifically written about redress. However, they must be careful not to over-interpret or apply excessively guidance which appears to favour their cause. As the Tiner letter and the Final Notice to Friends Provident shows, this could be an expensive mistake.

#### *20.5.3.4 Attempting to dissuade customers from referring their case to FOS*

The pensions review guidance required firms to state that "in making an offer, it had followed the requirements of the PIA guidance in its calculation".<sup>36</sup>

The FSAVC Guidance is silent on this. DISP App. 2's material on endowments takes a more permissive view. It says:

"2.5.11 One of the reasons for introducing the guidance in this appendix is to seek a reduction in the number of complaints which are referred to the Financial Ombudsman Service. If a firm writes to the complainant proposing terms for settlement which are in accordance with this appendix,

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<sup>35</sup> Final Notice to Friends Provident Life & Pensions Limited, 15 December 2003 at para. 6.12.

<sup>36</sup> PIA Redress Guidance at p. 15.

the letter may include a statement that the calculation of loss and redress accords with the FSA guidance.”

The two policies are fighting against each other. The FSA issued the endowment material to reduce the number of cases going to FOS. However, it should not be allowing firms to deter customers from referring their cases to the Ombudsman.

Consequently, it goes on to say that the letter:

“should not imply that this extends to the assessment of whether or not the complaint should be upheld . . .

A statement under DISP App 2.5.11G should not give the impression that the proposed terms of settlement have been expressly endorsed by either the FSA or the Financial Ombudsman Service.”<sup>37</sup>

In its final notice setting out the reasons for fining Friends Provident, the FSA was highly critical of an attempt made to deter customers from referring their cases to the Financial Ombudsman Service.<sup>38</sup> Firms should be exceedingly careful not to give the impression that they are trying to do this. Comments to the effect that FOS may take a while to deal with the case should be avoided for the same reason. Companies want to preserve the impression that they encourage external scrutiny on the basis that they have nothing to fear from it.

There is a further problem with asserting that a calculation has been done in accordance with regulatory guidance. Such a statement may prove to be misleading where an error has been made. In a court, the firm will not be able to rely on its discharge of liability, which is dealt with at 20.6.2, if the customer can say that he was misled by the reference to the FSA guidance into accepting the offer.

#### **20.5.4 Giving the outcome of the investigation**

##### *20.5.4.1 Deciding what to say*

The Glossary definition of a “final response” indicates that the letter has to state whether the complaint is upheld in full, in part or rejected. This tallies with the new complaint-reporting requirements. These will require information about upheld complaints to be provided to the FSA after April 2005.<sup>39</sup> The client wants to know that his complaint has been upheld. He is looking for the acceptance of his position and a sense that it was worth his while to express his dissatisfaction. So it makes sense to tell him that his view was justified, if possible. This was a requirement of the GISC rules.<sup>40</sup> Rule 7 read with admirable clarity:

“The Member’s response must either:

- 7.1 accept the complaint and offer compensation, where appropriate, or other form of redress;
- 7.2 reject the complaint, giving full reasons for doing so; or
- 7.3 be a combination of 7.1 and 7.2 above.”

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<sup>37</sup> DISP App. 2.5.12.

<sup>38</sup> Final Notice to Friends Provident Life & Pensions Limited, 15 December 2003 at para. 6.12.

<sup>39</sup> PS04/8 Appendix 1 draft DISP 1.5.5(2).

<sup>40</sup> Practice Requirement G2.

Firms should say clearly whether each of the grounds for the complaint has been upheld in full or in part. This is necessary to ensure that the final response has adequately addressed each point raised. Essentially, the number of conclusions should match that of the grounds for the complaint set out at the start of the letter. When indicating that the complaint has been rejected, some softening of the tone will make the customer less likely to challenge the result, perhaps along the lines of: "It follows from the above that we are sorry to say that we are unable to uphold your complaint." This also cushions the blow a little.

#### *20.5.4.2 Admissions of liability*

PI insurers and management may object to the idea of indicating that a complaint is upheld on the basis that this can constitute an admission of liability.<sup>41</sup> This is then virtually impossible to retract during litigation. In practice, where a firm is sued in relation to a consumer complaint, it usually ends up admitting liability anyway. Fighting cases in this area tends to be unproductive and often leads to serious reputational damage. To reassure insurers and managers, it is possible to add a paragraph in the gentlest possible terms on the lines of: "We hope that you will appreciate that, for legal reasons, we are unable to admit liability here." This is sufficiently anodyne not to offend the customer while protecting the legal position. The more common, "this offer is made without admission of liability" sounds defensive and confrontational. For these reasons, firms should avoid it.

## **20.6 Offering compensation**

### *20.6.1 The offer*

#### *20.6.1.1 Drafting the offer*

The next job is to offer the customer appropriate compensation that he will understand and be able to benefit from. This consists of two tasks. First, the offer has to comply with regulatory requirements while sometimes giving the customer options which might suit him better. Secondly, the client has to understand what is being offered to him.

To a large degree, the first aspect of this has been covered in the chapters on compensation. For non-pension cases, the usual assumption is that the customer is entitled to receive any redress personally in the form of a cash payment. Even though a mortgage endowment may have been set up to pay off a home loan, the payment required under DISP App. 2 must be paid directly to the customer (or anyone of his choice) and not automatically to the lender. The firm is also required to give the client the remedy that places him in the best position in which the various breaches of obligation entitle him to find himself. Firms cannot offer a variety of options knowing that one is obviously superior to the others without at the very least indicating this clearly.

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<sup>41</sup> PIA Regulatory Update 13 at p. 2 says on this: "Making an offer of compensation or redress to an investor who has sustained a loss is likely to involve a firm in putting forward an admission of liability."

Often, describing the compensation is straightforward, particularly if it involves the payment of a sum of money. However, time should be taken with more complicated settlements to ensure that the client understands what the firm wants to give him. In such cases, it makes sense for the letter to contain a direct-line number which the client can use to ask about the proposed solution.

People tend to use far less jargon when they are speaking than when they are writing. Consequently, one method that can be used to simplify complicated offers is to try and say aloud what the company wants to do for the client. Then the case-handler should write down what he has just said. Telling a colleague, or even better a non-technical member of staff (receptionist, security guard, clerical support staff), the terms of the proposed settlement and seeing whether they comprehend them is another approach. If the client does not understand the final response, he will waste the firm's time by ringing up to ask for a further explanation or refer the matter to FOS. Time taken at this stage can save a considerable amount of work later.

#### 20.6.1.2 *Keeping the offer open*

Strictly speaking, the statement that an offer will be kept open for a certain period of time has no legal force. Since there is no contract between the parties at this point because the client has not accepted, the company can withdraw its proposal at any time. Nevertheless, firms like to indicate a reasonable time for the customer to consider whether to accept. The pensions review guidance required firms to give the customer at least four weeks to consider whether to accept.<sup>42</sup> The company gains nothing from imposing an unreasonably short period since the key objective is to persuade the customer to accept. A regulator might intervene if it became concerned at customers being coerced into accepting offers.<sup>43</sup>

The key here is that the firm must explain why it is only leaving the offer open for a limited period. If a calculation will become stale and have to be re-done after a certain length of time, the firm should say so, indicating that it may result in a change in the compensation that will not necessarily be in the customer's favour.

In endowment cases, there are no compensation periods. All that the firm has to do is make an offer in accordance with the guidance. It should choose an appropriate crystallisation date: either the date of the offer or that on which the customer switched to a capital repayment mortgage if earlier. Interest should then, in principle, be offered on the balance at 8 per cent simple (less tax which should be deducted at source). The danger is that the rate is so high that the customer could fail to respond using the firm as a high interest account. For this reason, it may be sensible to leave the offer open for a month and then consider whether to withdraw it and recalculate the redress. The firm should explain its recalculation policies in the final response.

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<sup>42</sup> PIA Redress Guidance at p. 15.

<sup>43</sup> Principle 6 can always be used by the FSA for this purpose.

## 20.6.2 Discharges

### 20.6.2.1 Standard wordings

Most firms want to ensure that an offer once accepted will genuinely close the case. They do not want the client to sue them in future years. However, there are limits as to how much it is proper to require the customer to give up in exchange for compensation. Firms that have tried to draft discharges of future liability too broadly have ended up embarrassing themselves and removing the modest legal protection to which they were entitled.

A favourite example is the pension review team that offered to top up a personal pension on condition that the customer gave up all rights relating to the same policy. This rendered the agreement completely absurd. The effect was to deprive the discharge of any legal value.

Firms who seek to impose unfair terms on customers have higher numbers of rejections, not to mention the greater risk of regulatory involvement. It is necessary to consider what it is fair for the complainant to be required to give up.

The obvious thing that the client should have to abandon is the right to make subsequent claims relating to the subject matter of the complaint. In a conventional misselling case, it seems reasonable to go further and require the customer to give up the right to make future claims arising out of or relating to the sale of the relevant policy.<sup>44</sup>

In a House of Lords case relating to the collapse of the Bank of Credit and Commerce International, the House of Lords decided that a standard discharge did not cover extraordinary claims relating to damage to reputation in relation to the extreme circumstances of the bank's demise.<sup>45</sup> As a result, it may be preferable to make it clear that the offer is "in full and final settlement of all claims that may arise in the future whether or not the customer could be aware of them arising out of or relating to the sale of policy number xyz."

When drafting a discharge, the company's name should always be identified accurately. In many cases, financial institutions have a variety of possibly identities. One solution is to say that the offer discharges claims against either the holding company or the clearly relevant business and "any other companies, employees or other individuals associated with that company".

Regulators are rightly concerned to ensure that customers signing discharges understand what they are giving up. For this reason, the pension review guidance insisted that any discharge had to be printed prominently and reproduced on any acceptance form.<sup>46</sup>

### 20.6.2.2 Other elements

Companies sometimes include other elements in their discharges, notably the assignment of the policyholder's rights to claim against third parties.<sup>47</sup> Unless

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<sup>44</sup> PIA Redress Guidance at p. 16 and FSA, FSAVC Model Guidance at para. 8.5.4.

<sup>45</sup> *Bank of Credit and Commerce International SA v Ali* [2002] 1 A.C. 251.

<sup>46</sup> PIA Redress Guidance at p. 16.

<sup>47</sup> PIA Redress Guidance at p. 14.

there is a time-bar problem with making a claim against other firms involved, this assignment is fairly useless and can clog up the offer. Having said that, it is fairly harmless in situations where a third party claim might be useful.

More generally, companies must avoid asking the customer to give up rights that they cannot reasonably insist on being handed over. Some firms make it a condition that the customer acknowledges that no admission of liability is being made. This makes no sense whatsoever. The firm either has admitted liability or it has not. Making the client agree to it makes no difference. It just reinforces the image of defensiveness that complaint handling should always aim to avoid.

#### 20.6.2.3 Confidentiality clauses

Although an unfortunate reference in *Ombudsman News*<sup>48</sup> suggests the contrary, firms should not insist on a confidentiality requirement. What is beyond doubt is that a firm cannot say anything which may lead a consumer to think that he cannot seek advice on the adequacy of the offer.<sup>49</sup>

Reputable companies should not insist on any attempt to silence the customer. If the firm is so much above reproach, why should it wish to hide what it has done? The customer is entitled to the compensation. So on what basis can the company justify insisting on him giving up the ordinary right to communicate with other people? In any event, such a provision cannot be enforced in practice. The complainant's advisers are only bound to observe their client's confidentiality. So they can spread the information anyway. It is also unreasonable to expect individuals not to talk to those close to them about their experiences. Confidentiality clauses create a sense that the firm is still acting in an oppressive way towards the client. This is the opposite of the image that a company offering compensation should wish to give.

#### 20.6.2.4 Do you always need a discharge?

In small administrative problems, the firm may wish to make a simple gesture or just apologise for what they hope will be a one-off event of no long-term significance. Including a discharge in the offer may detract from the friendly gesture intended. It is largely a matter of judgement. The key is to consider whether the firm needs the reassurance that the customer will not bring subsequent claims against it. In many minor complaints, this is unnecessary. The cheque for the compensation, apology, gift voucher or flowers can be sent at the same time as the final response.

#### 20.6.2.5 Can the firm always use a discharge?

Where firms discover that the customer has suffered no loss, they would like to ensure that he cannot sue later if conditions change. A company cannot obtain a legally binding discharge in exchange for nothing. It has to rely on the six-month time-limit for challenging final responses at FOS and the tendency for complaints to "go cold" through neglect.

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<sup>48</sup> *Ombudsman News*, January 2004 at p. 7.

<sup>49</sup> *Ombudsman News*, January 2004 at p. 7.

### 20.6.3 Recommending the customer to seek advice

In some situations, the likely effect of the complaint succeeding is the surrender of a policy. This may involve the loss for the customer of a vehicle to repay a loan and a certain amount of life cover. Essentially, the complainant probably needs advice about making future arrangements for himself and his family. Firms have concerns that their clients are just spending their compensation on holidays when they should be applying it to reduce their outstanding mortgage. The Treasury Select Committee has also expressed concerns about the lack of availability of advice services to customers with mortgage endowment shortfalls, accusing the companies of letting down consumers a second time in this respect.<sup>50</sup>

In general, as discussed in Chapter 19 above, firms should be very wary of giving advice while handling complaints. Trying to do two jobs at the same time with regard to a client who is already unhappy with the firm can slow down the resolution of the complaint. Handling customer dissatisfaction is all about destroying the dispute.<sup>51</sup> The problem may fester if the firm gives some advice which turns out to be wrong. Advising and handling complaints involve quite different skills. Staff need to be authorised and specifically trained to make recommendations about people's finances. Notably, they will have to find out about the customer's current situation before they make any suggestions since it could well have changed since the sale in issue.

A further objection to firms imposing advice on complainants is that they may not want it. After all, the customer has probably complained about the quality of advice in the past. Why should they want to receive more of the same? Customers who want advice can seek it elsewhere as they wish.

In an ideal world, the firm would resolve the customer grievance and then offer an advice service. In practice, the customer may well have gone elsewhere or spent the compensation before there is time for any recommendation to be made.

DISP App. 2 requires firms to tell successful mortgage endowment complainants that "it is likely to be appropriate and necessary for them to convert to a repayment arrangement".<sup>52</sup> It must also make it clear that the firm will pay for the cost of making the switch with the existing lender or, where that institution cannot assist, the reasonable costs of doing so with another provider.<sup>53</sup> Similarly, where the policy is to be surrendered as part of the settlement, the company is required to tell the customer in writing that the life cover will come to an end and that it may be appropriate to seek advice about the merits of obtaining replacement protection.<sup>54</sup>

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<sup>50</sup> House of Commons Treasury Committee, "Restoring confidence in long-term savings: Endowment mortgages", March 2004 at p. 30.

<sup>51</sup> For a similar perspective from the world of arbitration, see Kellor, F (1941) *Arbitration in Action*, Harper & Bros, New York, p. 3.

<sup>52</sup> DISP App. 2.3.3.

<sup>53</sup> DISP App. 2.3.4.

<sup>54</sup> DISP App. 2.5.3.

It is vitally important that firms do not use the complaints process as an opportunity to promote their advice services and that they do not slow down the complaints process in order to make recommendations to ex-clients. They should put the relevant regulatory material in their final responses on endowment complaints. They can offer further advice in that letter, but it should be done through a different channel to the complaints function. Otherwise there is a risk that the effectiveness of the two activities could be compromised.

The Treasury Select Committee's notion that firms should be keen to offer advice to people who have just complained against them is unrealistic. Customers who have expressed dissatisfaction about a firm's advice usually do not want to receive more of the same service. There may be a case for equipping Citizens Advice Bureaux more effectively in this area or for firms to give out the IFA Promotions telephone number in their final responses. That is as far as it can go safely.

## 20.7 Referral to the Ombudsman

### 20.7.1 Referring the customer to the Ombudsman

#### 20.7.1.1 The rule

DISP 1.4.12<sup>55</sup> sets out the rules for referring the customer to the Ombudsman:

"When a firm sends a complainant its final response, the final response must:

- (1) inform the complainant that he may refer the complaint to the Financial Ombudsman Service if he is dissatisfied with the final response and that he must do so within six months; and
- (2) enclose a copy of the Financial Ombudsman Service's explanatory leaflet (unless it has already done so under DISP 1.4.5R(2)(b))."

#### 20.7.1.2 Presenting the referral to FOS

Under the PIA rules, the equivalent letter had to give the full name, address and telephone number of the Ombudsman. While much fun was had trying to ascertain the full name of the Ombudsman,<sup>56</sup> this provided otherwise a better format. One company actually removed the address and telephone number from its final responses shortly after N2. All this communicated was a reluctance to have their decisions reviewed by the Ombudsman. Although the leaflet<sup>57</sup> does contain the relevant contact details, it looks poor not to put at least the telephone number in the main body of the letter. Best practice is to give the customer the address, telephone number and website details as part of the referral. This shows again an absence of fear that external scrutiny will produce a better result for the customer.

<sup>55</sup> CRED 17.5.4(2)(b) is the equivalent provision.

<sup>56</sup> The second principal Ombudsman, now Sir Anthony Holland, posed some interesting problems in this respect since he signed correspondence, "J. Anthony Holland" and nobody seemed to know what the "J" stood for!

<sup>57</sup> On the need to enclose the leaflet, see *Ombudsman News*, October 2003 at p. 16.

PIA Regulatory Update 45 suggested mentioning the fact that the leaflet was enclosed.<sup>58</sup> This is a good idea. If someone forgets to put it in the envelope, the customer may well respond by contacting the firm to say so. The act of mentioning the leaflet in the body of the letter reduces the chances of it being left out.

#### *20.7.1.3 Where the Ombudsman might not deal with the case*

There is a problem here for cases which may fall outside the Ombudsman's jurisdiction or which the firm can ask FOS to dismiss without investigating. These are discussed in more detail in Chapter 22 below.

There are four main categories of cases to which this may apply. In some situations, the complaint falls outside DISP because it does not come within the definition of an eligible complaint for FOS investigation purposes. Pensions administration cases do fall within the FSA's rules. However, they are dealt with by the Pensions Ombudsman under a Memorandum of Understanding between that organisation and the Financial Ombudsman Service.<sup>59</sup> The firm may ask the Ombudsman to dismiss a case summarily if it relates to certain subjects, notably legitimate commercial decisions, investment performance or if the customer is continuing with court proceedings against the firm on the same subject.<sup>60</sup> Finally, a case may be time barred under DISP 2.3.

The correct way to handle these four different types of case varies. Where the Ombudsman probably has no jurisdiction because the case falls outside DISP, the firm should refer the customer to FOS anyway, adding that the company does not think that the Ombudsman can deal with the case. If it is wrong, this saves the firm from being in breach of DISP 1.4.12.

Pensions administration cases pose real problems here. A strict reading of DISP 1.4.12 requires the firm to refer the customer to the wrong Ombudsman. The firm should add that in its view, the Financial Ombudsman Service may pass the case to the Pensions Ombudsman to be resolved there. It should probably give the address and telephone details of that organisation and OPAS.

In cases where the firm will ask FOS not to consider the case either because of its subject matter or the time-limits, the usual form of referral should be used. The company should add that it will, nevertheless, ask the Ombudsman to decline to deal with the case and make the points that it proposes to raise in this respect.

In each of these situations, by raising the problem about the Ombudsman being able to deal with the case, the firm is being open and honest with the customer and not giving him false hopes. It is also making sure that legally it has not waived its right subsequently to object to FOS looking at the file and charging it a case fee.

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<sup>58</sup> RU45 at p. 7.

<sup>59</sup> Memorandum of Understanding 7 October 2002.

<sup>60</sup> DISP 3.3.1.

### 20.7.2 *The six months warning*

PIA Regulatory Update 45 also suggested a useful form of words for the six months warning. It was along the lines of:

“If you wish to refer your complaint to the Ombudsman, you must do so within six months of the date of this letter or you may lose your right to have the matter considered.”<sup>61</sup>

The use of the word “may” is intentional. In fact, the Ombudsman may consider cases brought to him outside that time frame in exceptional circumstances or if the firm consents.<sup>62</sup> So it is misleading to suggest otherwise.

It is vitally important that the letter includes a clear six months warning and the contact details of FOS, or that at least the leaflet is actually enclosed. Otherwise, FOS will not apply the six months limit<sup>63</sup> and the firm is potentially exposed to a complaint being made to the Ombudsman at any time in the future. The advantage of putting the address and telephone number of the Scheme in the final response is clear in this respect.

### 20.7.3 *Threatening to charge the customer for the FOS case fee*

As already seen, the FSA reacts strongly against any attempt to dissuade customers from referring their cases to the Ombudsman.<sup>64</sup> Occasionally a firm tries to charge the complainant the Ombudsman case fee and other expenses involved in handling the complaint. This is totally unacceptable. FOS made this clear in *Ombudsman News* in response to a letter from an IFA. It said:

“You cannot claim back these costs from your client – or suggest to him that you might do so. Consumers have a statutory right to refer disputes to us if they are unhappy with the way the firm has dealt with a complaint. And as a matter of law, the service is free to consumers.

If a firm threatens to penalise a customer for exercising the right to refer a complaint to us, then the FSA has indicated that it will treat the firm as having failed to meet certain of its *Principles for Businesses*. These are Principle 6 (*A firm must pay due regard to the interests of its customers and treat them fairly*) and Principle 8 (*A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client*).

If a firm fails to meet the FSA Principles, the regulator can take disciplinary action that, in some circumstances, may put the firm out of business.

Where appropriate, we may inform the FSA if we become aware of a firm putting pressure on any customers to try and stop them referring their complaints to us.”<sup>65</sup>

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<sup>61</sup> RU45 at p. 7. The author has changed the pronouns and exchanged “the firm’s final decision letter” for “this letter” to make it work in practice.

<sup>62</sup> DISP 2.3.1(2). DISP 2–5 apply to credit unions.

<sup>63</sup> DISP 2.3.3.

<sup>64</sup> Final Notice to Friends Provident Life & Pensions Limited, 15 December 2003 at para. 6.12.

<sup>65</sup> *Ombudsman News*, December 2002 at p. 20.

The Institute of Financial Planning very publicly disciplined a prominent member of that organisation for trying to do the same thing.<sup>66</sup> In spite of this, a trading standards officer reported that:

“The adviser has now written to [the complainant to] say that as her complaint . . . was ‘frivolous and vexatious’, she owes him £1,000.”<sup>67</sup>

FOS apparently made an award for distress and inconvenience in the case concerned for precisely this reason.<sup>68</sup> It is hoped that it also referred the matter to the FSA.

The Ombudsman Service is free of charge to all complainants. This is to ensure that it remains accessible to everyone. Any suggestion to the contrary in a final response letter or other correspondence risks putting the firm’s regulatory status in jeopardy.

## 20.8 Closing the letter

Since the final response will probably be the last letter of substance that the firm will write about the complaint, it makes sense to add a sentence to close the letter with a sympathetic remark:

“We apologise again for the fact that you have had to complain about our company and appreciate the time and trouble that you have taken to draw our attention to the problems that you have encountered.”

Perhaps, the most important thing to do at the end of the letter is to indicate what the customer has to do now in order to accept an offer. Strictly speaking, the client could ring the company and just say: “I accept your offer”, and that would be sufficient to bind both parties to its terms. Nevertheless, for the sake of tidiness, many companies like to use acceptance forms, particularly in areas where there are high volumes of complaints.

There is nothing wrong with using an acceptance form. However, assuming that the view expressed in the PIA Pensions Review Guidance is still valid on this point, any discharge should appear prominently on the form.<sup>69</sup> If it is well drafted, this should not cause any particular problem.

When it offers compensation, the letter should end with something on the lines of: “We look forward to hearing from you shortly”. This finishes the letter in a pleasant fashion. When rejecting the complaint, the company could finish with: “We are sorry that we are unable to help you further”.

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<sup>66</sup> “IFP Disciplinary Committee Update”, *Financial Planner*, summer 2004 at p. 5.

<sup>67</sup> *Ombudsman News*, May/June 2004 at p. 12.

<sup>68</sup> *Ombudsman News*, May/June 2004 at p. 12.

<sup>69</sup> PIA Redress Guidance at p. 16.

## **20.9 Conclusion**

The purpose of the final response is to persuade the customer, FOS, regulators and auditors that the company is both right and reasonable. It is the last important letter on the case from the company. So it must impress people. It will only achieve that if it is written in language that the customer will understand and feel comfortable with.

The structure of the letter seeks to mirror what an adjudicator or even a judge would say. It begins with some opening remarks designed to build rapport between the customer and the firm. It should then set out the grounds for the complaint and any other matters that the firm has investigated. The final response must set out the relevant facts in chronological order. Otherwise, nobody apart from the customer and the firm will be able to understand it. This is also part of the process of showing to everyone who reads the letter that the conclusion is correct. Facts are a large part of the basis for the outcome. The letter then analyses the events in question and reaches a clear conclusion as to whether the complaint should be upheld.

Where an offer is made, it should be crystal clear as to what is being proposed. Where significant compensation or issues are involved, the firm probably needs a discharge. This should be simply drafted to exclude the possibility of further claims against the company relating to the same subject matter. The firm should not ask the customer to give up anything else.

Finally, the customer should be referred to the Financial Ombudsman Service and given a clear warning of the need to contact that organisation within six months. The reference to FOS should include its address and telephone number and refer to the enclosed leaflet. It is a sensible touch to add the website address. This all contributes to the image of the company as being content to receive and learn from external scrutiny.