LIMITATION AND CONSUMER FINANCIAL SERVICES COMPLAINTS
by Adam Samuel

I: INTRODUCTION

The last decade has been a tumultuous one for Limitation and consumer complaints.

At the start of 2001, nobody gave the subject any great thought although perhaps they should have. The Court of Appeal's decision in *Cave* v. *Robinson, Jarvis & Rolf* and the *Brocklebury* case before it applied section 32 of the Limitation Act to a fairly standard professional negligence case. All that was necessary for this was that the act complained of was deliberate and that its nature was such that it could not be easily discovered by the victim. Where section 32 applies, time runs from 6 years from the victim's discovery or when he should have discovered that he had a cause of action. The 15 year backstop which normally time-bars claims made 15 years after the relevant event does not apply when section 32 does.

The effect of all this was reflected in the first issue of Ombudsman News which effectively declared the Limitation Act to be a dead duck in consumer financial services complaints. At the time, these were being dealt with by the Financial Ombudsman Service under a delegation of authority by the Personal Investment Authority Ombudsman Bureau (PIAOB). The PIAOB had been the first of the private sector Ombudsman schemes to include a provision preventing the organization from dealing with complaints that would be time-barred in a court. Even then, the regulator had had to amend the Terms of Reference to ensure that complainants did not flood PIAOB with pension transfers, opt-outs and non-joiner complaints which might otherwise become barred as a result of the time being taken by firms to carry out the review of those cases.

In the last three years, all this has changed. First, the FSA brought into force its own rules for the Financial Ombudsman Service, contained in Chapter 2 of DISP. These contain a limitation period that looks like but is not the same as that applied by the Courts.

Secondly, in April 2002, the House of Lords reversed the Court of Appeal's decision in *Cave* v. *Robinson, Jarvis & Rolf*.[1] It concluded that section 32, with its six year period and its disapplication of the 15 year backstop, only applies where the defendant has intentionally either done wrong or concealed it.

Thirdly, later that year, the Consumers Association became concerned that the new FSA rule could bar endowment complaints, made three years after consumers received from insurers a "red letter" warning investors that their policies would probably not reach the targets set at the start of the contracts. Its campaign, designed to lengthen the relevant Limitation period, perversely convinced the regulator to shorten it while protesting that it was doing the exact opposite. Amidst all the publicity, firms who had previously not given a great deal of thought to relying on time-bars suddenly saw this as

1 [2003] 1 A.C. 384

an opportunity to reduce their compensation bill.

Subsequently, an extremely difficult five-judgement decision of the House of Lords has increased confusion surrounding what is already a tough subject. At the same time, one County Court Judge has concluded that sending a red letter does not start the 3 year period running for the purposes of section 14A of the Limitation Act. A well-known bank has also given up defending a case shortly before the relevant hearing on the same point. There is also a complex but probably largely one-off case about income drawdown: *Shore* v. *Sedgwick Financial Services Ltd*.[2] The latest issue is determining the scope of the DISP rules relating to endowments. Do they cover policies surrendered before any red letters were sent out and misselling complaints about matters other than shortfalls, in particular sales into retirement?

II: SUMMARY

(i) The complainant is not time-barred from bringing a **claim to court** if he can bring his case within one of these categories

1. Six years from the completion of the transaction - see sections 2 & 9 Limitation Act 1980

2. Three years from the date on which the complainant learned of or should have known of the probability of financial loss up to 15 years from the transaction - see section 14A Limitation Act

3. Six years from any breach of contract - see section 5 Limitation Act

4. Six years from the date on which the complainant could reasonably have discovered negligence or breach of duty and probable financial loss if the breach of duty was deliberate and the circumstances make it unlikely that the breach of duty will be discovered for some time or where the defendant discovered the error and deliberately concealed it - see section 32 Limitation Act

(ii) The **Financial Ombudsman Service** will not consider a complaint brought to the firm more than

1. Six years after the event complained of and

2. Three years from the date on which he became aware (or ought reasonably to have become aware) that he had cause for complaint (DISP 2.8.2R(2))

This does not apply in exceptional circumstances or in Pensions or FSAVC review cases.[3]

(iii) In **endowment** cases, FOS will not usually hear a case if the consumer failed to

2 [2008] EWCA Civ 863

3 2.8.2R(3).

complain to the firm within 3 years of receiving his first red one about the policy. This, though is subject to a series of conditions.

(a) For complaints made to firms before 1st June 2004, six months must have passed since the customer received a second mailing of any colour.

(b) For complaints made to firms on or after 1st June 2004, the customer must have received a letter warning the client that the firm would rely on the time-bar,

1) more than two months from the end of the 3 year period if it ends before November 30th 2004.

2) otherwise more than 6 months before the end of the 3 year period.

The FOS time-bars do not apply in exceptional circumstances or in the case of the special endowment rules where the Ombudsman considers that the standard rules should apply (DISP 2.8.7R(5)).

That at any rate is the correct interpretation of the rule. However, FOS and the FSA have taken to misinterpreting the transitional provisions to time-bar complaints made to the firm after 1st June which had they been made before that date would have been time-barred. The Ombudsman has also shown a reluctance at times to rely on 2.8.7R(5) both to assist firms where policies matured before an appropriate red letter was sent and where it might help clients as regards complaints unrelated to a shortfall.

(iv) FOS also cannot deal with a complaint brought to it more than six months after the client was referred to it in the firm's final response letter other than in exceptional circumstances.

(v) If the complaint is time-barred under DISP, the firm must write to the complainant a final response explaining this and giving referral rights to FOS. It does not need to investigate the merits of the complaint.

III: LITIGATION AND LIMITATION

The basic approach to time-bars is to remember that the complainant only has to find one provision of the Limitation Act that permits his action, for him to succeed on this point. The same applies to the equivalent rules for the Financial Ombudsman Service. It is also important to note that firms are under no obligation to rely on Limitation. If they do not do so, neither the courts nor FOS will apply it pro-actively.[4]

1. BASIC LIMITATION PERIOD FOR A CLAIM IN NEGLIGENCE OR FOR BREACH OF CONDUCT OF BUSINESS RULES (SECTION 62 FSA/ SECTION 150 FSMA) - 6 YEARS FROM TRANSACTION

The first period we need to be interested in is 6 years from the date when the cause of

4 DISP 2.8.2R(5) & Ombudsman News May 2002 at p. 6.

action arose. For a claim in breach of contract, that is the date of the breach. For a negligence of section 62 or 150 claim, that will be when a loss has been suffered. That is normally when the defective transaction was concluded.[5] This means the date when the acceptance of the application was received by the client. Assuming that there has been no loading of the premium, this is the date on which the policy was received by the customer. If the contract has been loaded, the relevant date is that on which the amended terms have been received by the insurer. If the complainant starts his claim within six years of these dates, he will not be time-barred in the Courts or at FOS.

The Court of Appeal in *Shore* v. *Sedgwick* plumped firmly for the date of the transaction. Although in that case, there was no certainty that the customer would be worse off at that date, in a sense, the damage had been done. At least until the House of Lords considers this problem, the transaction date will remain the test for all financial services products that do not have any element of contingency liability risk, in laymen's terms, just about everything.

2. LATENT DAMAGE ACT S14A LIMITATION ACT - 3 YEARS FROM DISCOVERY OF THE PROBLEM OR WHEN HE SHOULD HAVE DISCOVERED IT AND SHOULD HAVE SUED - UP TO 15 YEARS FROM THE EVENT OR TRANSACTION

The second period comes from the Latent Damage Act and can be found in section 14A of the Limitation Act. Here, the 3-year period runs from the earliest date on which the complainant had both the knowledge required to bring the action and a right to bring the action. Section 14A does not apply to claims brought under sections 62 of the 1986 Financial Services Act or 150 of the Financial Services and Markets Act for breach of the conduct of business rules. However, as has been said on a number of occasions, a breach of the conduct of business rules is likely to constitute negligence. Section 14A does apply to a claim couched in those terms.[6]

The knowledge concerned is of the material facts about the damage in respect of which compensation is being claimed. Those facts are those that would lead a reasonable person to consider it sufficiently serious to justify instituting proceedings. The section then defines knowledge as being what he might reasonably have been expected to acquire from facts observable or ascertainable by him or from facts ascertainable by him with the help of appropriate experts advice. However, where he has taken reasonable steps to obtain and act on the advice, he is not to be taken to have the relevant knowledge if it would have taken an expert's advice to point it out to him.

In *Glaister* v. *Greenwood*, an IFA advised Mr Glaister to transfer his preserved OPS benefits to a personal pension. The customer received a SIB factsheet in April 1995 that suggested that he may have suffered a loss from transferring. In February 1996, he told the ICS that he believed that he had a claim because press articles and legal advice suggested that he would have been better off not to transfer. It was only when

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5 Sections 2 on actions in tort (ie negligence) and 9 on actions under statute (ie s.62 FSA or s. 150 FSMA for breach of the conduct of business rules). Glaister v. Greenwood at para 36 assumes that the primary limitation period run from the transaction. Shore v. Sedgwick at para. 41.

6 Shore v. Sedgwick Financial Services Ltd [2007] EWHC 2509 at para 198.

he received a report in February 1997 from an actuary indicating that there was probably a difference in the value of his personal pension and the preserved benefits of between £600 and £2400 that Mr Glaister had the relevant actual knowledge. The 3-year period ran from that date and so the claim was not time-barred.

Beatson J followed this approach in *Shore* v. *Sedgwick*.[7] He said:

> 220 Mr. Wardell submitted that Mr. Shore had the requisite knowledge in the spring of 1997. This was because he knew or must be taken to have known of his accrued rights under the Avesta scheme and that he would have no final salary rights when he transferred out of it. He also knew or must be taken to have known of the warnings in the personal financial report. The Scottish Equitable illustrations he received gave him knowledge that, save on the highest growth assumption, his income would fall if he withdrew the maximum permitted income. He was a businessman, a trustee of the Avesta scheme, and had been advised of his rights by Wragge and Co and Mr. Jamison of Britannia, the scheme's actuaries.
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> 221 I reject this submission. In effect it is a submission that Mr. Shore knowingly took the risk. This is inconsistent with my findings on liability which are predicated on the insufficiency of the explanations given by Mr. Ormond. Moreover, at the time Mr. Shore transferred out of the Avesta scheme and in July 1997, for the reasons I have given, he had not suffered damage. He was only exposed to risks. While he could be regarded as having knowledge of some of the material facts for the purposes of section 14A(6)(a) and (7), **he did not know about Sedgwick's recommendation that the maximum income withdrawal should not exceed 75% of the maximum GAD limit.** In the light, in particular of what Mr. Waddingham said about the importance of discussions as well as documents, he also did not have the requisite knowledge of the risks involved in taking maximum income under his PFW. The standard paragraph warning clients of the risks of taking income at or close to the permitted maximum limit was not included in Mr. Shore's personal financial report. Nor do I find that, even an experienced businessperson would, unless in finance, know of the risk as a result of being taken through Scottish Equitable's illustrations in the way Mr. Ormond took him through them.” (Emphasis added.)

The bold text suggests that three years cannot run on an endowment sold into retirement from the date of the sale on the basis that the customer knew his age. The customer must also appreciate the unsuitability of the transaction or at least the factors that make it unsuitable. The same would apply to a foreigner recommended to take out an endowment. Only an expert could appreciate the difficulties that this could create in maintaining direct debit payments in the event of going abroad and the unsuitability of using a savings vehicle which is only exempt from certain taxes in the customer’s hands in the UK. We will return to this case in relation to the drawdown aspects after the look at the *Haward* case.

Dyson LJ in the Court of Appeal commented further:

7 Shore v. Sedgwick Financial Services Ltd [2007] EWHC 2509 at para 198.

“58. The judge summarised the relevant principles set out by the House of Lords in *Haward v Fawcetts* [2006] UKHL 9, [2006] 1 WLR 682 in the following terms:

"225. It is clear from *Haward v Fawcetts* [2006] 1 WLR 682 that the key to "knowledge" for the purposes of section 14A is knowing facts with sufficient confidence to justify embarking on the preliminaries to the issue of a writ: see also *Halford v Brooks* [1991] 1 WLR 428, 443. Knowledge that the damage was "attributable" in whole or in part to the acts or omissions of the defendant alleged to constitute negligence within section 14A(8)(a) means knowledge in broad terms of the facts on which the claimant's complaint is based and of the defendant's acts or omissions. It must also be known that there is a real possibility that those acts or omissions were a cause of the damage. The first of these tests concerns the degree of certainty required before knowledge can be said to exist. The second concerns the degree of detail required before a person can be said to have knowledge of a particular matter in the context of the requirements of section 14A(8)(a), the question of attributability.

226. A variety of phrases have been used to describe the degree of detail required. These include "broad knowledge" of matters pointing to the defendant's act or omissions, an appreciation "in general terms", and knowledge of the "essence" of the act or omission to which the injury was attributable: see the decisions cited by Lord Nicholls at paragraph [10] in *Haward v Fawcetts.* One of these was *Broadley v Guy Clapham and Co* [1994] 4 All ER 439 where Hoffmann LJ, at 448 stated that section 14(1)(b) requires that "one should look at the way the plaintiff puts his case, distil what he is complaining about and ask whether he had, in broad terms, knowledge of the facts on which that complaint is based."

59. Having referred in some detail to the speeches in *Haward,* he continued:

"233. **(d) The present case:** By 15 December 1999 Mr. Shore knew that there had been a substantial fall in annuity rates since 1997. He knew that this and the level of his drawings would mean that his income would be substantially reduced at the triennial review when the maximum pension he would be entitled to withdraw would fall. I have found that Mr. Shore was aware of Sedgwick's recommendation that no more than 75% of the maximum permitted income should be withdrawn under a PFW scheme by the end of May 1999. Additionally, Mr. Fry specifically drew it to his attention in December when explaining to him why, as he also knew, the value of his fund had fallen.

234. By the time of the triennial review in May 2000 Mr. Shore knew of his actual loss of income from £45,869 pa to £32,578 pa, a reduction of over 30%. He also knew, as a result of what Mr. Fry had told him in December that the taking of maximum income had exposed him to this risk. He also knew, or should have known, that at the age of 60, which he would attain on 7 October 2000, he would be in receipt of an income substantially lower than that which he could have expected to receive had he remained a member of the Avesta scheme or had purchased an annuity in July 1997."

235. Mr. Shore was in a similar position to the claimant in *Haward v Fawcetts*. He knew what advice had been given by Mr. Ormond and what advice had not been given by him. By 15 December 1999 he knew that he had not been told of the recommendation that no more than 75% of the maximum permitted income should be drawn and had not been warned of the risks of drawing maximum income. Mr. Ormond failed to advise him as to the risks of PFW policies and the particular risks of drawing the maximum permitted income. He also failed to advise him about the benefits obtainable by purchasing an annuity in the light of those risks when his income needs changed in late May and early June 1997. Mr. Shore knew he relied on Mr. Ormond's advice. The causal connection between the advice, in particular the failure to advise about the risks of drawing the maximum income, and the damage was obvious.

236. Mr. Shore thus had knowledge of his actual loss of entitlement to income and of income, its causes and the relevant conduct of SFS and Mr. Ormond. I remind myself of the terms used in *Haward v Fawcetts*: "broad knowledge", the "essence", and "the essential thrust". In the light of these, in this case what Mr Shore was told in December 1999 about the risks of taking maximum income and the 75% recommendation meant that he appreciated in general terms that the loss he would sustain once the GAD rates were adjusted was capable of being attributed to Mr. Ormond's advice: see paragraph 10 of *Hayward v Fawcetts*.

237. I do not consider that any reassurance given to Mr. Shore about the underlying state of the fund or what might be done about the GAD rates means that he did not have sufficient knowledge. The absence of advice as to the risk of a reduced pension if maximum income is drawn lies at the heart of his complaint. Certainly by May 2000, and probably by 15 December 1999, Mr. Shore knew there was a real possibility his damage was caused by the failure to give him this advice."

60In *Haward* the House of Lords made it clear that the knowledge requirements must not be interpreted too strictly. The judge gave an accurate summary of the principles at [225] and [226] of his judgment which I have already quoted. I would also refer to the speech of Lord Brown of Eaton-under-Heywood at [90] where he said that all that is required is sufficient knowledge "to realise that there is a real possibility of his damage having been caused by some flaw or inadequacy in his advisers' investment advice, and enough therefore to start an investigation into that possibility which section 14A then gives them three years to complete". See also per Lord Mance at [126]: "actual knowledge within (a) involves knowing enough to make it reasonable to investigate whether or not there is a claim against a particular potential defendant".

61 As regards the date of knowledge of the "fact" that Mr Shore should have been advised to remain in the Avesta scheme, as I have said, the judge did not deal with this issue because he found that there was no duty to give the advice in the first place. But the judge was obviously right to say that Mr Shore knew what advice he had been given and what advice he had not been given. By May 2000, Mr Shore knew or should have known that at the age of 60 he would receive an income that was substantially lower than that which he could have

expected to receive if he remained a member of the Avesta scheme. The judge was also right to find that by May 2000, Mr Shore knew that there was a real possibility (to put it no higher) that the loss he had suffered as a result of not remaining in the Avesta scheme was caused by the failure of SFS to advise him to do so. In my judgment, that was sufficient to fix Mr Shore with knowledge of the facts relevant to the alleged breach of the advice duty for the purposes of section 14A. He had sufficient knowledge to make it reasonable to investigate whether there was a claim against SFS for their responsibility for his leaving the Avesta scheme for the PFW scheme.

62. I turn to the date of knowledge of the fact that Mr Shore had the option of remaining in the Avesta scheme. There is something unreal in the suggestion that, on the facts of this case, the allegation that SFS failed to inform Mr Shore that he had the option of remaining in the Avesta scheme is distinct from the allegation that SFS failed to advise him to remain in that scheme. It is implicit in the allegation that SFS should have advised him to remain in the scheme that he had the option to do so. In my view, the allegation that SFS should have informed Mr Shore that he had the option to remain in the Avesta scheme is subsumed in the allegation that they should have advised him to remain in the scheme. This is borne out by the terms in which Mr Shore's solicitors wrote to the Ombudsman on 2 November 2004 (following receipt of advice from Mr Erskine), when they expressed the new complaint in these terms:

"Advice could and should have been given in clear and unambiguous terms to Mr Shore that his stated objectives were met by his existing pension provision, without the need for any transfer to take place, or any investment risk to be incurred. Further the cash free sum available under the Avesta scheme was far in excess of that available via the drawdown route. Of course such advice, if accepted, would not have resulted in any commission for the adviser."

The significance of this letter is that it was written after Mr Erskine told Mr Shore that he had the option of remaining in the Avesta scheme. The letter contains no discrete complaint about the failure of SFS to inform Mr Shore of the existence of the option.

64 When the judge came to deal with the section 14A issue, he did not remind himself of his earlier findings at [41] and [42]. He did not deal explicitly with the question whether Mr Shore had knowledge before September 2004 of the "fact" that he had the option of remaining in the Avesta scheme. But it is implicit in [234] that the judge was saying that in May 2000 Mr Shore knew that he did have the option of remaining the Avesta scheme. Mr Soole submits that [234] is inconsistent with [41] and [42]

65 In [41] and [42], the judge was saying that it was not clear to Mr Shore in early 1997 what the effect of the winding-up of the scheme would be on his benefits. But the fact that in early 1997 he was unclear as to whether he could remain in the Avesta scheme is not inconsistent with a finding that there later came a time when he acquired knowledge that he should have been advised to remain in the scheme. Once it became clear to him that (for the time being at least) he was substantially worse off as a result of leaving the scheme, he

> should have realised that there was a real possibility that his financial disadvantage was attributable to the advice that he had received from SFS such that it became reasonable for him to investigate that possibility.
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> 66. In my judgment, the judge's reasoning at [233] to [237] cannot be faulted. It is fatal to Mr Shore's case on section 14A both in relation to the alleged breach of the advice duty and information duty. By May 2000 Mr Shore had acquired knowledge of the relevant facts in relation to both."

To apply the same logic as the *Shore* and *Glaister* cases to endowments, section 14A effectively ensures that until the client knows that he has probably suffered a loss judged by the standards of the FSA DISP App. 2 and that the sale was non-compliant or at least negligent, the 3-year period will not have started. A red letter does not have that effect since it does not tell the client that he has actually suffered a loss. This is reflected in paragraph 3 in the Notes to Editors of the FSA's Press Release of 22nd November 2002 (repeated paragraph 1 of the Notes of the Release of 21st January 2003). This reads:

> "A red letter is not enough to start time running on its own."[8]

The red letter suggests that his endowment is not likely to repay his mortgage. That is a different issue from whether the customer has suffered a financial loss as a result of the firm's non-compliance. This typically involves a comparison between the surrender value and the amounts that would have been repaid from a capital repayment loan.(There are also other elements such as the extra cost of replacement life cover and the cost of decreasing term cover for those who needed it and any switching costs.) This is a completely different calculation from the one that predicts that assuming certain growth rates the policy is unlikely to produce the sum assured on maturity.

If the industry wanted to start time running for limitation purposes, it would presumably have put a clear statement in the letter that the policy may well have been missold and that a significant loss has probably occurred. No such statement appears in a red letter.

In *Oakes* v. *Hopcroft*,[9] the claimant had suffered a work accident. She was wrongly told by a doctor that her injuries were much less serious than they were. She settled the court case against her employer by accepting much too low a payment. The Court of Appeal said that, for the three years to start running under section 14A, she had to know not only that the doctor had mis-diagnosed her condition but that she had accepted too low a settlement as a result.

In the textbook red-letter case, the client will not know whether they would have been better off with a capital repayment loan from the same provider. Actually, where an individual has taken out the endowment as a condition of a subsidised mortgage, he may have received a red letter without having suffered any financial loss. This assumes that the adviser is allowed to take into account the subsidy in calculating whether the client has lost out. The letter only indicates that the policy is unlikely to reach its target

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8 FSA/PN/008/2003

9 [2000] Lloyd's Rep. PN 946

maturity value.

This is broadly the view taken by the Reigate County Court in *Cunningham* v. *Friends Provident*, a decision whose text can be found on the “Writing” page of this website.

The House of Lords decision in *Haward* v. *Fawcett*[10] raised a question that many thought had been decisively concluded in favour of defendants: whether the complainant has to appreciate that the loss was the defendant’s fault. This does not appear to be quite as clear cut.

Lord Nicholls said:

> “Time does not begin to run against a claimant until he knows there is a real possibility his damage was caused by the act or omission in question…
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> In addition to having knowledge of the material facts about the damage, a claimant must know there was a real possibility the damage was caused by ('attributable to') the acts or omissions alleged to constitute negligence.
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> Stated in simple and broad terms, his claim is that Mr Austreng did not do his job properly. Time did not start to run against Mr Haward until he knew enough for it to be reasonable to embark on preliminary investigations into this possibility.”

Lord Scott reminds us that the Law Reform Committee behind section 14A said

> that "a plaintiff who has no means of knowing that he has suffered damage should not as a general rule be barred from taking proceedings by a limitation period which can expire before he discovers (or could discover) his loss".

Lord Walker concluded that the HF Pension Trustees case was wrongly decided:

> “Until the FMC scheme trustees knew that they had received seriously incorrect advice which overlooked the need for propriety in exercising fiduciary powers, they did not know that the interests of their beneficiaries, the scheme members, were being prejudiced. This lack of knowledge did not mean merely that they were ignorant of having a cause of action in negligence against the solicitors; more fundamentally and more relevantly, they did not know that they (on behalf of the beneficiaries) had suffered any damage at all. They did not know that what had happened was not a more or less technical reorganisation of two pension schemes, but an improper abstraction of funds which might (if the tax was not recovered) deprive their beneficiaries of over £7m. In short, they knew the bare facts, but they were ignorant of their real significance.”

Lord Brown tries to express things more succinctly but in doing so sets the most restrictive test by far:

10 [2006] UKHL 9

> "On the facts of this case the question ultimately seems to me to come down to this: to set time running did Mr Haward need to know not only that the investment was made on Fawcetts' advice but also that that advice had not been based on the kind of investigations which must necessarily be undertaken before any such advice can be reliably tendered?... I have finally come to the conclusion that nothing more *is* needed."

Lord Mance expresses support for the views expressed here about the need for a financial loss.

> "The seriousness of the damage is relevant because there may be cases where, although it is known that loss has been suffered due to the negligence of another person, the loss may appear for a time so minor that no-one would contemplate instituting proceedings."

However, what comes next would effectively make most consumer financial services time-bars limited to the 15-year backstop:

> "Similarly, if a financial adviser advises in favour of an investment, one would not describe the making of the investment itself as "damage" until one discovered that it had been a bad or unsound investment from the outset….
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> A claimant who has received apparently sound and reliable advice may see no reason to challenge it unless and until he discovers that it has not been preceded by or based on the investigation which he instructed or expected. A claimant who has suffered financial loss in a transaction entered into in reliance on such advice may not attribute such loss to the advice unless and until he either makes the like discovery about the inadequacy of the work done, or at least discovers some respect in which the transaction was from the outset unsound giving him (as Hoffmann LJ said) *prima facie* cause to complain. Such a scenario may well occur where there are other causes of loss which appear to him capable of explaining the whole loss."

These uncomfortable judgements stress the need (when they mention it at all and it was not relevant to the decision) for the customer to appreciate that he had suffered a significant loss before time starts to run. Otherwise, the customer must be aware that the loss is attributable to the advice given to him by the firm. That is a point made clearly by the Deputy District Judge in the *Cunningham* v. *Friends Provident* case. Probably, though, the customer does not need to appreciate that the advice was bad although this is now far from clear.

The *Shore* case casts a little more light on the Haward case. Beatson J says:

> 225…."the key to "knowledge" for the purposes of section 14A is knowing facts with sufficient confidence to justify embarking on the preliminaries to the issue of a writ…. Knowledge that the damage was "attributable" in whole or in part to the acts or omissions of the defendant alleged to constitute negligence within section 14A(8)(a) means knowledge in broad terms of the facts on which the claimant's complaint is based and of the defendant's acts or omissions. It must also be known

> that there is a real possibility that those acts or omissions were a cause of the damage. The first of these tests concerns the degree of certainty required before knowledge can be said to exist. The second concerns the degree of detail required before a person can be said to have knowledge of a particular matter in the context of the requirements of section 14A(8)(a), the question of attributability.
> 226… look at the way the plaintiff puts his case, distil what he is complaining about and ask whether he had, in broad terms, knowledge of the facts on which that complaint is based".
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> 227 Lord Nicholls stated .. that "consistently with the underlying statutory purpose, 'attributable' has been interpreted by the courts to mean a real possibility, and not a fanciful one, a possible cause of the damage as opposed to a probable one". He stated (paragraph 11) that "time does not begin to run against a claimant until he knows there is a real possibility his damage was caused by the act or omission in question". …
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> 228 It is clear that knowledge that the act or omission involved negligence is irrelevant. Section 14A(9) draws a distinction between acts said to constitute negligence and the legal consequence of those facts "knowledge of the former (the facts)" is needed before time begins to run, knowledge of the latter (the legal consequence of the facts) is irrelevant: … Lord Walker (paragraph 67), however, agreed with Lord Nicholls that the insistence on extremely non-judgmental language may sometimes ignore the realities of the situation. He stated that the level of generality or specificity will often be more important for the court to address than whether judgmental language is inconsistent with section 14A(9).

The key point to note is that the customer in a financial services case typically does not know or understand elements of the transaction, the products concerned and otherwise available and how they all work together until after the complaint is made. It is not that the complainant does not know that the acts constitute negligence. He is unaware of the facts that render those acts negligent. On that basis, until he does learn these facts, the three year period does not start to run.

To confuse matters, Shore was sophisticated businessman. By 15 December 1999, Shore knew that annuity rates had fallen since 1997 and that this would reduce the maximum income he could take from his plan. He had also discovered about the firm’s recommendation that not more than 75% of the maximum income should be taken. This had all been explained to him when he was told that his fund had fallen in value. The judge concluded with regret:

> “235…He knew what advice had been given by Mr. Ormond and what advice had not been given by him. By 15 December 1999 he knew that he had not been told of the recommendation that no more than 75% of the maximum permitted income should be drawn and had not been warned of the risks of drawing maximum income. Mr. Ormond failed to advise him as to the risks of PFW policies and the particular risks of drawing the maximum permitted income. He also failed to advise him about the benefits obtainable by purchasing an annuity in the light of those risks when his income needs changed in late May and early June 1997. Mr. Shore knew he relied on Mr. Ormond's advice. The causal connection between the advice, in particular

> the failure to advise about the risks of drawing the maximum income, and the damage was obvious.
>
> 236 Mr. Shore thus had knowledge of his actual loss of entitlement to income and of income, its causes and the relevant conduct of SFS and Mr. Ormond. I remind myself of the terms used in *Haward v Fawcetts*: "broad knowledge", the "essence", and "the essential thrust". In the light of these, in this case what Mr Shore was told in December 1999 about the risks of taking maximum income and the 75% recommendation meant that he appreciated in general terms that the loss he would sustain once the GAD rates were adjusted was capable of being attributed to Mr. Ormond's advice: see paragraph 10 of *Hayward v Fawcetts*.
>
> 237 I do not consider that any reassurance given to Mr. Shore about the underlying state of the fund or what might be done about the GAD rates means that he did not have sufficient knowledge. The absence of advice as to the risk of a reduced pension if maximum income is drawn lies at the heart of his complaint. Certainly by May 2000, and probably by 15 December 1999, Mr. Shore knew there was a real possibility his damage was caused by the failure to give him this advice.
>
> 238 I therefore conclude that SFS's limitation defence succeeds. …it gives me no satisfaction to reach this conclusion."

Three years seems to run then from the date that Mr Shore knew that he had been given the wrong advice and that this had caused a drop in his pension fund and the income he could take from it.

The Court of Appeal in the same case agreed with this approach. Dyson LJ said at paragraph 61:

> "By May 2000, Mr Shore knew or should have known that at the age of 60 he would receive an income that was substantially lower than that which he could have expected to receive if he remained a member of the Avesta scheme… Mr Shore knew that there was a real possibility .. that the loss he had suffered as a result of not remaining in the Avesta scheme was caused by the failure of SFS to advise him to do so. In my judgement that was sufficient to fix Mr Shore with knowledge of the facts relevant to the alleged breach of the advice dut for the purposes of section 14A."

The key finding of fact, though, here is that by May 2000, it had become "clear to him that (for the time being at least) he was substantially worse off as a result of leaving the scheme." Again, the vagaries of income drawdown and the fact that Mr Shore was a sophisticated businessman may mean that this judgement has less impact at least as regards section 14A than it might.

Finally, section 1(2) of the Limitation Act provides that the limitation period of 15 years from the date of the event (often known as the backstop) applies to cases brought under section 14A. This means that in the ordinary case (the exception will be dealt with later in the description of section 32 of the Act), an endowment complaint will be time-barred in court 15 years after the date on which the policy commenced.

This is important for IFAs. Typically, their pre-29th April 1988[11] sales are not covered by any Ombudsman scheme. The FSA complaint rules (DISP) only apply to cases covered by a "former scheme".[12] "Former scheme" includes the Personal Investment Authority Ombudsman Bureau (PIAOB) and the Banking and Building Society Ombudsman schemes.[13] It does not include the FIMBRA Arbitration Scheme.

PIAOB had a compulsory jurisdiction covering events that occurred on or after 29th April 1988. It also had a voluntary jurisdiction which dealt with matters regardless of when they occurred. Unlike their life assurer counterparts, most independent financial advisers did not agree to be bound by the PIAOB's voluntary jurisdiction. This enlarged arrangement allowed the Ombudsman to resolve complaints regardless of when the transaction took place. (There are a few exceptions to this tendency not to sign up for the voluntary jurisdiction, typically members of groups that include insurance companies.) Customers of the vast majority of IFAs who are not banks or building societies could not have brought a complaint to any Ombudsman Scheme before N2.

The result of this is that a complaint made against a non-bank or building society IFA cannot be the subject of DISP or a reference to FOS. Nor can a complaint against a non-bank or building society IFA who never joined PIA (typically because it became an appointed representative of a life assurer) ever be referred to FOS.

The effect of the 15-year backstop in the Limitation Act is to bar any ordinary claims[14] brought now relating to negligent sales made before 29th April 1988. So most IFAs can reply politely that the claim is time-barred and falls outside the FSA's rules and FOS's jurisdiction. As will be seen, there is only one significant and one minor exception to this rule.[15] Banks and building societies cannot say the same. Their cases all fit within DISP because of their membership of their old Ombudsman Schemes.

3. BREACH OF CONTRACT - 6 YEARS FROM BREACH

There is some further bad news where complainants allege a guarantee or warranty, typically that an endowment will pay off a mortgage on maturity. The six year limitation period for contract claims only starts when the contract is broken.[16] If it is still possible for the guarantee to be met, there is no breach of contract. So, time will not start to run until maturity. 6 years, therefore, should run from that date. At the very earliest it would run from the date on which the person alleged to have offered the guarantee declines to

11 The date on which the relevant provisions of the Financial Services Act came into force. There is a bizarre loophole in the rules which prevents FOS from looking at sales made by firms who never joined the PIA. Until November 30th 2001, these cases were taken care of by PIAOB under a delegation of authority from the FIMBRA arbitration scheme.

12 DISP 1.1.5 & 2.2.2(1)

13 The definition of "former scheme" can be found in GLOSS.

14 Not within the exception created by section 32 of the Act (intentional wrongdoing or concealment).

15 Intentional wrongdoing or concealment under section 32.

16 Section 5 Limitation Act 1980.

honour it.

4. SECTION 32 - 6 YEARS FROM THE DATE ON WHICH THE COMPLAINANT COULD REASONABLY HAVE DISCOVERED NEGLIGENCE OR BREACH OF DUTY AND PROBABLE FINANCIAL LOSS

(I) WHERE THE WRONGDOER TAKES ACTIVE STEPS TO CONCEAL HIS OWN BREACH OF DUTY AFTER HE HAS BECOME AWARE OF IT; OR (II) WHERE HE IS GUILTY OF DELIBERATE WRONGDOING AND CONCEALS OR FAILS TO DISCLOSE IT IN CIRCUMSTANCES WHERE IT IS UNLIKELY TO BE DISCOVERED FOR SOME TIME

Section 32(1) says: “Where... (a) the action is based upon the fraud of the defendant; or (b) any fact relevant to the plaintiff’s right of action has been deliberately concealed from him by the defendant... the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake or could with reasonable diligence have discovered it.” (Emphasis added.)

Then subsection (2) explains that “deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time” amounts to deliberate concealment of the facts involved in the breach of duty.

In *Cave* v. *Robinson Jarvis & Rolf*, the House of Lords lifted the cloud that hung over professional advisers by rejecting the previous broader interpretation of this section of the Act.

In 1989, the claimants asked solicitors to arrange for the sale of some of their land in exchange for mooring rights over the land. The solicitor left out the mooring rights. Everything went well until 1994 when the purchaser went into liquidation. The receivers then denied the claimants their mooring rights relying on the absence of these rights in the deed. The court found that the 6-year period started to run in 1994. Essentially, the act of the solicitors in producing the defective deed was unlikely to be discovered for some time. It was an intentional act. However, the solicitor had no knowledge or intention of any concealment or any unconscionability at least until after the claimant knew about the problem.

The House of Lords decided that where someone unintentionally commits a breach of duty and does not deliberately conceal that wrong once he discovers it, section 32 does not apply and the usual limitation rules can be used to bar an action.

As Lord Millett put it:

> “25. In my opinion, section 32 deprives a defendant of a limitation defence in two situations: (i) where he takes active steps to conceal his own breach of duty after he has become aware of it; and (ii) where he is guilty of deliberate wrongdoing and conceals or fails to disclose it in circumstances where it is unlikely to be discovered for some time.”

However, Lord Millett refers favourably to a passage in *King* v *Victor Parsons*[17] and Lord Scott to a much more recent extract from a leading textbook to similar effect.[18] Both added to the notion of a deliberate breach of duty the situation where the defendant is aware that what is doing may be a breach of duty but turns a blind eye to this fact.

Lord Scott makes it clear also that if the defendant knew he was committing a breach of duty that would be the same as if he intended it.[19]

On the meaning of concealment, Lord Scott required the claimant to prove that

> "some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but in either case, with the intention of concealing the fact or facts in question."

The significance of all this is that if the complainant can prove intentional or reckless breaches of duty, it is quite likely that the claim will not be time-barred until 6 years after the breach is discovered. Most breaches of duty in the financial services industry are made in circumstances where they are unlikely to be discovered for some time. Proving intention or recklessness will be difficult - but someone will try to do this and succeed.

There should also be a warning to firms who may try to cover up misselling that this could be used against them on an intentional concealment claim. Firms who are fined by the FSA for encouraging staff to mishandle complaints are vulnerable to the application of section 32. Having said that, the section imposes no duty to be open to clients, just not to conceal actively breaches of duty once the firm has become aware of them.

Incidentally, section 32 applies equally to actions for breach of contract. Finally, the 15-year backstop does not apply to cases coming within section 32.

5. JOINT LIABILITY

There has been some talk of IFAs who have paid out compensation with respect to policies which were mispriced by the insurer claiming a contribution from the product provider. The only scenario in which this could realistically arise would be where no compensatory amount had been added to the policy prior to the redress calculation. There is no possibility that FOS or a court would have increased its estimate of the riskiness of the policy by reference to the low level of the premium unless the IFA specifically selected it.

Section 10(1) of the Limitation Act gives a firm only two years to claim contribution after the date on which its right against the insurer accrued. That date, according to subsection (2) is to be ascertained in accordance with subsections (3) and (4). They in

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17 [1973] 1 WLR 29 at pp. 33-34.

18 Clerk & Lindsell on Torts, 18th ed at p. 1723.

19 Para 60.

turn give the date as when a judgment or arbitration award was rendered or any voluntary payment is made or agreement is reached to make such a payment (even with no admission of liability). This does not fit comfortably with the way the Financial Ombudsman Service works. There could, therefore, be an argument that the two years do not start running until a judgment has been obtained on the FOS award. This is unrealistic since in the vast majority of cases no court proceedings are ever commenced. A court would almost certainly interpret section 10(2) as offering only examples of the when the right to claim a contribution accrued. The two years would then run from the date on which the FOS award was either given or more likely accepted by the complainant.

Subsection (5) applies section 32 to claims for contribution. So, it may be possible to argue that the correct period is six years from the date on which the wrongdoing was uncovered or the FOS award was made. Mis-pricing on the basis of the LAUTRO projection rates may not have been very intelligent but it was not intentional wrongdoing. One would have to scrutinize individual insurers to see if they could be said to have intentionally concealed their mispricing. This seems unlikely if they have been telling the truth.

IV: TIME LIMITS FOR COMPLAINING TO FIRMS AND FOS UNDER THE FSA'S DISP RULES

(i) The original rules

In the vast majority of cases, this discussion of the legal position will only be relevant to the interpretation of the similarly drafted DISP rules. Under section 228(2) of the Financial Services and Markets Act and DISP 3.6.4R, the Ombudsman is required to reach a fair and reasonable result. He only has to consider the law as part of that process. She does not have to apply it.

Under DISP 2.8.2(2), the Ombudsman will not be able to look at a case if the complaint was made to FOS more than "six years after the event complained of or (if later) more than three years from the date on which he became aware (or ought reasonably to have become aware) that he had cause for complaint"

This is the section 14A position without the 15-year backstop combined with the traditional view of the primary limitation period. In court we saw that the six year period actually runs from the date of loss or damage in a negligence or breach of conduct of business rules case which may be later than the DISP "the event complained of".

The comments made above about red letters issued to endowment customers not starting the three year period running should logically apply equally here. If the client complains without having suffered a loss, his case will be rejected. So, he has to be aware that he has suffered a loss before the three year period can start to run. The red letter does not tell the client that he has suffered any loss from the transaction. Indeed for reasons indicated above, in a subsidised mortgage case, he might not have incurred any loss at all. A red letter likewise does not inform him that the adviser missold the contract. He must know both those things before the three year period can start to run.

It follows from all this that limitation should not seriously be an issue in endowment cases unless the company or a third party has told the client that he has probably lost money by taking out the product (typically as part of a pro-active business review). This must follow from the Court's decision in *Glaister* v. *Greenwood*.

In the case of a guarantee, the event complained about has to be the failure to honour the promise. This does not happen until maturity. The customer then has six years after that to complain.

(ii) The 2003 rule-change - the position for complaints made to firms before 1st June 2004

However, the Consumers Association, after many years of neglecting the issue, suddenly woke up in 2002 to endowment complaints and limitation. Its relations with the FSA have been notoriously difficult. One effect of their campaign on limitation being conducted without proper legal advice is that they have actually managed to reduce the limitation period applicable to their clients.

As already indicated, the FSA was prepared to accept in the notes to all of its three Press Release that a red letter "was not enough to start time running on its own". If the Consumers Association had left the discussion there, the problem would have disappeared. However, the debate seems to have pushed the FSA into the arms of the Association of British Insurers with predictably ugly results.

The FSA's first change time-barred six months after the receipt by the client of a second re-projection letter of whatever colour if this gave the consumer more than 3 years from the date of the a red letter in which to complain.[20] In some cases, this could have shortened the limitation period by decades. Yellow and amber letters are acknowledged as having no impact at all on the FOS three year time-bar. However, they bizarrely could start the final six-month period running.

The problem, as already indicated, with all this is that a consumer may have received even two red letters and not suffered any loss. In that case, typically one where a bank or insurance company employee has been given a subsidised mortgage on condition he takes out an endowment, FOS is of no use whatsoever.

Under DISP 2.3.6(2), the Ombudsman could decide to ignore the new rules in particular if he considered that the three-year period began before the customer received a first red letter or that it would just be more appropriate to do so. In March 2003, the Investment Division of FOS indicated in Ombudsman News that this exception would apply if the customer had received before the red letter a contractual review letter. However, as the Ombudsman said, firms

> "will need to show that the complainant received an individualised calculation using the regulatory growth rates that were used for illustrations at the time. The calculation must have indicated that the policy was expected to produce a

20 DISP 2.3.6(1)(b) prior to its 2004 amendment.

> shortfall. And the letter must also have encouraged the complainant to take appropriate action."[21]

This presumably cannot survive the 2004 amendment to the rules. It would be totally contrary to their purpose. This was to respond to the Treasury Select Committee's criticisms of the 2003 version principally that nobody should be timebarred without being warned of this happening in the future.

There are two further restrictions on the application of the FOS limitation rules. First, the Ombudsman can hear a case in exceptional circumstances, typically where the firm failed to tell the client of his services.[22] Pensions and FSAVC review cases are exempt from the DISP 2.8 timebar anyway.[23]

There is one more limit on bringing complaints to FOS. It cannot deal with a complaint brought to it more than six months after the client was referred to it in the firm's final response letter, again other than in exceptional circumstances.[24] The importance of this is considerable in pensions and FSAVC review as well as endowment cases. In the latter category, if the client complains too early and no loss is found to exist, the customer has probably lost for ever their right to complain to FOS. A movement in investment conditions is hardly fresh evidence entitling the Ombudsman to consider a case for the second time.

In pensions and FSAVC review cases, firms receive a considerable degree of protection against stale complaints where they have completed the review in accordance with the Guidance. They can rely on DISP 3.3.4(5) which discourages (although does not prevent) an Ombudsman from upholding a complaint against a firm that has done the review in accordance with the Guidance unless the standards laid down by the Guidance did not address the particular facts of the case.

A less heralded but much better amendment to the FOS limitation rules was made at the same time as the first special endowment rule was being imposed. DISP 2.3.1(c) makes the six and three year periods end on the receipt by the firm of the complaint. Under the Limitation Act, a claim has to be filed with the court. The new rule stops complaints becoming time-barred while they are being investigated by firms. One adverse effect of this difference is that case can become time-barred under the Limitation Act while being considered by the firm or FOS.

Finally, the FSA in December 2003 announced that firms would not be entitled to use the 15-year backstop contained in the Limitation Act to reject complaints without an investigation or referral to the Financial Ombudsman Service.[25] Both the regulator and

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21 At p.13.

22 2.8.2(3) & 2.8.3G.

23 2.8.5R(2).

24 2.8.2R(1) & 2.8.3G.

25 Ombudsman News 34 at p. 7. It is fairly typical of the way things work in this field that the relevant information was not published until January 2004 and then by FOS which is strictly speaking the wrong organization to be doing

FOS made it clear that the 15-year period is not contained in DISP and, therefore, has no application to cases handled under those rules. Firms who had tried to rely on the Limitation Act here could expect contact from the Financial Services Authority.

This must be right. After all, if firms want to have the Limitation Act applied instead of DISP, they would have to forfeit their right to ask FOS to reject complaints made to the Ombudsman more than six months after their final response letter. They would also have to deal with claims of intentional wrongdoing and concealment which under section 32 of the Act would result in a six rather than a three year period and no 15-year backstop. Anyway, the Limitation Act does not apply to FOS either in its terms or that of DISP. All that the Ombudsman can do is consider it as part of the law in general.

(iii) The FSA's third version of the rules for endowments

In March 2004, the Treasury Select Committee sent the FSA back to the drawing board on time-limits for complaining. It savaged the linking of re-projection letters to DISP 2.3 as unfair, particularly bearing in mind the absence of any information about how to complain and any warning as to the timeframe concerned.[26]

As a result, the FSA changed the rules again. It took away the requirement of a six months delay from the second mailing,[27] for no apparent reason. Instead, firms have to give a warning six months ahead if they wish to time-bar endowment complaints.[28] This curiously drops to two months if the 3 years from the red letter expires before the end of November 2004.[29]

The FSA has not laid down the form of the warning. Firms can, therefore, probably print it in small type on the bottom of any subsequent mailings. This raises questions, though, as to whether companies who take such an approach are not in breach of Principle 6 "treating customers fairly". The regulator should have insisted on a separate letter or appropriate prominence for the warning. To some degree, this has happened behind the scenes with the ABI text appearing in a square box.

Customers who have already complained to firms are left unprotected by the new rules.[30] Their cases are governed by the second version of DISP in this area. The Treasury reckons that this eliminates 700,000 complaints. Predictably, this has not produced a positive reaction from the Treasury Select Committee. In more recent hearings, they have again urged firms to stop relying on the time-bar.

One could assume that FOS will go back on its earlier view of allowing firms who have issued the equivalent of red letters from relying on DISP 2.3.1 to bar complaints. It would go against the entire thrust and purpose of the 2004 amendments to the rule.

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this.

26 "Restoring confidence in long-term savings: Endowment mortgages" March 2004 at pp. 33-34.

27 DISP 2.3.6R(1) – now 2.8.7R(1).

28 DISP 2.3.6(2) – now 2.8.7R(2)

29 DISP TP1.7B

30 DISP TP1.7A.

This was to respond to the Treasury Select Committee's criticisms that cases should not be barred without the customer being warned about the risk of this. However, FOS, has taken to time-barring pension review complaints where the customer never responded to a Phase 2 mailing. Since that document did not tell the customer that he had individually suffered a loss or that he would lose legal rights by not complaining or participating in the review, this is little short of scandalous. It would subvert the whole point of the latest revision to the rules for endowments and would be bad law anyway. Firms should not be able to rely on the provision allowing FOS to waive through cases falling within the pension review here because the customer by not participating took the case outside the ambit of that project.

There is a further possible unexpected and undesirable consequence of the new rule. Customers who were told as part of a pro-active endowment business review that they have suffered a loss might now be able to take the case to FOS more than 3 years later. Firms who have done reviews of this type might be wise to consider mailing everyone with an offer outstanding threatening to rely on the time-bar. In many of these cases, the customer will not have complained to the firm as yet. This might represent a good case for the Ombudsman to exercise the power that he has to apply DISP 2.8.2 and bar the claim on the basis that three years have passed since the customer knew that he had cause to complain. In practice, if the firm can show that it complied with the standards laid down by the regulator for reviewing the case, FOS will probably decline jurisdiction under DISP 3.3.4R(5).

The sheer perversity of the way in which FOS has handled the new rules can be seen by the way in which it has prevented firms relying on the three year time-limit where the customer has never received a red letter or never had a six months warning typically because they have surrendered the policy or it has matured. In fact, the FOS should be using the power in DISP 2.8 to revert to the original rule in these circumstances. [31]

V: DOES THE RED-LETTER RULE APPLY TO SUITABILITY COMPLAINTS WHICH DO NOT RELATE TO SHORTFALLS?

An issue that has become increasingly troublesome concerns the question of whether FOS should apply its "red-letter" rules to cases where the complaint is not based on mortgage risk but on the inherent unsuitability of an endowment for an unrelated reason, such as being a single person without dependants or the loan going into retirement. The original version of DISP 2.3.6read

> "(1) If a complaint relates to the sale of an endowment policy for the purpose of achieving capital repayment of a mortgage and the complainant would, as a result of this rule DISP 2.3.6, have more time to refer the complaint than under DISP 2.3.1R(1)(c), the time for referring a complaint to the Financial Ombudsman Service:
> (a) starts to run from the date the complainant receives a letter from a firm or VJ participant warning the complainant that there is a high risk that the policy will not, at maturity, produce a sum large enough to repay the target amount; and

31 DISP 2.8.7R(5).

> (b) ends six months from the date the complainant receives a second letter from a firm or VJ participant containing the same warning or other reminder of the need to act.
>
> (2) Paragraph (1) does not apply if:
> (a) the Ombudsman is of the opinion that, in the circumstances of the case, it is appropriate for DISP 2.3.1R(1)(c) to apply without modification."

The first question is whether "the complaint relates to the sale of an endowment policy for the purpose of achieving capital repayment of a mortgage". One way of reading this is to say that the complaint must relate to the purpose of achieving the capital repayment of the mortgage. A complaint about affordability or suitability that does not relate to the purpose of repaying the loan does not do that. It concerns the affordability and thus suitability of the endowment sale bearing in mind the term of the policy.

The second element is whether the complainants with a case about affordability in retirement or general suitability would, as a result of DISP 2.3.6, have more time to refer the complaint than under DISP 2.3.1R(1)(c). They would not have done. We know from the FSA Notes to Editors quoted above that "A red letter is not enough to start time running on its own." If that is right and one must construe an FSA rule in the light of the apparent intentions of those who drafted it, DISP 2.3.6 has no application to this case.

If the customer's complaint is not about a shortfall or the risk of it, the red letter cannot under the FSA's interpretation of its own rule (wrong as it is) start time running under DISP 2.3.1R(1)(c). Unless the complainants were more financially astute than the many insurers who sold policies into retirement or to customers who had no dependants or could not afford them, they could have no idea that the advice received was "unsuitable for the customer" to quote the January 2003 FSA Press Release. They lacked a crucial piece of knowledge for their complaint. As CP158 which led to the 2003 version almost begins:

> "1.2 A consumer normally has three years to raise their case with the Financial Ombudsman Service (FOS), from the point where they might reasonably be expected to be aware that they have cause for concern. For mortgage endowments, this has been the point where they first became aware, or might reasonably be expected to be aware, that their policy may have been mis- sold, and that they had potentially suffered a loss as a result."

The key point is that the 2003 amendment was made to deal with the situation of the customer complaining that his policy would not repay the loan on maturity. Although complaints about the unsuitability of a policy sold into retirement were well-known in 2003, they are not mentioned once in CP158. The FSA said of its proposals there:

> "The proposals will define the point at which consumers generally become aware of a specific problem"

The red letter tells the reader nothing about whether affordability into retirement is a problem.

Equally, CP 158 continues by relating the use of red letters to the customer's knowledge of his cause to complain

> "First we consider that only a red reprojection letter ("high risk the plan may not pay out enough") should be regarded as putting consumers in possession of knowledge that they had potential for financial damage, so as to start time running for the time bar."

One can see from this that the FSA never intended that a red letter would be used to time-bar a complaint that is about affordability and suitability in retirement or otherwise. Indeed a search in CP158 for "afford" or "retire" comes up blank. The same applies to the resulting Policy Statement.

In fact, the first consideration by the FSA of the question of time-bars and retirement came in its 2005's Review of firms' approach to time barring mortgage endowment complaints (MECs). It made it clear that where the complaint is not clearly linked to the ABI Code letters,

> "a firm wishing to time bar these complaints will need to think carefully about when and how, in the circumstances of the case, the policyholder might reasonably have been expected to become aware of their potential cause for complaint."

This shows clearly that where a complaint does not relate to a matter mentioned in the red letter and is not about the risk that the policy will not pay off the loan on retirement, DISP 2.3.6 does not apply. Three years runs from the date of awareness that the customer was badly advised.

When the FSA gave evidence to the Treasury Select Committee in 2004 on mortgage endowments, the MPs were outraged at the operation of the 2003 rules. Again, though, the discussion assumed that they only applied to mortgage risk complaints. At page 34, the Committee reported:

> "Mr Tiner of the FSA told us that information on the time limits is currently "not set out in the red letter, it is set out in the document that people can request as a consequence of the red letter that deals with 'How do you make a complaint?'" The issue of time limits is likely to become increasingly pressing given that the first wave of projection letters went out in 2000, although Mr Prosser of Legal & General assured the Committee "We would not be looking to timeliness as a reason for not dealing with a complaint." The Committee welcomes Legal & General's statement that it would not use time limits to rule out complaints, but across the industry urgent action is required to ensure that substantial numbers of policyholders do not lose their rights to compensation. It would be unfair to apply time limit rules which early mailings made little or no mention of. These rules, which have still not been spelt out explicitly to most policyholders, should be reviewed and the time limits extended."

This sets out the Committee's view of the unfairness of the 2003 rules and makes it clear that they should not be given a broad construction in favour of time-barring complaints. It clearly had no idea that firms would be considering using the red letters to time-bar cases that did not relate to shortfalls.

All in all, DISP 2.3.6, now 2.8.7R was never intended to apply to a complaint of the type under discussion here. The FSA who drafted it have subsequently made it clear that where a complaint is not linked to material in an ABI mailing, firms should not rely on it to time-bar cases. The actual wording of the rule makes it equally clear that it applies only to lengthen not shorten the time for complaining where a red letter may provide information that would give the customer cause to complain. Where a complaint is about affordability, the letter provides no such information. By its terms, then DISP 2.8.7 does not apply.

In any event, FOS should exercise the discretion under DISP 2.8.7R(5) if necessary to disapply DISP 2.8.7 to affordability complaints or complaints about the suitability of a policy extending into retirement generally.

The 2003 version of DISP 2.3.6(2) makes it clear that the Ombudsman has the power to apply the ordinary rule in 2.3.1 discussed above if he or she considers it appropriate to do so. If I am wrong about the scope of DISP 2.8.7, a complaint unrelated to the ABI wording such as one about affordability of the premiums in retirement and its suitability as a result should be dealt with under DISP 2.8.2 under the power in DISP 2.8.7R(5) and should not be regarded as time-barred for the reasons already indicated. Indications from FOS so far suggest that it will not have the courage to reach such a decision which is a disgrace.

The 2003 rule was regarded by the Treasury Select Committee and ultimately the FSA in 2004 as unfair to policyholders who were complaining about mortgage risk. Where the complaint is about the affordability of the policy in retirement, that unfairness is even more extreme, particularly bearing in mind the lack of connection with the information in the red letter and the nature of the losses likely to be incurred as a result.

FOS occasionally and wrongly seeks to time-bar complaints about endowments sold into retirement on the basis that the customer would have known the date of their retirement at the point of sale. That proposition itself is doubtful. However, it misses two points. First, the customer has no idea whether he has suffered a loss and, therefore, is unaware of the need to complain. Secondly, (and this is a matter of principle rather than law) the customer is unaware that the advice to prefer an endowment over a capital repayment mortgage or to use such a long term is unsuitable.

VI: SOME QUIRKS

One of the odder effects of the FSA's special rules for mortgage endowments has been to provide an opportunity for complainants to argue that a case is not time-barred through a failure to send a second letter of any colour or a six-months warning when otherwise, the case would be barred. The obvious examples concern the situation where the customer's policy has matured between the dates for sending the red letter and the later correspondence. Typically, life offices do not send out the second document if the policy has matured or been surrendered.

Where the policy has matured and the only matter complained of concerns the way in which the policy did not repay the mortgage and the risk involved in that respect, the case would have been time-barred under the original rules. The customer would have known that he had cause to complain. The situation is more complex where the customer has surrendered the policy early typically because he or she was unable to sustain the payments or a move abroad, typically back to a country of origin. There, things might be more finely balanced since the unsuitability of the policy typically because of its regular payment commitment might not be apparent to a customer who might blame himself not the firm for the problem.

In either case, it is open to the FOS to apply its main time-bar rule and dismiss the claim. The Ombudsman has been seen using DISP 3.3.4(17) the discretionary power to dismiss a case summarily which is far less appropriate than applying the original DISP 2.8 rule. In the second scenario, that provision might lead the FOS to ignore the lapse of time and deal with the case anyway.

Beyond the field of endowments, one is sometimes in a quandary to work out whether a case is time-barred where a customer is knowledgeable as in the *Shore* v. *Sedgewick*-type of situation. The provision of a set of management accounts of an investment to an experience corporate accountant probably should start the three years running when it would not if the customer was an ordinary layman in this area.

VII: THE LIMITATION ACT DOES NOT APPLY TO FOS

DISP does not reproduce the 15 year backstop provision found in the Limitation Act. It has been quite wrongly suggested that this is illegal and contravenes the European Convention on Human Rights.

The Limitation Act 1980 refers throughout to “actions”. The Financial Services and Markets Act 2000 uses the term “complaints” when describing the Ombudsman service. In the 19 years between the creation of the Insurance Ombudsman Bureau and the passage of FSMA, Ombudsman schemes had always disapplied the Limitation Act to some degree. If the legislature had wanted to impose the Act on FOS, it would have said so. It did not do so.

The argument based on Article 6 of the European Convention on Human Rights involves inverting the Stubbings case. There, the Court held that a country did not contravene the right to a fair trial by having a Limitation Act and barring claims. That is quite a different thing from saying that not applying the full English Act contravenes human rights. It does no such thing. Curiously, the House of Lords recently overruled its own previous decision time-barring the victims of child abuse in the Stubbings case.[32]

In two relatively recent cases, the English courts have rightly rejected arguments that the Limitation Act applies to FOS.[33]

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32 *A* v. *Hoare* [2008] UKHL 6

33 *Bamber & Anor, R (on the application of)* v. *Financial Ombudsman Service* [2009] EWCA Civ 593. There is a

VII: CAN FIRMS REJECT COMPLAINTS ON GROUNDS OF LIMITATION?

DISP 2.8, which lays down the limitation periods for the Financial Ombudsman Service, only applies to that organization. At least, that is how the rule is worded. Does it permit firms to reject complaints purely on the basis that they cannot be referred to FOS? There was a vigorous argument about this which has now become academic. In 2006, Ed Balls suggested that firms still had an obligation to handle complaints fairly even if they were time-barred. The FSA never denied this. However, perhaps true to form, its latest report “Mortgage Endowments: Delivering Higher Standards”[34] suggests the opposite. The new DISP 1.8.1R removes this issue entirely by making it clear that a time-barred complaint need not be investigated on the merits. The firm will just have to refer the customer to the Ombudsman while pointing out that he may deal with the matter in exceptional circumstances.

Finally, the latest changes to the rules have raised interesting questions about whether all complaints that were brought to the firms late before 1st June 2004 deserve to be considered by FOS on the basis of exceptional circumstances. Other features which might raise a case to such a level could be the fact that the firm complained against has been fined either for misselling or mishandling complaints.

It is fairly appalling that a firm that has been fined for misselling endowments or mishandling complaints should be entitled to decline to investigate the substance of a complaint on the basis of DISP 2.8.

VIII: OTHER LIMITATION PROBLEMS

More difficult issues arise where a customer has died. Then, as a matter of law, the customer will usually know that a churned policy would have paid out a greater sum on death at the time of the sale. Such a case may, therefore, legally be time-barred. However, FOS and firms should consider that, since the customer or surviving spouse was unaware that the churning advice was non-compliant, time should not start to run until this is discovered.

FOS made another mistake in this area when it ruled that customers who had been invited to have a review of their pensions as part of the pensions review and declined to respond were time-barred. The mailings do not indicate to the customer that he has personally suffered any loss. So, this ruling would not be applied in court. Since the mailings carried no warning about the loss of the right to refer the matter to FOS, this decision is frankly outrageous. It cannot even be defended on the basis that the firm has handled the case in accordance with the pensions review since a case where the customer has not accepted the invitation did not fall within the review. In view of the volumes of lost mail, this decision is even more scandalous.

IX: CONCLUSION

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second case unreported brought by the Advisers Alliance.

34 December 2006 at para 2.15

The Ombudsman will not have to apply the Limitation Act although she will be required to have regard to it. So, the House of Lords's decision in Cave may not make much difference.

He will have instead a basic six-year limitation period with a 3 year limit from the date that the client ought to have known that he had good grounds to complain. This will not apply in pensions and FSAVC review cases or in other exceptional cases.

Unlike the legal position for courts, FOS limitation is judged by the date that the firm not the Ombudsman service received the complaint

The endowment position at FOS for complaints made to companies before 1st June 2004 is that a firm cannot block a complaint on limitation unless it received the complaint three years after the client received a red re-projection letter and six months after it received such letter of whatever colour. The Ombudsman has discretion to override this rule in exceptional circumstances.

For complaints made to firms after 1st June 2004, the period is reduced to 3 years from the receipt of the red letter but cannot start to run unless the firm has sent the customer a warning that it will rely on the time bar. For cases where the 3 years runs out before the end of November 2004, the time-limit for the warning is 2 months before the end of the three years. Otherwise, firms will have to send the warning more than six months in advance.

In any event, a guarantee claim will not be barred until 6 years after the policy's maturity.

The FSA rules, though, appear to suggest that firms are not allowed to refuse compensation on the basis of the FOS time-limit. This deadline appears not to apply to the industry.

If cases go to court, the key date will be 3 years from the date when the client ought to have known that he had suffered a loss as a result of a breach of duty unless he can prove a deliberate breach of duty or concealment.

The meddling of regulators and the Consumers Association has produced a time-bar provision at FOS that is mind-bogglingly complex. By playing politics, rather than applying the Court's interpretation of an almost identically drafted rule, the FSA has come up with rules that the Treasury Select Committee has rightly condemned as unfair to consumers. The regulator needs urgently to go back to the original wording of DISP 2.3 and issue a clarifying statement that as three of its own press releases clearly state:

> "A red letter is not enough to start time running on its own"

Since a customer must show that he has suffered a loss or material distress or inconvenience to bring a successful complaint, the FSA needs to clarify that the three years will run from the time that he knew that he had suffered a financial loss as a result of taking out an endowment.

Overall, the FSA and FOS' position on time-barring mortgage endowment complainants is a disgrace. Neither body has realized its fundamental duty which is to run a complaints process where customers can complain within a reasonable time of discovering that they had the right to do so. The whole DISP set-up is predicated on customers not seeking professional advice. It is hard to escape the view that the rules and the way they have been applied has more to do with a decision to keep the complaints and compensation numbers within reasonable proportions than any principled discussion. Frankly, with the exception of the Treasury Select Committee report, there has never been one of those.

Attached to this paper are the relevant provisions of DISP, the Limitation Act and the key FSA press releases.

HANDOUT - TIME-BARS AND ENDOWMENT COMPLAINTS REVISITED
By Adam Samuel

DRIFTWOOD by Justin Hayward
"Time waits for no one at all
No not even you
You thought you'd seen it all before
You really thought you knew

Limitation Act 1980

2 Time limit for actions founded on tort
An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

5 Time limit for actions founded on simple contract
An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

9. Time limit for actions for sums recoverable by statute.
(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.
(2) Subsection (1) above shall not affect any action to which section 10 of this Act applies.

10 Special time limit for claiming contribution.
(1) Where under section 1 of the Civil Liability (Contribution) Act 1978 any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall be brought after the expiration of two years from the date on which that right accrued.
(2) For the purposes of this section the date on which a right to recover contribution in respect of any damage accrues to any person (referred to below in this section as "the relevant date") shall be ascertained as provided in subsections (3) and (4) below.
(3) If the person in question is held liable in respect of that damage—
(a) by a judgment given in any civil proceedings; or
(b) by an award made on any arbitration;
the relevant date shall be the date on which the judgment is given, or the date of the award (as the case may be).
For the purposes of this subsection no account shall be taken of any judgment or award given or made on appeal in so far as it varies the amount of damages awarded against the person in question.
(4) If, in any case not within subsection (3) above, the person in question makes or agrees to make any payment to one or more persons in compensation for that damage (whether he admits any liability in respect of the damage or not), the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him (or

his representative) and the person (or each of the persons, as the case may be) to whom the payment is to be made.
(5) An action to recover contribution shall be one to which sections 28, 32 and 35 of this Act apply, but otherwise Parts II and III of this Act (except sections 34, 37 and 38) shall not apply for the purposes of this section.

14A Special time limit for negligence actions where facts relevant to cause of action are not known at date of accrual

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) below.
(4) That period is either--
(a) six years from the date on which the cause of action accrued; or
(b) three years from the starting date as defined by subsection (5) below, if that period expires later than the period mentioned in paragraph (a) above.
(5) For the purposes of this section, the starting date for reckoning the period of limitation under subsection (4)(b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.
(6) In subsection (5) above _the knowledge required for bringing an action for damages in respect of the relevant damage_ means knowledge both--
(a) of the material facts about the damage in respect of which damages are claimed; and
(b) of the other facts relevant to the current action mentioned in subsection (8) below.
(7) For the purposes of subsection (6)(a) above, the material facts about the damage are such facts about the damage as would lead a reasonable person who had suffered such damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
(8) The other facts referred to in subsection (6)(b) above are--
(a) that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence; and
(b) the identity of the defendant; and
(c) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant.
(9) Knowledge that any acts or omissions did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (5) above.
(10) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire--
(a) from facts observable or ascertainable by him; or
(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek;
but a person shall not be taken by virtue of this subsection to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

14B Overriding time limit for negligence actions not involving personal

injuries

(1) An action for damages for negligence, other than one to whichsection 11 of this Act applies, shall not be brought after the expiration of fifteen years from the date (or, if more than one, from the last of the dates) on which there occurred any act or omission--

(a) which is alleged to constitute negligence; and

(b) to which the damage in respect of which damages are claimed is alleged to be attributable (in whole or in part).

(2) This section bars the right of action in a case to which subsection (1) above applies notwithstanding that--

(a) the cause of action has not yet accrued; or

(b) where section 14A of this Act applies to the action, the date which is for the purposes of that section the starting date for reckoning the period mentioned in subsection (4)(b) of that section has not yet occurred;

before the end of the period of limitation prescribed by this section.

32 Postponement of limitation period in case of fraud, concealment or mistake

(1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either--

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant’s agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

(5) Sections 14A and 14B of this Act shall not apply to any action to which subsection (1)(b) above applies (and accordingly the period of limitation referred to in that subsection, in any case to which either of those sections would otherwise apply, is the period applicable under section 2 of this Act).

DISP Time Limits for referral of complaints to the Financial Ombudsman Service - Version 2003 applicable to complaints received by firms before 1st June 2004.

2.3.1 (1) The Ombudsman cannot consider a complaint (except as described in (2)) if the complainant refers it to the Financial Ombudsman Service:

(a) less than eight weeks after receipt of the complaint by the firm or VJ participant, unless the firm or VJ participant has already sent the complainant its final response; or

(b) more than six months after the date on which the complainant is advised by the firm or VJ participant in its final response that he may refer his complaint to the Financial Ombudsman Service; or

(c) more than six years after the event complained of or (if later) more than three years from the date on which he became aware (or ought reasonably to have become aware) that he had cause for complaint, unless he has referred the complaint to the firm or VJ participant or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received (but see DISP 2.3.5R DISP 2.3.6R).
(2) The Ombudsman can consider complaints outside the time limits in (1)(b) or (c) when, in his view, the failure to comply with the time limits was as a result of exceptional circumstances or where he is required to do so by the Ombudsman Transitional Order (see DISP 2.3.2G) or where the firm has not objected to the Ombudsman considering the complaint.
2.3.1A If the complaint relates to the sale of an endowment policy for the purpose of achieving capital repayment of a mortgage, the receipt by the complainant of a letter which states that there is a risk (rather than a high risk) that the policy would not, at maturity, produce a sum large enough to repay the target amount is not, itself, sufficient to cause the three year time period in DISP 2.3.1R(1)(c) to start to run.
2.3.2 In relation to DISP 2.3.1R (1)(b) and (c), article 4(2) of the Ombudsman Transitional Order requires an Ombudsman to extend the time limit in respect of a relevant new complaint referred to the Financial Ombudsman Service not later than twelve months after commencement, so the time limit applying to the complaint is the same as that which would have applied under the former scheme in question as it had effect immediately before commencement.
2.3.3 For the purposes of DISP 2.3.1R(2), an example of an exceptional circumstance might be where the complainant has been or is incapacitated or where the firm or VJ participant has failed, in its final response, to inform the complainant that he may refer his complaint to the Financial Ombudsman Service or that he must do so within six months.
2.3.4 Under DISP 5.6.1R a firm or VJ participant is liable to pay a case fee in respect of chargeable cases. However, in some circumstances, the Ombudsman may conclude that a firm or VJ participant should have more time to resolve a complaint before a case fee is incurred (for example, where there has been delay in obtaining information from third parties or where the Ombudsman considers that the complainant has not fully cooperated with the firm or VJ participant in the investigation of the complaint).

Exceptions for reviews of past business
2.3.5 _ DISP 2.3.1R(1)(c) does not apply where:
(1) the time limit has been extended under a scheme for review of past business approved by the Treasury under section 404 of the Act (Schemes for reviewing past business); or
(2) the complaint concerns a contract or policy which is the subject of a review directly or indirectly under:
(a) the terms of the Statement of Policy on Pension transfers and Opt-outs issued by the FSA on 25 October 1994; or
(b) the terms of the policy statement for the review of specific categories of FSAVC business issued by the FSA on 28 February 2000.

Exception for mortgage endowment complaints
2.3.6 (1) If a complaint relates to the sale of an endowment policy for the purpose of achieving capital repayment of a mortgage and the complainant would, as a result of

this rule DISP 2.3.6, have more time to refer the complaint than under DISP 2.3.1R(1)(c), the time for referring a complaint to the Financial Ombudsman Service:
(a) starts to run from the date the complainant receives a letter from a firm or VJ participant warning the complainant that there is a high risk that the policy will not, at maturity, produce a sum large enough to repay the target amount; and
(b) ends six months from the date the complainant receives a second letter from a firm or VJ participant containing the same warning or other reminder of the need to act.
(2) Paragraph (1) does not apply if:2
(a) the Ombudsman is of the opinion that, in the circumstances of the case, it is appropriate for DISP 2.3.1R(1)(c) to apply without modification; or
(b) in respect of any particular complaint, the firm can show that the three year period specified in DISP 2.3.1R(1)(c) had started to run before the complainant received any such letter as mentioned in DISP 2.3.6R(1)(a).

DISP Time Limits for referral of complaints to the Financial Ombudsman Service - Version 2004 applicable to complaints received by firms after 1st June 2004.

2.3.1
(1) The Ombudsman cannot consider a complaint (except as described in (2)) if the complainant refers it to the Financial Ombudsman Service : (a) less than eight weeks after receipt of the complaint by the firm or VJ participant, unless the firm or VJ participant has already sent the complainant its final response; or
(b) more than six months after the date on which the firm or VJ participant sends the complainant its final response advising him that he may refer his complaint to the Financial Ombudsman Service; or
(c) more than six years after the event complained of or (if later) more than three years from the date on which he became aware (or ought reasonably to have become aware) that he had cause for complaint, unless he has referred the complaint to the firm or VJ participant or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received (but see DISP 2.3.5R B DISP 2.3.6R).

(2) The Ombudsman can consider complaints outside the time limits in (1)(b) or (c) or in DISP 2.3.6R when, in his view, the failure to comply with the time limits was as a result of exceptional circumstances or where he is required to do so by the Ombudsman Transitional Order (see DISP 2.3.2G) or where the firm has not objected to the Ombudsman considering the complaint.

2.3.1A If the complaint relates to the sale of an endowment policy for the purpose of achieving capital repayment of a mortgage, the receipt by the complainant of a letter which states that there is a risk (rather than a high risk) that the policy would not, at maturity, produce a sum large enough to repay the target amount is not, itself, sufficient to cause the three year time period in DISP 2.3.1R(1)(c) to start to run.

2.3.2 In relation to DISP 2.3.1R (1)(b) and (c), article 4(2) of the Ombudsman Transitional Order requires an Ombudsman to extend the time limit in respect of a relevant new complaint referred to the Financial Ombudsman Service not later than twelve months after commencement, so the time limit applying to the complaint is the same as that which would have applied under the former scheme in question as it had effect immediately before commencement.

2.3.3 For the purposes of DISP 2.3.1R(2), an example of an exceptional circumstance might be where the complainant has been or is incapacitated or where the firm or VJ participant has failed, in its final response, to inform the complainant that he may refer his complaint to the Financial Ombudsman Service or that he must do so within six months.

2.3.4 Under DISP 5.6.1R a firm or VJ participant is liable to pay a case fee in respect of chargeable cases. However, in some circumstances, the Ombudsman may conclude that a firm or VJ participant should have more time to resolve a complaint before a case fee is incurred (for example, where there has been delay in obtaining information from third parties or where the Ombudsman considers that the complainant has not fully cooperated with the firm or VJ participant in the investigation of the complaint).

2.3.5 Exceptions for reviews of past business
DISP 2.3.1R(1)(c) does not apply where: (1) the time limit has been extended under a scheme for review of past business approved by the Treasury under section 404 of the Act (Schemes for reviewing past business); or
(2) the complaint concerns a contract or policy which is the subject of a review directly or indirectly under: (a) the terms of the Statement of Policy on 'Pension transfers and Opt-outs' issued by the FSA on 25 October 1994; or
(b) the terms of the policy statement for the review of specific categories of FSAVC business issued by the FSA on 28 February 2000.

2.3.6 Exceptions for certain mortgage endowment complaints
(1) If a complaint relates to the sale of an endowment policy for the purpose of achieving capital repayment of a mortgage and the complainant receives a letter from a firm or a VJ participant warning that there is a high risk that the policy will not, at maturity, produce a sum large enough to repay the target amount then, subject to (2), (3), (4) and (5): (a) time for referring a complaint to the Financial Ombudsman Service starts to run from the date the complainant receives the letter; and
(b) ends three years from that date (_the final date_).
(2) Paragraph (1)(b) applies only if the complainant also receives within the three year period mentioned in (1)(b) and at least six months before the final date an explanation that the complainant's time to refer such a complaint would expire at the final date.
(3) If an explanation is given but is sent outside the period referred to in (2), time for referring a complaint will run until a date specified in such an explanation which must not be less than six months after the date on which the notice is sent.
(4) A complainant will be taken to have complied with the time limits in (1) to (3) above if in any case he refers the complaint to the firm or VJ participant within those limits and has a written acknowledgement or some other record of the complaint having been received.
(5) Paragraph (1) does not apply if the Ombudsman is of the opinion that, in the circumstances of the case, it is appropriate for DISP 2.3.1R (1)(c) to apply.

TP7A reads:

“Nothing in DISP 2.3.6 R affects the position of a complaint which, on 31 May 2004, could not have been considered by the *Ombudsman* under DISP 2.3.1 R (1)(c); or DISP 2.3.6 R (1)(b) as it then stood.”
The latest revisions have made some small adjustments

DISP 2.8 Was the complaint referred to the Financial Ombudsman Service in time?
DISP 2.8.1R
The Ombudsman can only consider a complaint if:
(1) the respondent has already sent the complainant its final response; or
(2) eight weeks have elapsed since the respondent received the complaint.
DISP 2.8.2R
The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:
(1) more than six months after the date on which the respondent sent the complainant its final response; or
(2) more than:
(a) six years after the event complained of; or (if later)
(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;
unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;
unless:
(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R or DISP 2.8.7 R was as a result of exceptional circumstances; or
(4) the Ombudsman is required to do so by the Ombudsman Transitional Order; or
(5) the respondent has not objected , on the grounds that the time limits in DISP 2.8.2 R or DISP 2.8.7 R have been exceeded, to the Ombudsman considering the complaint.
DISP 2.8.3 G
The six-month time limit is only triggered by a response which is a final response. A final response must tell the complainant about the six-month time limit that the complainant has to refer a complaint to the Financial Ombudsman Service.
DISP 2.8.4 G
An example of exceptional circumstances might be where the complainant has been or is incapacitated.
Reviews of past business
DISP 2.8.5 R
The six-year and the three-year time limits do not apply where:
(1) the time limit has been extended under a scheme for review of past business approved by the Treasury under section 404 of the Act (Schemes for reviewing past business); or
(2) the complaint concerns a contract or policy which is the subject of a review directly or indirectly under:
(a) the terms of the Statement of Policy on 'Pension transfers and Opt-outs' issued by the FSA on 25 October 1994; or
(b) the terms of the policy statement for the review of specific categories of FSAVC business issued by the FSA on 28 February 2000.
Mortgage endowment complaints
DISP 2.8.6 G

If a complaint relates to the sale of an endowment policy for the purpose of achieving capital repayment of a mortgage, the receipt by the complainant of a letter which states that there is a risk (rather than a high risk) that the policy would not, at maturity, produce a sum large enough to repay the target amount is not, itself, sufficient to cause the three year time period in DISP 2.8.2 R (2) to start to run.
DISP 2.8.7 R
(1) If a complaint relates to the sale of an endowment policy for the purpose of achieving capital repayment of a mortgage and the complainant receives a letter from a firm or a VJ participant warning that there is a high risk that the policy will not, at maturity, produce a sum large enough to repay the target amount then, subject to (2), (3), (4) and (5):
(a) time for referring a complaint to the Financial Ombudsman Service starts to run from the date the complainant receives the letter; and
(b) ends three years from that date ("the final date").
(2) Paragraph (1)(b) applies only if the complainant also receives within the three year period mentioned in (1)(b) and at least six months before the final date an explanation that the complainant's time to refer such a complaint would expire at the final date.
(3) If an explanation is given but is sent outside the period referred to in (2), time for referring a complaint will run until a date specified in such an explanation which must not be less than six months after the date on which the notice is sent.
(4) A complainant will be taken to have complied with the time limits in (1) to (3) above if in any case he refers the complaint to the firm or VJ participant within those limits and has a written acknowledgement or some other record of the complaint having been received.
(5) Paragraph (1) does not apply if the Ombudsman is of the opinion that, in the circumstances of the case, it is appropriate for DISP 2.8.2 R (2) to apply.

FSA/PN/116/2002 22 November 2002

Notes for editors

The FSA has already put in place, with the insurance industry, arrangements for endowment providers to report to their customers regularly on whether their policies are on track to pay off their mortgages. Under this system:

_ a greenletter confirms that an endowment needs to grow by no more than 6% annually to keep on track;
_ an amber letter indicates a possible shortfall; and
_ a red letter indicates a likely shortfall.

A red letter is not enough to start time running on its own. A claim can only be made if both:

_ the policy was mis-sold at outset (e.g. It was unsuitable for the customer, or the salesperson indicated that it was guaranteed to pay off the mortgage); and
_ there was potential for financial damage as a result of that mis-sale (rather than due to poor market performance since).

FSA/PN/119/20025 December 2002

Notes for editors

The FSA has been in discussions with insurers during the year and has proposed rule changes to clarify the position on time bars for consumers. Specifically:

- Time should only start to run as a result of sending a re-projection letter if it is a red letter (Athere is a high risk that your endowment policy will not pay out the target amount at the end of the term@). An amber letter, which indicates only that there may be a problem, or a green letter, which indicates the policy is on track, should not start time running.
- The normal three-year period would be extended, where this is necessary, to allow complainants six months after the receipt of a further re-projection letter or other reminder within which to complain.
- A complaint will be regarded as made in time if, within the relevant period, it has been lodged with the firm (and can be shown to have been acknowledged) or with the Ombudsman. This change is of general application i.e. not confined to mortgage endowment complaints.

A red letter is not enough to start time running on its own. A claim can only be made if both:

the policy was mis-sold at outset (e.g. It was unsuitable for the customer, or the salesperson indicated that it was guaranteed to pay off the mortgage); and
there was potential for financial damage as a result of that mis-sale (rather than due to poor market performance since).

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Notes for editors

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