LIMITATION AND CONSUMER FINANCIAL SERVICES COMPLAINTS
by Adam Samuel

A simple summary of the rules appears in the Guide to the Perplexed which you can have a look at by clicking on its front cover.

I: INTRODUCTION

The last couple of years have been tumultuous ones for Limitation and consumer complaints.

At the start of 2001, nobody gave the subject any great thought. The Court of Appeal's decision in Cave v. Robinson, Jarvis & Rolf 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 timebars 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 Limitation 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 put in the rules for its Ombudsman Scheme, Chapter 2 of DISP, 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

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[1] [2003] 1 A.C. 384

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 an opportunity to reduce their compensation bill.

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 2.3.1(1)(c)).

This does not apply in exceptional circumstances or in Pensions or FSAVC review cases.[2]

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

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[2] 2.3.5(2).

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

This does not apply in exceptional circumstances.

(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) The wording of the FSA complaint rules (DISP) suggests that a complaint which may be time-barred at the FOS under DISP 2.3.1 must still receive a proper investigation and a fair and reasonable decision.

III: LITIGATION IN THE COURTS

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.[3]

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 defective transaction was concluded.[4] 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.

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.

The knowledge concerned is of the material facts about the damage in respect of which

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[3] DISP 2.3.1(2); Ombudsman News May 2002 at p. 6

[4] 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 makes the primary limitation period run from the transaction.

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 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.

To apply the same logic 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 Statement 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:

> AA red letter is not enough to start time running on its own.[5]

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,[6] 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

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[5] FSA/PN/008/2003

[6] [2000] Lloyd=s Rep. PN 946

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 maturity value.

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[7] sales are not covered by any Ombudsman scheme. The FSA complaint rules (DISP) only apply to cases covered by a "former scheme".[8] "Former scheme" includes the Personal Investment Authority Ombudsman Bureau (PIAOB) and the Banking and Building Society Ombudsman schemes.[9] 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[10]

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[7] 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.

[8] DISP 1.1.5 & 2.2.2(1)

[9] The definition of Aformer scheme@ can be found in GLOSS.

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

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 exception to this rule.[11] 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.[12] 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.

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 Adeliberate 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 recently 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

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[11] Intentional wrongdoing or concealment under section 32.
[12] Section 5 Limitation Act 1980.

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[13] and Lord Scott to a much more recent extract from a leading textbook to similar effect.[14] 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.[15]

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.

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[13] [1973] 1 WLR 29 at pp. 33-34.
[14] Clerk & Lindsell on Torts, 18th ed at p. 1723.
[15] Para 60.

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 new Act and DISP 3.8.1, 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 2.3, 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"[16]

This is the section 14A position without the 15-year backstop. So, the comments made above about red letters issued to endowment customers not starting time 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 of late. 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

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[16] 2.3.1(1)(c).

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.[17] 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 shortfall. And the letter must also have encouraged the complainant to take appropriate action."[18]

This presumably cannot survive the 2004 amendment to the rules. It would be totally contrary to their purpose.

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 her services.[19] Pensions and FSAVC review cases are exempt from Limitation anyway.[20]

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.[21] 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

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[17] DISP 2.3.6(1)(b) prior to its recent amendment.
[18] At p. 13.
[19] 2.3.1(2) & 2.3.3.
[20] 2.3.5(2).
[21] 2.3.1(b) & 2.

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 3.3.1(5) which prevents 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.

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.[22] Both the regulator and 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 the timeframe concerned.[23]

As a result, the FSA has changed the rules again. It has taken away the requirement of a six months delay from the second mailing,[24] for no apparent reason. Instead, firms have to give a warning six-months ahead if they wish to time-bar endowment complaints.[25] This curiously drops to two months if the 3 years from the red letter

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[22] 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 this.

[23] ARestoring confidence in long-term savings: Endowment mortgages@ March 2004 at pp. 33-34.

[24] DISP 2.3.6(1).

[25] DISP 2.3.6(2).

expires before the end of November 2004.[26]

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.[27] Their cases are governed by the second version of DISP in this area. The Treasury reckons that this cuts out 700,000 complaints. Predictably, this has not produced a positive reaction from the Treasury Select Committee. In current hearings, they have again urged firms to stop relying on the time-bar. It is rumoured that some companies are taking heed of this or at least considering it.

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. 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, rumour has it that this is not necessarily so. FOS, it is said, 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, the rumour if true would be little short of scandalous. It would subvert the whole point of the latest revision to the rules and would be bad law anyway. One can only hope that this story reverts to the category of “tittle-tattle”. 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 2.3.1 and bar the claim on the basis that three years have passed since the customer knew that he had cause to complain.

A major area of controversy concerns cases which were not brought to the firm before 1st June 2004 but which if they had, would have been time-barred under the old rules. FOS are interpreting TP7A of DISP to time-bar these cases as well. The relevant transitional provision reads:

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[26] DISP TP1.7B

[27] DISP TP1.7A.

> “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.”

If a complaint had not been made to the firm at the time, it could not have been considered under DISP 2.3.1(a) not (1)(c). In fact, it would not have been a complaint at all. If FOS is going to bar complaints, it must do so using clear language which it has not done here. More generally, there is something objectionable about any ambiguity being construed against a policyholder here. The purpose of the FSA’s rule change was to respond to the Treasury Select Committee’s criticism that customers were having their cases barred without being warned of this eventuality. FOS’s interpretation runs directly counter to that. This increases the risk of litigation being brought by dissatisfied customers.

V: CAN FIRMS REJECT COMPLAINTS ON GROUNDS OF LIMITATION?

DISP 2.3, 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?

The first thing to note is that these cases can and must be referred to the Ombudsman.[28] After all, the Ombudsman can consider cases “when, in his view, the failure to comply with the time limits was as a result of exceptional circumstances”.[29] So, there is no doubt that a time-barred complainant is still an “eligible complainant” and that the case fits within the definition in DISP 1.1.5 of a complaint, namely that it “is capable of becoming a relevant new complaint”. The only exception to this (discussed above) relates to firms (typically IFAs) who did not volunteer for the PIAOB voluntary jurisdiction and did not join either the Banking or Building Societies Ombudsman schemes and whose pre-29 April 1988 sales, therefore, fall outside the FSA’s remit.

DISP 1.2.16(3) requires responses to complaints to “address adequately the subject matter of the complaint and, where a complaint is upheld, to offer appropriate redress.” 1.2.17 goes on: “Where a firm decides that redress is appropriate, a firm must provide a complainant with fair compensation for any acts or omissions for which it was responsible.” 1.2.20 reminds firms of the existence of endowment compensation guidance in DISP App 2. The FSA has already fined Friends Provident in December 2003 and Allied Dunbar in March 2004 for failing to comply with these provisions in its general handling of endowment complaints. (The fine, though, had nothing to do with limitation issues.)

Finally, Issue 34 of Ombudsman News which announced that the FSA does not consider it appropriate for firms to reject complaints on the basis of the 15-year backstop provision in the Limitation Act is delightfully obliquely worded:

> “The FSA stressed that the complaint-handling rules do not permit any firm to

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[28] DISP 1.2.4(4) & 1.4.12(1).

[29] DISP 2.3.1(2).

refuse to investigate complaints. It would be contacting those firms that had been citing the ‘15-year rule’ as a reason to reject complaints.”

The generality of the first sentence makes one think that the second sentence does not qualify its meaning in any way. Perhaps, though, one should not deduce too much from what was effectively a second-hand report of the FSA’s opinion.

From all this, one can conclude that the FSA expects complaint handling to be done fairly by all firms for all cases covered by its rules regardless of whether the FOS is able to deal with the same file. If this view is correct, some of the UK’s larger life assurers have some files to go through to ensure that complaints previously rejected on time-bar grounds are re-opened. Some clarification from the FSA would be welcome in any event.

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

1. the fact that the firm complained against has been fined either for misselling or mishandling complaints; or
2. the company’s breach of DISP 1.2.1, 1.2.16, 1.2.20 and 1.2.22 in declining to offer redress purely on the basis of 2.3 which does not apply to firms.

It is fairly appalling that a firm that has been fined for misselling endowments or mishandling complaints should be entitled to decline to investigate a complaint on the basis of DISP 2.3.

VII: OTHER LIMITATION PROBLEMS

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.

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.

VII: CONCLUSION

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 a 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.

Attached to this paper are the relevant provisions of DISP, the Limitation Act and the key FSA press releases, not to mention the lyrics of some appropriately soothing music

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

DRIFTWOOD by Justin Hayward
Just like the driftwood of a dream
Left on the seashore of sleep
Just like the words that wouldn't rhyme Lost in the desert of time
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.

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."

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 ("there 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).

FSA/PN/008/200321 January 2003

Notes for editors

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).