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as news

Dear Friends...

As ever, I hope that you had a delightful Second Eidh, Hanucah, Divali not to mention Christmas.

2002 was a strange year for all of us involved in the financial services world. It ended with many excellent pension review managers and staff without jobs as the review staggered to its end. At the same time, the industry was and is facing an endowment disaster with financial and goodwill implications similar to those involved in the pensions review. Hopefully, this year will see increasing numbers good pension review people playing major roles in endowments and compliance generally.

For me, the year was equally curious. The consulting business boomed but at the expense of training. As part of this, I have developed a line in designing and improving complaints procedures. Being more desk-bound has restricted my continuing exploration of the UK.

My key location this year was the Golden Eagle pub in Marylebone Lane, London's West End. On Thursday evening, a wonderful pianist plays a curious mixture of musical and music hall to which everyone is welcome to sing from 9pm onwards. A conversation, there, has also set me on my latest venture.

Thanks to a regular there, I signed an agreement to write for the insurance arm of an online news service. I also act as an adviser to its insurance team. So, I am brushing up on my management skills. My involvement has coincided with a sharp increase in users. so, I am now talking to other publishers and companies about writing pieces for them on regulatory developments, At the same time, I seem to be edging back into the dispute resolution world. Two lectures in Europe and some major written pieces have come alongside some old-fashioned lawyering. I also re-drafted the Institute of Financial Planning's Disciplinary Rules.

Concerned at the changing shape of my business, I sent a client questionaire to a number of people this summer. I am grateful for the excellent responses from the people who use my services directly. However, this contrasted with the limited reaction of senior managers. This year's big challenge for all of us is to involve senior management more with what I do.

Adam Samuel

Pensions and FSAVC Review

Most of the work on these reviews has been done although there are still scrapes to extricate people from. The big issue has been the need to clean up the effects of the demutualisation court case (Needler). The High Court decided that benefits given to customers when an insurer demutualized had to be ignored for the purposes of calculating compensation for being wrongly advised to take out a policy with the firm concerned. This ill-starred litigation left IFAs and ex-mutual insurers struggling to exclude bonuses added to policies on such occasions from loss and redress calculations. The ABI has at least persuaded the FSA not to ask firms to redo calculations made before a cut-off date which left out the bonuses. This is not something a court would allow.

The Needler decision has been applied in the Court of Appeal and so appears to be embedded in English law. The Primavera v Allied Dunbar case may have even greater implications for financial services compensation. It involved a pension that failed to produce a particular lump sum at an intended date. Allied Dunbar could not rely on subsequent gains in policy value to offset the loss. Presumably, only the House of Lords could overrule Needler now. The ABI's argument that only windfall benefits received by investors on demutualization should be ignored can also be confined to the history books.

Otherwise, the task of decommissioning the two review projects and reducing subsequent risks for them has dominated the landscape. Sadly, the regulator has not addressed the problem of companies which have offered compensation correctly but whose

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Pensions and FSAVC Review continued

customers have failed to accept. Where the investor is being deliberately obstructive, an offer can be frozen so that there is no need to re-calculate the compensation in the future (under FSA Bulletin 9). Even in these cases, the regulator has not said that firms can withdraw the offer. It would be better for the FSA to issue a bulletin enabling firms to withdraw offers that have been outstanding for a certain length of time and pull such cases from the review. The client could always complain within 3 years of the offer letter.

Much concern has been expressed about whether customers could ask for cases to be re-opened when redress turns out to have been inadequate. The customer will almost always have only 3 years to sue the firm after an offer has been made. Having said that, review cases are exempt from these time limits if the client complains to the Financial Ombudsman (FOS). A compliant offer or no loss letter will be let through by FOS unless the facts of the case are not governed by the Guidance. An offer accepted in full and final settlement of all claims arising out of or relating to the sale of the policy should block further litigation or trips to FOS. There are two exceptions. First, the offer may be misleading, most notably by saying that it is calculated in accordance with the Guidance if it was not. Secondly, there is a remote prospect that a court will state that the new claim was so completely unforeseen that a discharge not mentioning future claims is insufficient.(BCCI v. Ali). In real terms, this means that very few cases can be re-opened if discharges have been properly drafted.

In general, pension review activity does not seem to be finished. The FSA has asked a number of firms to do look at income drawdown (a facility through which customers may take income without converting their pension into an annuity before age 75) now. It has not yet published the parameters of these projects or the standards to be observed. The initial task will be to work out a redress formula. The easiest way to do this is to assume that the customer would have taken their pension benefits when they entered the drawdown arrangement. One needs to take what these would have been, add interest at base rates and deduct any sums, also with interest, taken from the drawdown arrangement (including the tax free cash). This calculates what has already been lost by the customer from not taking his pension when he should have done. Firms should then have to buy an annuity of the same level as the investor would have received originally. This formula does not tell you which company's annuity rate to use - perhaps an industry average could be agreed. It also does not cope with the possibility that the current lump sum or annuity available is greater than the adjusted value of what should have been paid.

Complaints

A firm can currently block access to the Pensions Ombudsman by failing to carry out the first stage of the process

This year, I branched out into a new area. For the first time, I was asked to draft a company's complaints procedure from scratch. The second commission came shortly afterwards. For years, I have trained and advised firms on different elements of these processes. So, this was a natural development. It was also challenging and satisfying to build systems compatible with the FSA, GISC and even Lloyd's rules and the various features of them applicable to different types of firms. The most beautifully written procedures still need proper training and good management if they are to work. So, I have continued the usual round of training, lecturing and advising on sales and admin complaints generally and endowments in particular. In my 1999 newsletter, I said that the regulator had to do something about endowments soon. This year, it has been asking firms to review random selections of business. The key message with most endowment complaints is that the earlier that many of them are tackled, the cheaper it becomes. This is most apparent with policies which last beyond the client's retirement age. The recent Government Green Paper on Pensions revealed that most of us actually retire at about 58. This makes the sale of an endowment, rather than a repayment loan without early termination penalties, past age 60 unforgivable. The Ombudsman and the FSA prefer the criterion of normal retirement date of the client's employer to determine which endowments are acceptable. Either way, their compensation formula can cost firms five-figure sums for each year the resolution of such a complaint is delayed.

I seem to have become an expert on time-limits for complaining. The recent mess over endowments could have been avoided if the FSA and FOS had just issued a simple press release. It should have said that the 3 year period for complaining to the Ombudsman does not begin to run as a result of the customer receiving a re-projection letter from the insurer saying that the endowment is unlikely to repay the mortgage at maturity. The only exception would be if the letter says explicitly that the policyholder has lost money by taking out the policy. The Notes to the Editors section of three consecutive Press Releases from the regulator

Compliance

I continue to train advisers how not to break the Conduct of Business Rules. Firms who have had previous problems with regulators might like to follow the example of a client who booked me just before a monitoring visit. Having been told about the forthcoming training, the regulator was much gentler with the firm than it had been on previous visits. More importantly, one keeps seeing financial advisers who by not doing the fact-finding process properly are missing opportunities to give advice and so make money. More dangerously, I keep encountering advisers who have not written down what they know about their clients. This makes it impossible for 3rd parties to know whether a sale is correct.

As part of compliance workshops, I draft a suitability letter "live". Everyone assumes that this will end up as a long letter. Actually, it comes out shorter than most. The reason is because the structure is tight and few words are wasted. I also use very few standard paragraphs. Those who assess whether an adviser is competent to do the job should require advisers to use their own language to make recommendations to customers while following a set structure. This needs to be 1) a description of the client's situation and aspirations 2) the recommendation 3) the reasons for the recommendation and 4) the disclosure of the risks and disadvantages involved, including the charges.

There has been much talk about the role of Ethics in compliance lately. I have published "answers" to the 12 scenarios in the FSA's recent discussion paper on the subject. Attitude plays a much larger role than knowledge in determining whether individuals and businesses act in a compliant way. The problem with any attempt to promote an ethical approach to the subject is that beyond the compliance rules, there is no such framework of rules or principles on which one can rely. I am not convinced that it is enough just to encourage businesses to discuss ethics. Firms may just agree on an unsatisfactory approach to these questions. I am continue to be involved in investigating and writing up the decisions of the Institute of Financial Planning's Disciplinary Committee. This private organization in 2002 expelled a member for unethical behaviour after a process in which I was heavily involved. In writing up its decisions, I am developing some minor precedents. Happily, the Institute has insufficient numbers of cases. More generally, though, I think that publications of opinions and decisions on concrete cases issued by disciplinary bodies and regulators is the only way forward in enhancing discussions of what is ethically acceptable.

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have said this. So, it presumably corresponds to advice obtained by the FSA about its own rules. The relevant provision mirrors section 14A Limitation Act 1980. However, the new FSA rule says that an endowment sales case cannot be resolved by FOS if the complaint was not received by the firm concerned three years after a red letter re-projection if six months has passed from a subsequent mailing of any colour. This rule will not apply in "exceptional circumstances", where the firm does not object, within six years of the transaction or in court to which any customer who has missed the FOS deadline would be wise to go. It is all very unsatisfactory.

I have found myself playing a minor role in the reform of occupational pension complaints procedures. Anyone who dislikes the FSA rules should try these. A firm can currently block access to the Pensions Ombudsman by failing to carry out the first stage of the process. The Government's proposals will dispense with this. However, it may be too much to expect for it to adopt a clearly written process which will facilitate the eventual merger of the two processes. This seems increasingly inevitable and desirable.

Some IFAs have involved me in the world of split-cap trusts. Until the FSA orders one or more of the providers to compensate investors, small advisers will have to carry the burden and risk of handling cases which should ideally be investigated on a joint-basis. Unfortunately, any consumer protection regulator like the FSA has to limit itself to ensuring that consumers are properly compensated. It has no power to order the fair distribution of the costs involved amongst those who are liable. There are some complicated ways of avoiding some of these problems. They do, though, take IFAs to the very limits of the complaint rules in terms of delay and adopting a fairness standard. If they take these options, they must at least offer to assist clients in recovering the rest of the compensation due from other parties, such as stockbrokers and the marketing groups of the product providers.

Finally, the Association of Independent Financial Advisers persuaded me to write the chapter on complaint handling in a book on the FSA rules to appear later this year.

Dispute Resolution

Such a scheme would have been extremely handy for dealing with split-cap problems, not to mention joint-liability questions

The Institute of Financial Planning recently adopted my re-draft (with some amendments) of their disciplinary procedures. We have widened and clarified the grounds for upholding complaints against members. Acting unethically, displaying serious incompetence, bringing the Institute into disrepute, being punished by a regulator and intentionally misleading the Institute and conviction of a relevant criminal offence are the basic grounds. The use of regulatory action as a ground for disciplining members of what is a private organization is part of a general process of improving links with regulators. The new rules make it clear that the Institute may pass onto regulators information that emerges during disciplinary proceedings.

A novel aspect of the rules is that the Disciplinary Committee is actively entitled to encourage members in dispute resolve their complaints amicably or through arbitration. The rules contain an arbitral process which can be used even where there is no disciplinary case. Recently, a solicitor called to ask whether I could be the arbitrator in a dispute between two IFAs with elements of misselling involved. He said that neither he nor his opponent had much idea about arbitration. It raised the question of how much an arbitrator could assist, notably with drafting the arbitration agreement under which he would subsequently be appointed. I do not see an inherent problem with advising parties together on this or at least giving them the options. Other people's views would be much appreciated.

More generally, this all increases the momentum for an old hobby horse of mine: the need for an arbitration scheme to resolve disputes between financial services industry participants. If it published accounts of its decisions, it could prevent problems occurring in the future. It will, though, need the trade bodies to work together to create such an entity. Such a scheme would have been extremely handy for dealing with split-cap problems, not to mention joint-liability questions on both the pension review and increasingly with endowments. In the meantime, I can certainly arbitrate disputes as and when they arise.

I rekindled some old contacts last year by giving a couple of international arbitration lectures. The first in the Hague covered the European Convention on Human Rights and dispute resolution. Where the parties freely agree to arbitrate or subject themselves to another type of adjudication, they give up their protections under the Convention. It is the area of quasi-compulsion that causes the problems.

In October, I spoke on arbitration in Western Europe at the Swiss Institute of Comparative Law's 20th Anniversary on Chauvinism and Imperialism in Comparative Law. I have also written a piece for a book in honour of a good friend on the strange Fomento case in Switzerlandand the use of litigation in foreign countries to stop arbitrations. People who are interested in private international law and court intervention in arbitration might like this. It and the Hague lecture can be found on www.adamsamuel.com.

It remains only to wish everyone an enjoyable, compliant and dispute-free 2003.