

Dr M Egan
Joint Committee on Human Rights
House of Commons
7 Millbank
London
SW1P 3JA

6 February 2009

Dear Dr Egan

Thank you for your letter of 26 January in response to my letters addressed to the Committee members.

You have asked for the precise statutory provision which led to the disapplication of the “15 year longstop” to financial advisers or, alternatively, if the change was brought about by the Financial Services Authority (FSA), details of this.

My aim is to be brief, so I will summarise the position. I provide greater detail within the appendix for the purpose of reference.

Until December 2001, when the Financial Services & Markets Act (FSMA) came into force, financial advisers enjoyed the protection of the 15 year longstop from the Limitation Act in the same way as other professions.

The FSA was empowered by FSMA to establish rules under the compulsory jurisdiction that operated from December 2001 but were required by secondary legislation to provide legitimate expectation for the voluntary jurisdiction that operated before December 2001.

On 18 September 2003 the FSA Board removed the 15 year longstop for the voluntary jurisdiction that operated before December 2001.

In so doing, the FSA has breached secondary legislation and the human rights of advisers.

Yours sincerely

Alan Lakey
PARTNER

APPENDIX

1 History

- 1.1 Like other professions, financial advisers enjoyed the protection of a 15 year longstop by section 14(b) of the Limitation Act 1980 until the Financial Services and Markets Act 2000 (FSMA) came into force on 1 December 2001.

It was recognised by the previous Ombudsman scheme, Personal Investment Authority Ombudsman Bureau (PIAOB), under the voluntary jurisdiction that operated before December 2001 by the Financial Services Act 1986.

- 1.2 PIAOB and other Ombudsman bodies were incorporated into the Financial Ombudsman Service (FOS) which was created by FSMA. Legitimate expectation for the voluntary jurisdiction that operated before December 2001 was provided by secondary legislation under Statutory Instrument 2001 No. 2326 (SI 2326) issued under sections 426 to 428 of FSMA.

Following the ruling in IFG Financial Services Ltd v FOS and Jenkins (2005) the FOS is not constrained under Section 228(2) of FSMA by the parameters of UK law however it has chosen to adopt the '6 and 3' rule enshrined within the Limitation Act 1980 in the following way,

"The ombudsman cannot normally consider a complaint if the complainant refers it to us:

more than six years after the event complained of; or

(if later) more than three years from the date on which they became aware (or ought reasonably to have become aware) that they had cause for complaint."

However, the FOS does not accept the established limitation defence of a 15 year longstop, even for the voluntary jurisdiction that operated before December 2001 in breach of SI 2326.

The FOS contends that FSMA makes no reference to the 15 years longstop but there was no requirement since the legitimate expectation from PIAOB was provided by SI 2326.

2 Responsibility

- 2.1 The FSA is responsible for drafting the rules under which the FOS is able to claim jurisdiction regarding a complaint. These are set out within the FSA handbook under the Dispute Resolution section, Disp 2.

- 2.2 When challenged on this as part of a response to Consultation Paper 158 (CP158) the FSA stated,

"We have no say in whether there should be time limits rules for the FOS (there must be rules that comply with paragraph 13(1) of schedule 17 of FSMA). So long as the rules made are rational, in public law terms, there is no requirement in the FSMA for the time limits to follow the requirements of the general law"

The FSA then went on to say,

"We do not consider it is in the interests of consumers to rule out the possibility of complaints being dealt with outside the 15 year period that would apply to court cases. Nor do we consider this necessary to prevent hardship to firms. "

2.3 The FSA concedes that it is subject to statutory law, as confirmed by Managing Director RSB, David Kenmir, on 22 June 2005, yet the provisions within Disp 2 clearly show that it is able to create new law without reference to Parliament or the Courts. Both the FOS and the FSA ignore statutory law and generate new law, or apply variations of existing law, at their behest.

2.4 By way of emphasis I also highlight the words of Chief Ombudsman, Walter Merricks, spoken during an address to the Financial Regulation Industry Group in June 2001,

“We do not have to pretend to ‘find’ what the law is. We unashamedly make new ‘law’”.

2.5 Anthony Speaight QC, an expert within the financial services field, affirmed,

“There is an authority from a Lord Chancellor that an arbitration clause that permitted arbitrators to disregard the law would render them arbitrary in their dealings with the parties”.

3 The FSA’s Involvement

3.1 Both the FSA and the FOS argue that it was never Parliament’s intention that a 15 year longstop would apply to financial services complaints. This argument is predicated on there being no specific mention of a 15 year longstop within FSMA.

In taking this stance the FSA is arguing that procedural rules, made pursuant to FSMA, as delegated legislation, takes away the protection afforded by primary legislation, i.e. the Limitation Act 1980.

3.2 A Freedom of Information request unearthed the minutes of an FSA Board Meeting, held on 18 September 2003, which debated the issue of a 15 year longstop.

At this meeting the FSA Board took the decision to ignore the Limitation Act 1980 on the advice of General Counsel. The minutes state,

“GCD advises that the way in which Schedule 17, paragraph 13 of FSMA is framed suggests that Parliament intended the FSA to be able to set time limits which can differ from those in the Limitation Act”.

This was stated even though GCD was aware that Schedule 17, paragraph 12 stated,

“This part of this schedule applies only in relation to the compulsory jurisdiction”.

The action of GCD may have been malfeasance, being illegal conduct by a public official, and of the FSA Board misfeasance, being illegal conduct by a public body without the knowledge that their action was illegal.

FSMA states clearly in paragraph 12 of Schedule 17 that Part III could only apply to the compulsory jurisdiction, i.e. from December 2001 (N2). This was confirmed by the FSA in CP99 June 2001 section 2.2.

3.3 During 2007-2008, the FSA consulted on potential industry changes within documents entitled Retail Distribution Review and Retail Distribution Review Interim Report. One aspect of the process requested feedback on whether to re-introduce the 15 year longstop.

When the results of the consultation were published within the RDR Feedback Statement (FS08/06), in November 2008, the FSA acknowledged that there was widespread support within the industry for a long-stop, and commented;

“The Discussion Paper suggested that we might consider changing the FSA’s dispute resolution sourcebook (DISP) in order to introduce a 15-year ‘long-stop’ on bringing complaints against financial services firms. This would be in line with in the way that the Limitation Act 1980 (and the Prescription and Limitation (Scotland) Acts 1973 and 1984 in Scotland) set limits for claims in negligence.

To justify the introduction of a ‘long-stop’ time limit on the period within which complaints must be brought, we needed to identify benefits to firms or consumers beyond the savings for firms in compensation payments. This is because the savings in compensation payments are the same as the costs to consumers from the introduction of the long-stop. In other words, it is a transfer from consumers to firms. Additional benefits that would make the introduction of a long-stop cost-effective would be, for example, an increase in investment in the sector to the benefit of consumers, resulting from reduced uncertainty over liability

Feedback to the question about a long-stop in the DP is in Annex 1. The feedback from the industry, particularly from the IFA community, was forceful – the strength of feeling on this issue was clear. The industry’s feedback focused on ‘fairness’ arguments, for example that the general law of limitation did not apply to advisers, and that they were concerned about handling ‘stale claims’ – particularly into retirement. However, we were unable to convert these arguments into a persuasive analysis that introduction of a long-stop would deliver net benefits for consumers, and other responses – including some from firms – highlighted the consumer detriment and reputational damage that a long-stop could cause.

Therefore, in the IR we asked for further information to help our cost benefit analysis of the introduction of a long-stop, and we have pursued this in the period since then. Feedback we received on the issue of the long-stop following the IR is in Annex 2. We are aware of only three entities that actively went further by trying to find information to demonstrate net benefits to consumers, and we are grateful to them for doing so. One said that it had not been able to find sufficient evidence that the absence of a long-stop was a critical factor constraining the supply of savings and investment services to retail customers. It thought that introducing a long-stop in present circumstances might further undermine consumer confidence.

Information from the other two entities:

- included an estimate of the cost of long-term record-keeping;*
- argued that potential investors in advice businesses focus in depth on the potential liabilities in them, and that a long-stop would give potential investors greater certainty about liability, but was unable to quantify how much of the uncertainty about liability related to business undertaken more than 15 years previously; and*
- argued that the impact of the absence of a long-stop will increase as more time elapses since the introduction of financial services regulation in 1988.*

Our own work estimated that reducing the time for holding records from 30 to 15 years would save an average advisory firm about £3,000 per year, which was very much in line with the figures provided on the cost of long-term record keeping, bearing in mind that firms would still need to retain records for at least 15 years under a long-stop arrangement. These savings are not trivial, but we were not convinced that they would provide sufficient additional benefits to both consumers and firms. In addition, we learned that broader uncertainties over liability have more impact on potential investors than the specific uncertainty associated with the lack of a long-stop.

As mentioned in the IR, the Financial Ombudsman Service (FOS) estimated that the introduction of a 15-year long-stop would time-bar approximately 2,000 of its cases a year. This figure excluded 7,000 mortgage endowment complaints that would have been time-barred in 2007/08 by such a long-stop because it was clear that the number of these complaints was falling dramatically and hence was unlikely to figure in the medium term. Work with a sample of product providers found that there are further complaints, relating to business undertaken more than 15 years previously, upheld by firms that are not referred to FOS.

Having thought carefully about this additional information, we have concluded that we should not introduce a long-stop because we have been unable to demonstrate that it would bring additional benefits to consumers and firms (for example from greater investment in the sector) given that the consumer detriment from time-barred complaints is equal to the resulting benefit for firms from compensation payments.

We recognise that many in the industry will be deeply disappointed by this decision."

- 3.4 The FOS statistics have since been proven to be without merit. Statistics accumulated from an assortment of financial advisers confirm that around 25% of all complaints made during the previous eight years related to advice given more than 15 years previous. Also highlighted was that only around 30% of complaints were escalated to the FOS. Using the FOS's own annual statistics this implied that around 500,000 complaints made during the 2000-2008 period would have been older than 15 years.

4 Parliament's Intentions

- 4.1 Parliament never intended that adviser's ability to use a longstop defence would be extinguished by FSMA.

That conclusion is not weakened but fortified by the explicit recognition in Section 228(2) of FSMA that, "*a complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case.*"

The scope of the power under paragraph 13(1) and (2) of FSMA is to be determined by what Lord Donaldson MR referred to' as the 'Padfield approach' to the construction of an enactment conferring a discretion. This was defined by Lord Reid in *Padfield v Minister of Agriculture, Fisheries and Food* (1968) :

"Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act."

- 4.2 The legislation governing acts or omissions before December 2001 (N2) was FSMA (Transitional Provisions) (Ombudsman Scheme and Complaints Scheme) Order 2001 (Statutory Instrument 2326/2001) issued under sections 426-428 of FSMA and is applicable directly to the FOS.

This statutory instrument confirmed the intent of the Treasury by that order to provide legitimate expectation to which regulated firms and clients had entitlement under previous Ombudsman schemes.

The scheme applicable for Independent Financial Advisers (IFAs) was the arbitration scheme operated by the Personal Investment Authority Ombudsman Bureau Ltd

(PIAOB). The details of the scheme were confirmed by the Council of the PIAOB in accordance with their Articles of Association in 2001 as the Terms of Reference.

- 4.3 On 6 May 2004 the House of Lords Select Committee on the Constitution report stated "*...as a consequence of the Human Rights Act 1998(regulators)must exercise their powers in a manner consistent with the rights protected by the European Convention on Human Rights.*"
- 4.4 On 8 June 2004 the Chief Ombudsman stated to the Treasury Select Committee "*we comply with the rules of natural justice*".
- 4.5 On 3 April 2007 the Economic Secretary confirmed "*FOS process of investigating complaints...is designed to take account of the Human Rights Act and the general principles of natural justice.*" This reaffirmed the statement by FSA in consultation paper CP04/12. "*FOS is required to proceed in line with the rules of natural justice and the HRA 1998.FOS procedures are designed accordingly*".
- 4.6 However the FOS blatantly ignores the Treasury's SI2326/2001 for claims relating to the period pre N2, arguing that they are directed by Section3 (1) of the FSA later issued Transitional Provisions to apply the compulsory jurisdiction resulting from section 226 of FSMA, without reference to the provisions of this Order which requires all other Sections of the Order to take precedence over that Section of the Order.

The FOS claims that the rules made by the FSA for the FOS were not intended to replicate the complex provisions of the Limitation Act 1980. This might be true for post N2 advice but is irrelevant when the FOS is asked to act as the former ombudsman.

5 Legal Precedents

- 5.1 The entitlement to a limitation defence has been upheld by the European Court of Human Rights.

- 5.2 *Stubbings v UK (1996)*

"They serve several important purposes, namely to ensure legal certainty and finality, to protect potential defendants from stale claims which might be difficult to counter and to prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time."

This entitlement has also been upheld by the House of Lords.

- 5.3 *Haward v Fawcetts (2006)*

"In prescribing the conditions for the barring of an action on account of lapse of time before its commencement, Parliament has had to strike a balance between the interests of claimants and the interests of defendants. It is a hardship, and in a sense an injustice, to a claimant with a good cause of action for damages to which, let it be assumed, there is no defence on the merits to be barred from prosecuting the cause of action on account simply of the lapse of time since the occurrence of the injury for which redress is sought.

But it is also a hardship on a defendant to have a cause of action hanging over him, like the sword of Damocles, for an indefinite period. Lapse of time may lead to the loss of vital evidence; it is very likely to lead to a blurring of the memories of witnesses and to the litigation becoming even more of a lottery than would anyway

be the case; and uncertainty as to whether an action will or will not be prosecuted may make a sensible and rational arrangement by the defendant of his affairs very difficult and sometimes impossible.”

6 Further Pertinent Points

6.1 On 30 January 2009, Deputy Pensions Ombudsman, Charlie Gordon, agreed to accept the 15 year longstop defence in the case involving a Mr Lever, Lancashire County Cricket Club and AXA Insurance.

6.2 The ABI, in its January 2003 submission to the FSA, in respect of CP158, noted,

“It seems clear that, under the general law, firms could take the benefit of the 15 year limitation period. We believe that this is an important point to recognise, as it is inequitable for matters older to be the subject of adjudication. We can already see areas of difficulty in remembering what happened at the point of sale, and memories of actions and words over 15 years ago will clearly be more faded still. This 15 year long stop is intended to prevent the unfairness of very old matters being brought before the Courts and it is right that this safeguard against unfairness should remain.

Notably, the 15 year "longstop" is not mentioned. This does not necessarily mean that, on a proper reading of DISP 2.3, firms cannot claim the benefit of it. There is a good argument that neither FSA nor FOS can change the legal position without either an express provision or, at least, necessary implication. Silence is not enough. We assume therefore that this longstop applies to references to the Ombudsman, but believe FSA should clarify the position.”

7 The Implications for Advisers

7.1 Firms are compelled to retain client records indefinitely just in case they later receive a complaint. This increases costs by way of storage and upkeep.

7.2 Not having the safeguard of a longstop reduces the value of a firm due to the build up of unknowable potential liabilities. This renders the sale of the firm difficult as potential buyers refuse to take on such unlimited liability. This means that the seller has to retain the liability and hope to purchase run-off cover using Professional Indemnity Insurance. PI insurers are reluctant to offer this cover and those that do so often require a sizeable premium such as makes it impossible for a retiring adviser to consider.

8 Summary

8.1 The evidence confirms that the FSA is fully aware that its stance is disadvantaging firms and is in breach of Parliament's intentions. Further, I contend that it is conscious that its actions are breaching advisers' Human Rights entitled under Article 6 and Article 14 of the Human Rights Act 1998.

8.2 The argument that the long-term nature of investments makes financial advisers a special case is undermined by the fact that many other professions carry potential long-term claim implications. Regulators, politicians, surveyors, architects, builders, solicitors and accountants all fit into this category but do not suffer from the removal of the longstop defence.

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Yours sincerely

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It was recognised by the relevant previous Ombudsman scheme, Personal Investment Authority Ombudsman Bureau (PIAOB), under both the voluntary and the compulsory jurisdictions (PIAOB Term of Reference 2001) that operated before December 2001 by the Financial Services Act 1986.

- 1.2 PIAOB and other Ombudsman bodies were incorporated into the Financial Ombudsman Service (FOS) which was created by FSMA as a matter of convenience. Legitimate expectation for the jurisdictions that operated before December 2001 was provided by secondary legislation under the Treasury issued Statutory Instrument 2001 No. 2326 (SI 2326) issued under sections 426 to 428 of FSMA and applicable directly to the FOS.

Following the ruling in IFG Financial Services Ltd v FOS and Jenkins (2005) the FOS is not constrained under Section 228(2) of FSMA by the parameters of UK law however it has chosen to adopt the '6 and 3' rule enshrined within the Limitation Act 1980 in the following way,

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- 1.4 However, the FOS does not accept the established limitation defence of a 15 year longstop, even for the voluntary jurisdiction that operated before December 2001 in breach of SI 2326.

The FOS contends that FSMA makes no reference to the 15 years longstop but there was no requirement since the legitimate expectation from PIAOB was provided by SI 2326, which is largely being ignored by the FOS.

2 Responsibility

- 2.1 The FSA is responsible for drafting the rules under which the FOS is able to claim jurisdiction regarding a complaint. These rules are only applicable to claims from post December 2001 sales as the FSA are not empowered to legislate retrospectively. These are set out within the FSA handbook under the Dispute Resolution section, Disp 2.

- 2.2 When challenged on this as part of a response to Consultation Paper 158 (CP158) the FSA stated,

"We have no say in whether there should be time limits rules for the FOS (there must be rules that comply with paragraph 13(1) of schedule 17 of FSMA). So long as the rules made are rational, in public law terms, there is no requirement in the FSMA for the time limits to follow the requirements of the general law"

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- 3.5 *“The Discussion Paper suggested that we might consider changing the FSA’s dispute resolution sourcebook (DISP) in order to introduce a 15-year ‘long-stop’ on bringing complaints against financial services firms. This would be in line with in the way that the Limitation Act 1980 (and the Prescription and Limitation (Scotland) Acts 1973 and 1984 in Scotland) set limits for claims in negligence.*

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Feedback to the question about a long-stop in the DP is in Annex 1. The feedback from the industry, particularly from the IFA community, was forceful – the strength of feeling on this issue was clear. The industry’s feedback focused on ‘fairness’ arguments, for example that the general law of limitation did not apply to advisers, and that they were concerned about handling ‘stale claims’ – particularly into retirement. However, we were unable to convert these arguments into a persuasive analysis that introduction of a long-stop would deliver net benefits for consumers, and other responses – including some from firms – highlighted the consumer detriment and reputational damage that a long-stop could cause.

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Information from the other two entities:

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We recognise that many in the industry will be deeply disappointed by this decision."

- 3.6 The FOS statistics have since been proven to be without merit. Statistics accumulated from a survey of financial advisers show that around 25% of all complaints made during the previous eight years related to advice given more than 15 years previous. It also highlighted that around 30% of all complaints were escalated to the FOS. Using the FOS's own annual statistics this suggested that around 500,000 complaints made during the 2000-2008 period would have been older than 15 years.

4 Parliament's Intentions

- 4.1 Parliament never intended that adviser's ability to use a longstop defence would be extinguished by FSMA.

That conclusion is not weakened but fortified by the explicit recognition in Section 228(2) of FSMA that,

"A complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case."

- 4.2 The scope of the power under paragraph 13(1) and (2) of FSMA is to be determined by what Lord Donaldson MR referred to' as the 'Padfield approach' to the construction of an enactment conferring a discretion. This was defined by Lord Reid in *Padfield v Minister of Agriculture, Fisheries and Food* (1968) :

"Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act."

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On 6 May 2004 the House of Lords Select Committee on the Constitution report stated,

"...as a consequence of the Human Rights Act 1998 (regulators) must exercise their powers in a manner consistent with the rights protected by the European Convention on Human Rights."

- 4.4 On 8 June 2004 the Chief Ombudsman stated to the Treasury Select Committee

"We comply with the rules of natural justice".

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"FOS process of investigating complaints...is designed to take account of the Human Rights Act and the general principles of natural justice."

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- 5.2 This entitlement has also been upheld by the House of Lords.

Haward v Fawcetts (2006)

“In prescribing the conditions for the barring of an action on account of lapse of time before its commencement, Parliament has had to strike a balance between the interests of claimants and the interests of defendants. It is a hardship, and in a sense an injustice, to a claimant with a good cause of action for damages to which, let it be assumed, there is no defence on the merits to be barred from prosecuting the cause of action on account simply of the lapse of time since the occurrence of the injury for which redress is sought.

But it is also a hardship on a defendant to have a cause of action hanging over him, like the sword of Damocles, for an indefinite period. Lapse of time may lead to the loss of vital evidence; it is very likely to lead to a blurring of the memories of witnesses and to the litigation becoming even more of a lottery than would anyway be the case; and uncertainty as to whether an action will or will not be prosecuted may make a sensible and rational arrangement by the defendant of his affairs very difficult and sometimes impossible.”

6 Further Pertinent Points

- 6.1 On 30 January 2009, Deputy Pensions Ombudsman, Charlie Gordon, agreed to accept the 15 year longstop defence in the case involving a Mr Lever, Lancashire County Cricket Club and AXA Insurance.

- 6.2 The ABI, in its January 2003 submission to the FSA, in respect of CP158, noted,

“It seems clear that, under the general law, firms could take the benefit of the 15 year limitation period. We believe that this is an important point to recognise, as it is inequitable for matters older to be the subject of adjudication. We can already see areas of difficulty in remembering what happened at the point of sale, and memories of actions and words over 15 years ago will clearly be more faded still. This 15 year long stop is intended to prevent the unfairness of very old matters being brought before the

Courts and it is right that this safeguard against unfairness should remain.

Notably, the 15 year "longstop" is not mentioned. This does not necessarily mean that, on a proper reading of DISP 2.3, firms cannot claim the benefit of it. There is a good argument that neither FSA nor FOS can change the legal position without either an express provision or, at least, necessary implication. Silence is not enough. We assume therefore that this longstop applies to references to the Ombudsman, but believe FSA should clarify the position."

7 The Implications for Advisers

- 7.1 Firms are compelled to retain client records indefinitely just in case they later receive a complaint. This increases costs by way of storage and upkeep. This creates a conflict with the Data Protection Act as the act demands that the keeper of personal data must prove a legitimate reason for holding on to personal data. The act does not recognise a possibility of a future claim as legitimate reason.
- 7.2 Not having the safeguard of a longstop reduces the value of a firm due to the build up of potential liabilities. This renders the sale of the firm difficult as potential buyers refuse to take on such unlimited liability. This means that the seller has to retain the liability and hope to purchase run-off cover using Professional Indemnity Insurance. PI insurers are reluctant to offer this cover and those that do so often require a sizeable premium such as makes it impossible for a retiring adviser to consider.

8 Summary

- 8.1 The evidence confirms that the FSA is fully aware that its stance is disadvantaging firms and is in breach of Parliament's intentions. Further, I contend that it is conscious that its actions are breaching advisers' Human Rights entitled under Article 6 and Article 14 of the Human Rights Act 1998.
- 8.2 The argument that the long-term nature of investments makes financial advisers a special case is undermined by the fact that many other professions carry potential long-term claim implications. Regulators, politicians, surveyors, architects, builders, solicitors and accountants all fit into this category but do not suffer from the removal of the longstop defence.



HM Treasury, 1 Horse Guards Road, London, SW1A 2HQ

Andrew Dismore MP
Joint Committee on Human Rights
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7 Millbank
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4 June 2009

Dear Andrew

Time Limits For Complaints Against Financial Advisers

Thank you for your letter of 21 May 2009.

As you know, the FSA is responsible for rules covering the day-to-day operations of the Financial Ombudsman Service, including time limits for referring cases to the FOS. The Limitation Act 1980 does not apply to the FOS, a point that was discussed and considered when the Financial Services and Markets Act 2000 was being debated by Parliament.

I understand that the FOS scheme rules were consulted on extensively before they came into force on 1 December 2001.

The FSA considered the case for the introduction of a 'long-stop' time limit in the context of the Retail Distribution Review. According to Feedback Statement (FS08/6)¹ responses from the industry - particularly from the IFA community -

¹ http://www.fsa.gov.uk/pubs/discussion/fs08_06.pdf



focused on the 'fairness' argument. However, other responses, and this included responses from firms rather than just consumers, highlighted the possible consumer detriment and reputational damage that a 'long-stop' could cause. In light of the responses to the review, the FSA did not consider there to be a sufficiently strong case that introducing a 'longstop' would bring additional benefits to either consumers or firms and therefore decided not consult further on this.

The Treasury does not have full details of all other ombudsman schemes to determine whether meaningful comparisons can be made. However, to give one example, I understand that the Legal Services Ombudsman also has discretion to extend its usual three-month time limit in exceptional circumstances, such discretion not being subject to a pre-determined 'long-stop'.

A handwritten signature in black ink, which appears to read 'Paul Myners', is positioned above the printed name.

PAUL MYNERS
FINANCIAL SERVICES SECRETARY TO THE TREASURY

Dr M Egan
Joint Committee on Human Rights
House of Commons
7 Millbank
London
SW1P 3JA

22 June 2009

Dear Dr Egan

Time Limits For Complaints Against Financial Advisers

Thank you for providing a copy of Lord Myners response to Mr Dismore's letter.

As I am sure you are aware, the response is very vague and fails to answer any of the questions posed.

He makes a number of points, the first regarding Parliament debating the Financial Services and Markets Act 2000. I have undertaken extensive research of Hansard and have been unable to find any reference to a longstop during the various debates in both Houses. His assertion is therefore incorrect.

Secondly, he argues that there was "extensive consultation" on FOS scheme rules prior to the eventual implementation. Whilst there was a consultation at no point was the removal of the 15 year longstop mentioned. Again it would appear that obfuscation is the prime tool at his disposal.

The FSA Feedback Statement FS/08/6 in respect of their Discussion Paper DP/07/1 was published in November 2009. The attaching pages have been printed from this document and highlight the industry support for the return of a protection that has been removed illegally in defiance of Statute.

Finally, Lord Myners dissembles regarding other ombudsman bodies. He suggests that the Legal Services Ombudsman has discretion to extend its usual three-month time limit in exceptional circumstances.

Rationality is stretched at this point because the Legal Services Ombudsman does not deal with complaints from the public against legal practitioners. It is only able to investigate the complaint-handling undertaken by one of the six legal professional bodies.

In turn, these bodies do not investigate complaints in respect of negligence; their remit is solely with regard to the service and administrative capability of the body being complained about.

Additionally, whilst the Legal Services Ombudsman is able to extend the “usual three-month time limit in exceptional circumstances” the FOS is anything but exceptional – it ignores the 15 year longstop in each and every instance.

I also refer to the following extracts from Hansard, specifically the minutes of the Standing Committee A, 29th Sitting Part II. Miss Melanie Johnson MP stated; *“The schedule provides in paragraph 11 for the scheme operator and the ombudsman to have statutory immunity in damages for anything done or not done in the discharge of their statutory functions under the compulsory jurisdiction, except when that is done in bad faith or is unlawful under section 6(1) of the Human Rights Act 1998.”*

On June 5 2000 The House of Commons debated the House of Lords amendments and Stephen Timms MP, in response to a point raised by Howard Flight, commented, *“The standard limitation period is, of course, six years, although it can vary according to the type of case and according to judicial discretion. If a lengthy complaint was before the ombudsman and a statute bar appeared on the horizon, it would be up to the consumer to institute protective court proceedings to ensure that the limitation period did not run out”.*

As previously advised, the business of providing financial advice carries no greater long-term potential for detriment than the medical profession, surveyors, builders, architects, legal practitioners or politicians. It is therefore incumbent on a free society to ensure that advisers human rights enjoy a parity with those of other professions.

The FSA cannot override statute yet, by using its powers to design the rules under which FOS operates, it is making new law to the disadvantage of the adviser community.

Yours sincerely

Alan Lakey
PARTNER

Enclosures: Pages 29-31 of Annex 1 of the FSA publication FS/08/6.