



Financial Services Authority

Direct line:
Local fax:
Email:

To the Chief Executives
of leading banks, product providers and IFAs in the
mortgage endowment market

December 2004

Mortgage Endowment Complaints Handling

John Tiner wrote to you and to other banks, product providers and larger IFAs in the mortgage endowment market in April 2002 to draw to your attention our concerns about the way in which mortgage endowment complaints were being handled. I attach a copy of John's letter for ease of reference. In January this year we also issued a letter to leading firms in relation to mortgage endowment complaints, emphasising the need for the timely resolution of complaints.

Since the issue of these letters we recognise that a significant amount of work has been undertaken by the majority of the industry to improve both the standards and the speed of dealing with complaints. There are a large number of firms who are achieving the required standards and taking seriously the concerns of policyholders.

However we are aware there are some firms which, to a varying extent, are failing to meet the required standards and this has prompted us to issue this further letter to remind firms of our requirements in relation to mortgage endowment complaints handling.

We are writing to you today in order to:

- cover issues which have recently come to the attention of the FSA and/or the FOS that you may not be aware of (see Annex) and which show that some firms are not dealing with these issues correctly;
- remind you of the importance of handling complaints in a way that is consistent with the principle of treating customers fairly, including the need for complaints to be dealt with as much as possible, by the firm, rather than the FOS; and
- finally, to make it clear that where we hear of problems in complaint handling we will pursue this with firms and if it is established that there is a significant shortfall, we will consider whether enforcement action is appropriate.

As you are aware, it is one of our objectives to assist retail customers to achieve a fair deal. Fair complaints handling by firms is one of the key indicators of our success. We are concerned, in particular, that the FOS has reported to us that not only is it continuing to face a rising number of endowment complaints, but that it is upholding a very high percentage of complaints from some firms, suggesting that these firms may not be handling complaints properly. Firms should not manage their own caseloads by allowing an excessive number of complaints to flow through to the FOS.

High uphold rates of complaints against some firms by the FOS also suggests that there may be other customers – who may have complained on issues very similar to those considered by the FOS but have not taken their complaints to the FOS – who may not have had their complaints properly considered. The FOS has also informed us that some firms have repeatedly turned down complaints on grounds which appear only very slightly different to those used in connection with earlier batches of complaints which the FOS has upheld. Our own work has also identified inconsistencies in some firms' decision-making. Such behaviour is not in keeping with the spirit or letter of our requirements.

In addition to the concerns identified by the FOS, our work on complaint handling has also identified a number of specific areas where some firms appear to be unclear about the standards that need to be applied to be in line with our requirements. The Annex to this letter sets out the main areas and provides detail on the standards we expect firms to apply. Neither this letter nor the Annex introduces new rules or formal guidance; rather, they confirm the standards already expected from firms in their handling of mortgage endowment complaints.

Work on mortgage endowment complaints is far from finished with new issues in complaints handling continuing and we emphasise the importance of pressing on with this work so customers can be satisfied that they have been treated fairly.

I would ask you to consider this material and ensure that your firm's policies and procedures for the handling of complaints are appropriate and effective. If you decide that changes need to be made, I expect you to implement all of the necessary actions.

As you know, we monitor progress and outcomes to assure ourselves and the public that complaints are being handled fairly, and to act in any cases where we find weaknesses that put consumers' interests at risk. We have taken action in a number of cases, including the use of enforcement action against five firms, and will do so again if appropriate. We are in dialogue with a number of firms and will be undertaking further detailed supervisory work to test the robustness of firms' complaint handling arrangements in the coming months.

As this letter will also be of wider public interest, it will be published on the FSA's website on 4 January 2005.

ANNEX to letter dated []

Mortgage endowment complaints

Decision-making

DISP requires that a firm must put into place appropriate management controls and take reasonable steps to ensure that it handles complaints fairly, consistently and promptly and that it remedies any recurring or systemic problems as well as any specific problem identified by the complaint.

Allowing for the fact that DISP requires firms to assess each complaint case on its individual merits, some firms' complaint handling and redress calculations show significant differences in outcomes for similar cases, suggesting a potential lack of guidance or standard practice in design or operation.

Equally, we have also seen some firms operate an over prescriptive approach to complaint handling, to the extent that insufficient discretion is used to ensure that the outcome is relevant and appropriate to the individual circumstances of the case. Application of precedent without due regard to the facts of the individual case represents poor complaint handling.

Redress Calculations and Mitigation

The guidance we have published in DISP acknowledges that in some instances a loss may not be recoverable if it could have been avoided by the complainant taking action which in the circumstances it would have been reasonable for him or her to take. Normally a failure to mitigate loss will only arise where a consumer is in full possession of facts which will enable the consumer to understand that they may have suffered damage as a result of some breach of duty and that there are steps which can reasonably be taken to limit or avoid further loss occurring.

We expect firms to take a fair and reasonable approach in determining whether in any case the complainant's recoverable loss should be limited in this way. We do not think it would be reasonable, for example, if a firm were routinely to assume that an absence of mitigation is always sufficient evidence of a failure on the consumer's part to justify redress being reduced or capped.

Reducing or capping a complainant's recoverable loss is only likely to be fair where:

- There is clear evidence that the complainant has been notified of a likely shortfall and told of the need to take action to address the shortfall, i.e. that the endowment is unlikely to pay off the loan, and an alternative means of meeting the liability will have to be found

- The options available to address the shortfall are clearly communicated and are a fair representation of **all** the options available to that complainant
- The consequences of not taking action are clearly communicated i.e. that any future compensation may be reduced due to the complainant's inaction
- The complainant has been given a reasonable amount of time to seek advice and rearrange his or her affairs. It is not reasonable to expect a complainant to do so on the day they receive such a warning letter, and
- The firm can demonstrate that it is in all the circumstances reasonable to expect the complainant to have taken action which would prevent further losses accruing.

Routine letters enclosing annual statements of policy benefits or those relating to a contractual review of policy premiums, for example, are unlikely by themselves to be sufficient to trigger a duty on the part of the consumer to mitigate.

The guidance in DISP outlines to firms when it may be appropriate to reduce redress payments, for example, deducting savings. Failure to adhere to this guidance by some firms raises questions about the effectiveness of their systems and controls for ensuring fair complaint handling. To assist consumers in assessing the offers made when complaints are upheld and to avoid unnecessary referrals to FOS, firms should specify clearly in plain language the components of their offer and, in particular, any circumstances which they consider should properly reduce the redress payable.

Communication with consumers

Decision Letters that contain shorthand and jargon may not be readily understood by consumers. DISP requires responses to complaints to address adequately the subject matter of the complaint, and where a complaint is upheld, to offer appropriate redress. Firms should therefore consider explaining in plain English terms such as a pre-'A Day' case and a Cancellation Notice.

Sales into retirement

Where a firm has sold an endowment policy that runs into the policy holder's retirement, the firm should have considered, at the time of sale, the affordability of the policy after retirement age. We will be undertaking further work with firms that have sold policies into retirement to consider whether wider review work is appropriate. If your firm has sold policies into retirement, you should consider whether wider review work is required to consider the appropriateness of these sales.

In calculating redress for sales into retirement cases, some firms have assumed that the policyholder will retire at the state retirement age rather than the intended retirement date, where that date is known, or ought reasonably to have been known, at the time of the sale. However, in such cases DISP App2 2.4 applies and refers to an *individual complainant's normal retirement age*.

Cooperation with FOS

DISP 1.6.1R requires that a firm must cooperate fully with the Ombudsman in the handling of complaints against it.

Cooperation with the Ombudsman includes, but is not limited to, producing requested documents, adhering to any specified time limits, attending hearings when requested to do so and complying promptly with any settlements or awards.

We are aware that some firms have refused to comply with awards made by the FOS until threatened with court action. We consider this behaviour runs contrary to Principle 6 of the FSA's Principles of Business – A firm must pay due regard to the interests of its customers and treat them fairly – and will consider whether the circumstances warrant enforcement action.

Equally, some firms have determined to reject complaint cases on the basis of a single argument only to then broaden this out to include further arguments each time they are subject to challenge. DISP requires that responses to complaints address adequately the subject matter of the complaint; arguments rejecting complaints cases written in such a way are not considered to meet this requirement and, again, run contrary to Principle 6.

Pre-'A Day' Complaints

Complaints about pre-'A Day' sales are in some cases *relevant new complaints* and where applicable, firms must handle and investigate them in accordance with the procedures in DISP as these procedures apply to post N2 complaints. This would typically be complaints made to firms who had, under arrangements operated by the PIA, agreed that the PIA Ombudsman scheme should extend to pre-'A Day' and other matters or were members of the predecessor Banking and Building Society ombudsman schemes. We would expect the senior management of all authorised firms to be concerned to see that complaints of this kind are dealt with fairly and effectively and without any bias or presumption in favour of the firm itself.

Firms giving advice before 'A Day' had at least three basic legal obligations at the time:

- a duty not to make negligent mis-statements;
- a duty (where advice was given) to advise with reasonable care and skill; and
- a duty to provide all material information (if information was given).

Where a firm did not give advice during the sales process, but did arrange the policy on behalf of the consumer, our view is that the first and third of these obligations would probably have applied. Such a firm, for example, would need to have ensured that its promotional literature did not misrepresent the relative merits of the different mortgage repayment methods. A firm which gave advice would have needed to have ensured that its advice fairly covered all the available options for mortgage repayment.

DISP requires firms to assess each complaint case on its individual merits. It would be inappropriate therefore for a firm to treat all sales as compliant and to assume that no advice was given simply because no contemporary documentary evidence exists to suggest otherwise. Firms should give due weight to the complainant's account of events.

The FOS has provided guidance to the industry in its publication 'Ombudsman-News' about how it considers pre-'A Day' complaints (see for example the February 2002 edition). Details can be found at: www.financial-ombudsman.org.