

JURISDICTION DECISION	
consumers	Mr and Mrs Y
business	ABC Ltd
complaint reference	
date of jurisdiction decision	18 March 2009

This jurisdiction decision is issued by me, Richard West, an ombudsman with the Financial ombudsman Service.

I do not have a free hand to investigate all of the complaints that are referred to me. The extent of my powers to consider complaints is set by the industry regulator – the Financial Services Authority (FSA). I cannot investigate complaints that are not within my jurisdiction.

In this instance, the business has objected to me considering the complaint – it says that Mr and Mrs Y failed to make the complaint within the time limits that apply. I must decide whether that is the case.

summary of complaint

Mr and Mrs Y's complaint concerns the sale, in March 1989, of an endowment policy for the purpose of achieving the capital repayment of a mortgage. Mr and Mrs Y surrendered the policy in September 2003.

Briefly, their complaint is that the adviser, a representative of what is now the business, failed to explain the risks associated with the policy and instead led them to believe it would pay off their mortgage and produce a surplus.

background and circumstances

Mr and Mrs Y complained to the business in February 2007. The business concluded that the complaint was made out of time. It said:

- Mr and Mrs Y had three years to complain from the date they first knew, or ought to have known, that the advice they received was unsatisfactory.
- Mr and Mrs Y were sent a high risk warning letter on 14 April 2003 and subsequently surrendered the policy on 26 September 2003.
- It was satisfied that Mr and Mrs Y were aware of the risk of a shortfall when they surrendered the policy and they should have complained within three years of that date, but they did not.

When Mr and Mrs Y subsequently referred their complaint to the Financial ombudsman Service, the business objected to me considering the complaint.

The question of whether the complaint was referred in time was considered by members of our jurisdiction team who concluded that:

- Mr and Mrs Y received their first high risk warning letter in April 2003. Under the February 2003 version of the rules they had three years to complain from then.

- The complaint was not ‘time barred’ on 31 May 2004 and so the June 2004 time limit rules apply.
- Those rules require a business to notify the complainant of a final date for complaining before the complaint can be time barred. The fact that Mr and Mrs Y surrendered the policy does not alter that requirement.
- As Mr and Mrs Y were not given a final date explanation, the complaint is not ‘time barred’.

The business did not accept the adjudicators’ conclusions and asked for the complaint to be reviewed by an ombudsman. In summary, it said:

- It accepts that the June 2004 rules apply, but the rules must be interpreted in the light of their purpose.
- The Financial ombudsman Service has failed to do that and has applied an inappropriately literal interpretation to DISP 2.3.6R by concluding that the final date explanation provisions should apply where the complainant has surrendered her policy on the basis that those complainants are not specifically excluded.
- The Financial ombudsman Service should instead apply a purposive interpretation. The purpose of DISP 2.3.6R is to provide a defined time limit for a mortgage endowment complaint to be made *“when there would otherwise be uncertainty as to when that period had either begun or ended”*, whilst at the same time balancing the need for businesses to close their liabilities after a reasonable period of time.
- For people like Mr and Mrs Y who have surrendered their policies there is no such uncertainty and so DISP 2.3.6R does not apply – they did not need the protection of *“a second reminder of a need to complain and an explanation of the final date”* because:
 - They had knowledge of the shortfall risk and cause for complaint in April 2003 when they received a red re-projection letter (a high risk warning letter) and they had knowledge of the actual shortfall when they surrendered the policy in September 2003.
 - They took action to end the shortfall risk by surrendering their policy.
 - Following surrender they were no longer relying on the policy to repay their mortgage (or to meet a savings objective). Their relationship with the business was at an end and there were no further events connected to the policy for which they could have been waiting.
- The FSA did not intend DISP 2.3.6R to apply to complainants with surrendered policies.
 - The FSA linked DISP 2.3.6R to the ongoing mortgage endowment policy review programme. That programme only applies to policies that remain in force demonstrating that the FSA only intended DISP 2.3.6R to apply to policies that remain in force.

- The FSA’s “guidance” relating to the rules make numerous references to policyholders, customers and consumers rather than ex-policyholders, ex-customers and ex-consumers. It is clear from this that the FSA only intended DISP 2.3.6R to apply to policies in force.
- Handbook Notice 33 says *“most businesses will be able to provide notice of the final date within re-projection letters, avoiding the need for a separate communication”*.
- The word ‘most’ does not indicate that firms should communicate with former policyholders, rather this statement simply acknowledges that it would not be possible for some businesses to include final date notifications in re-projection letters because of “system constraints” and in those circumstances a separate notification would be required.
- For these reasons DISP 2.3.6R does not apply to Mr and Mrs Y and instead DISP 2.3.1R(1)(c) applies.
- Alternatively if I consider DISP 2.3.6R applies, I should use my discretion to apply the general time limit rules (DISP 2.3.1R(1)(c)) instead because:
 - It is impracticable and unrealistic to expect the firm to provide Mr and Mrs Y with an explanation of the final date as it no longer had a continuing relationship with them following surrender.
 - It was unnecessary and inappropriate for the firm to provide Mr and Mrs Y with a final date notification *“they knew of the risk and amount of shortfall, had capped that risk by surrendering the policy, no longer held an in-force policy, and were aware of the cause for complaint”*.
 - The provision of a final date notification was contrary to FSA’s intention and industry practice at the time.

the relevant rules

The general time limits for the referral of a complaint are set out at DISP 2.3.1R (1)(c). This states:

The ombudsman cannot consider a complaint if the complainant refers it to the Financial ombudsman Service:

(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 to the ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received.

Special provision is made in the rules for mortgage endowment complaints. These rules, which can extend the time limits for mortgage endowment complaints, were introduced from 1 February 2003 and modified from 1 June 2004.

The rules applicable from 1 February 2003 state:

DISP 2.3.6R:

(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 2.3.6R, 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 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 containing the same warning or other reminder of the need to act.

(2) Paragraph (1) does not apply if:

(a) the ombudsman is of the opinion that, in the circumstances of the case, it is appropriate for DISP 2.3.1R(1)(c) to apply without modification; 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).

The rules applicable from 1 June 2004 state:

DISP 2.3.6R:

(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 2.3.1 R(1)(c) to apply.

Transitional provision 7A states:

Nothing in DISP 2.3.6R 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 2.3.6R (1)(b) as it then stood.

In April 2008, the rules were renumbered and so DISP 2.3.1R(1)(c) is now DISP 2.8.2R(2)(b), whilst DISP 2.3.6R is now DISP 2.8.7R. But there were no material changes to the text of those rules. I have used the old references in this decision as those were the rule numbers when Mr and Mrs Y referred their complaint to this office.

findings

I have considered all of the evidence and arguments from the outset so far as they relate to the question of my jurisdiction to consider the complaint.

which rules apply to Mr and Mrs Y's complaint?

The effect of Transitional Provision 7(A) is that the 1 June 2004 version of the rules applies to all complaints referred after 1 June 2004 that were not already time barred on 31 May 2004 under the old (1 February 2003) rules.

The firm accepts that the complaint was not time barred on 31 May 2004 and so the 1 June 2004 rules apply. But for the sake of completeness, I have considered the position.

Having done so, I am satisfied that had Mr and Mrs Y referred their complaint on 31 May 2004 they would not have been time barred under the rules that applied at that time.

Mr and Mrs Y received their first high risk warning letter in April 2003. That would have been sufficient to trigger the general three-year time period for complaining set out at DISP 2.3.1 R(1)(c). And that time period would still have been running on 31 May 2004.

It follows that I am satisfied that the 1 June 2004 rules apply to Mr and Mrs Y's complaint.

the 1 June 2004 rules

Under the 1 June 2004 rules: where the 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 warning of a high risk of a shortfall, the applicable time limits are the provisions set out at DISP 2.3.6R – unless the ombudsman is satisfied that it is appropriate for DISP 2.3.1 R(1)(c) to apply instead.

In other words, providing the two qualifying criteria are met, DISP 2.3.6R applies instead of the general time limits, unless I am satisfied that it is appropriate to apply the general time limits instead.

The position is somewhat different to the 1 February 2003 version of the rules, where the special mortgage endowment rules only applied if it gave the complainant more time than the general time limits.

Under the provisions of the June 2004 version of DISP 2.3.6R, the time limit for making a complaint starts to run from the date the complainant receives a high risk warning letter.

The time limit normally ends three years from the date the complainant receives the high risk warning letter. But the time limit only ends after three years if the firm provides the complainant with an explanation of her final date for complaining, at least six months prior to the final date.

does DISP 2.3.6R apply to Mr and Mrs Y's complaint?

On the face of things, Mr and Mrs Y's complaint would appear to meet the two qualifying criteria and so DISP 2.3.6R (including the final date explanation provisions) would seem to apply:

- Mr and Mrs Y's complaint relates to the sale of an endowment policy for the purpose of achieving capital repayment of a mortgage.
- Mr and Mrs Y received a letter from a firm (the firm) in April 2003 warning them that there is a high risk the policy would not produce a sum large enough to repay the target amount.
- The provisions of DISP 2.3.6R are not said to exclude complainants like Mr and Mrs Y who surrendered their policies after receiving the high risk warning letter.

But the firm says that I must apply a purposive, rather than literal interpretation to the rules. In essence, it says that:

- The purpose of the rule is to apply a defined time limit where there would otherwise be uncertainty about when the time period for complaining starts and ends. Where the complainant has surrendered the policy there is no uncertainty and so the rule does not apply.
- The FSA did not intend the final date explanation notification rule to apply to complainants, like Mr and Mrs Y, who surrendered their policies at some stage after receiving a high risk warning letter and so they should not benefit from the final date explanation provisions.

I have only summarised the firm's representations in this decision, but I have read and considered them all carefully.

As the firm has pointed out in its submissions the General Provisions of the FSA Handbook (in which the time limit rules are found) contain rules and guidance about interpreting the provisions of the Handbook.

In particular, GEN 2.2.1R provides that: *"every provision in the Handbook must be interpreted in the light of its purpose"*.

In addition, the guidance at GEN 2.2.2G includes the following: *“the purpose of any provision in the Handbook is to be gathered first and foremost from the text of the provision in question and its context among other relevant provisions.”*

It follows that I am required to apply a purposive interpretation to the time limit provisions. But I do not consider that applying a purposive interpretation to DISP 2.3.6R means that its provisions do not apply to Mr and Mrs Y’s complaint as the firm suggests.

Having considered the text and context of DISP 2.3.6R, it seems to me that the purpose of the rule is to ensure that those who wish to make a complaint about the sale of a mortgage endowment policy should not find themselves out of time unless they have been made aware (through a final date explanation) of the final date for complaining that applies to them.

This would appear to be consistent with public statements made by the FSA about its thinking when introducing the modified rule in June 2004 and since.

For example in its response to the Treasury Committee’s fifth report on “Restoring confidence in long-term savings” (the report which prompted the FSA to change the rules in June 2004), the FSA said:

“30. We have introduced new rules to ensure that all customers are fully aware of the time limits that apply to making complaints if they feel they have been mis-sold, as suggested by the Committee.

31. From 1 June 2004, our new rules mean that before they can be time barred, customers will receive letters which make clear what their position is and the final date before which a complaint must be made to prevent time barring. This notice must be given at least six months in advance.”

In Handbook Notice 33 the FSA said:

“We are introducing an additional requirement that a consumer must be given at least six month’s notice of this final date before the time-bar can apply. This is to draw policyholder’s attention to the time bar and the need to make a complaint (if they believe they were mis-sold) before this date if they are not to lose their right to possible compensation”.

And in its July 2005 publication “Mortgage endowments: Progress report and next steps”, the FSA explained that:

“In May 2004 we announced changes to our rules in relation to time bars. Many firms had been keen to limit their liability by limiting the amount of time given to a policyholder to make a complaint. Imposing a time limit is in line with general principle of law (and, of course, our rules on complaints generally) and is consistent with the Limitation Act 1980. Although we believed it unjust to remove this right to limit liability, we did think it entirely appropriate that consumers be given a more explicit warning if a firm intends to invoke it. So the rule changes required firms using a time bar to state the date or the period (with reference to a specific date) after which the consumer can no longer complain about the original sale of the policy.

The rule changes came into effect on 1 June 2004 and were introduced without consultation, reflecting the important consumer protection we felt they afforded.”

I accept it is possible that the FSA may not have given particular thought to the position of complainants like Mr and Mrs Y who were policyholders at the start of the time period for referrals, but who later surrendered their policies, when introducing the final date explanation requirements (although I can only speculate about that).

I also note that when commenting on this issue the FSA referred at various times to 'policyholders', 'customers', 'consumers' and 'complainants' without any particular consistency; and, depending on which term is used, the comments might in theory therefore appear to refer to different groups of people.

But I have not seen any compelling evidence to suggest the FSA intended to exclude complainants like Mr and Mrs Y from the protection afforded by the final date explanation notice.

The purpose of the rule amendments in June 2004 seems to have been to introduce an additional level of consumer protection (the consumers being people who at some stage were advised to take out a mortgage endowment policy who might wish to complain and who might fall foul of the time limits) by introducing the final date explanation requirement.

It seems to me that the purpose of the final date explanation (to ensure that mortgage endowment complainants should not find themselves out of time without first being warned about the deadline for complaining) is as relevant to Mr and Mrs Y's circumstances as it is to a complainant whose policy remains in force.

I do not find the firm's representations that Mr and Mrs Y did not need the protection of "*a second reminder of a need to complain and an explanation of the final date*" because they had surrendered their policy and so knew all they needed to know, to be persuasive.

As an aside, those representations appear to suggest some confusion on the firm's part between the February 2003 special endowment rules that were concerned with the complainant receiving a second warning letter or other reminder of the need to act and the June 2004 rules which introduced the final date explanation notice requirements (and replaced the 'second reminder' provisions).

Mr and Mrs Y may not have needed a second reminder of the need to act – they had as the firm submits acted when they surrendered their policy. But it is the June 2004 rules that apply to Mr and Mrs Y's complaint, and knowing the final date for complaining is a different matter.

In essence the firm says that because Mr and Mrs Y surrendered the policy, the fact that they had cause for complaint would have been more apparent to them and so they did not need to be warned about the time limits.

Again as an aside, it seems to me that the firm overstates the 'knowledge' of people with surrendered policies (they would not as the firm suggests know the true amount of the shortfall – as that knowledge can only be gained on maturity).

But I do not consider it matters. Ultimately both those complainants who keep their policies after receiving a high risk warning letter and those that surrender them after receiving a high risk warning letter have *sufficient* information to know that they have cause for complaint for the purposes of DISP2.3.6R(1)(c) and the warning required to start DISP 2.3.6R.

The additional layer of protection afforded by DISP 2.3.6R is the final date explanation requirement. The fact that Mr and Mrs Y surrendered their policy would not have given them the information that a final date explanation is intended to provide (even if as the firm suggests they had greater reason to think that they had cause for complaint). There remained the possibility that they could be time barred without knowing the time limits that apply to them.

And so it seems to me that the purpose of the final date notification is applicable to complainants who surrendered their policies after receiving a high risk warning letter as it is to those who continue to pay into their policies.

Clearly the time limit rules are closely linked to the mortgage endowment review re-projection programme – DISP 2.3.6R only applies to complainants who have received a high risk warning letter (likely to be a ‘red’ re-projection letter) and the time period for complaining starts upon receipt.

And it is of course true that the mortgage endowment review re-projection programme only applies to policies that remain in force (because the purpose of that programme is to warn consumers about potential shortfalls on maturity so that they can prepare for that eventuality – that purpose is extinguished on surrender).

But it is not the underlying purpose of the re-projection programme to allow firms to time bar complaints (although that is a by-product of it) and it is not a requirement under the time limit rules for the final date explanation to be delivered within a re-projection letter – although that in practice is the medium generally used by policy providers, the letters provide a convenient opportunity to provide the required explanation.

It is open to firms to send final date explanation notices in a separate communication (as indeed the ABI’s own “Guidance for insurers complying with the ABI Code of Practice” envisaged an independent financial adviser might).

And I do not consider the fact that the FSA told firms that in most cases they would be able to provide the final date notice within re-projection letters means that the rules should be interpreted to mean that firms do not have to send complainants final date explanations if they no longer have cause to send re-projection letters – unlike the purpose of a re-projection letter, the purpose of the final date explanation notification is not extinguished when the policy is surrendered.

Overall I am satisfied that DISP 2.3.6R applies to Mr and Mrs Y’s complaint.

is the complaint time barred under DISP 2.3.6R?

DISP 2.3.6R(1)(a) states that the time limit for making a complaint starts to run from the date the complainant receives a high risk warning letter. Mr and Mrs Y received such a letter in April 2003, so, the time period under DISP 2.3.6R (1)(a) started then.

DISP 2.3.6R(1)(b) states that the time limit ends three years from the date the complainant receives the high risk warning letter. But only if the firm provides the complainant with an explanation of their final date for complaining, at least six months prior to this final date [DISP 2.3.4(2)].

The firm did not issue or even attempt to issue Mr and Mrs Y with a final date explanation. Consequently, Mr and Mrs Y's time limit has not ended when they complained in February 2007.

I am satisfied that the complaint was made within the time limit contained in DISP 2.3.6R.

is it appropriate in the circumstances of the complaint to use my discretion and apply the general time limits?

Whilst the complaint was made within the time limit contained in DISP 2.3.6R, there is provision (set out at DISP 2.3.6R(5)) for me to apply the general time limit rules (contained in DISP 2.3.1R(1)(c)), if I am of the opinion that it is appropriate to do so in the circumstances of the case.

The firm says that if DISP 2.3.6R applies, I should use my discretion to apply the general time limits instead.

I have considered all of the firm's arguments, including its submissions about the applicability of DISP 2.3.6R, in deciding whether it is appropriate to do so in this case.

I have carefully considered this argument and I do not dismiss the firm's point lightly.

However, as I have explained, DISP 2.3.6R applies to all complaints that relate to the sale of an endowment policy for the purposes of achieving capital repayment of a mortgage where the qualifying criteria are met. If I were to use my discretion in these circumstances, this would have the effect of substituting my judgement about what the rules could or should have said, for what they actually say. This does not appear to me to be an appropriate use of my discretion. I am not free to put aside these rules simply because a firm wishes me to do so.

I note that the firm says that it is impractical and unrealistic to send final date notifications. I accept that it may not always be entirely straightforward to send final date notification to ex-policyholders. But I do not consider that is sufficient to mean I should apply my discretion.

Overall and on balance, I do not consider that it is appropriate in the circumstances of this case for me to exercise my discretion to apply the general time limits.

decision

My decision is that I am satisfied that Mr and Mrs Y's complaint falls within my jurisdiction as it was made within the time limits which I must apply.

Richard West
ombudsman