

FINAL JURISDICTION DECISION	
consumers	Mr and Mrs Z
business	XYZ Ltd
complaint reference	
date of jurisdiction decision:	28 February 2008

complaint

Mr and Mrs Z's complaint concerns a mortgage endowment policy they took out in 1993.

Mr and Mrs Z are represented by a claims-management company in their complaint.

circumstances

I issued a provisional decision on 11 July 2007 explaining why I considered this complaint did not fall within my jurisdiction. That decision forms part of this final determination of jurisdiction.

Mr A of the complaint handler responded by e-mail on 12 August 2007. Mr A made a number of additional points in response to my provisional decision. I have summarised and responded to these points below.

The firm acknowledged my provisional decision, but said it had nothing further to add.

findings

I have carefully considered all of Mr A's representations on behalf of Mr and Mrs Z. Having done so, it is my conclusion that I do not have jurisdiction to consider the merits of this complaint. I will explain my reasoning below. For clarity, I will respond to Mr A's comments in turn.

Mr A has said the old style 'red' letter told the 'client' that the policy's investment performance might not be good enough to pay off the mortgage and that its explicit purpose was to prompt remedial action by the clients; not complaint.

Mr A has also commented that I have assumed the cause of complaint is that the policy might not pay off the mortgage. He says that this is not the cause of this complaint. He argues that the cause of complaint is that the customer received poor advice; and accordingly, for the purposes of DISP 2.3.1, the customer has to be told enough to understand that he or she received poor advice and could complain about it.

DISP 2.3.1R (1)(c) says:

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

There is nothing in DISP 2.3.1 that requires the firm to state that a complaint can be made, rather it requires (in relation to the three year knowledge part of the test) that a customer is aware or ought reasonably to have become aware that he had cause for complaint.

The high risk warning letter sent on 5 May 2001 told Mr and Mrs Z their policy was at high risk of not paying out enough on maturity. The projections showed shortfalls against the target amount of £40,375 at each of the rates of growth.

	4%	6%	8%
projected final amount	£21,800	£27,600	£35,200
potential shortfall	£18,575	£12,775	£5,175

Mr and Mrs Z's complaint is that they were not advised of the possibility of a shortfall, and that they were told the policy would repay the mortgage and provide a surplus. I consider that from the content of the high risk warning letter they 'ought reasonably to have been aware' that they had cause for the complaint which they have subsequently made.

DISP 2.3.1 A G says:

If the complaint relates to the sale of an endowment policy for the purposes of achieving capital repayment of a mortgage, the receipt by the customer of a letter which states there is a risk (rather than a high risk) that the policy would not, at maturity, produce a sum large enough to repay the target amount is not, itself, sufficient to cause the three year time period in DISP 2.3.1 R(1)(c) to start to run.

The above guidance is contained within the DISP 2.3 rules, and it expressly refers to a 'letter warning of a risk (rather than a high risk)' as not being sufficient to start the time limits running. The corollary of this is that a high risk warning letter is sufficient for these purposes.

As explained in my provisional decision, I am satisfied the high risk warning letter started the time limits running under DISP 2.3.1.

Mr A has argued that it must have been the intention of DISP 2.3.6 to require two letters otherwise DISP 2.3.1 could have been added to. Mr A asserts that in applying any discretion, this would be to 'favour' the firm and he queries why those that have surrendered their policies should lose the 'protection' of DISP 2.3.6.

Mr A also considers that I have made an incorrect assumption when I say that firms could not have sent a second letter to those customers who had surrendered their policies. Mr A considers that a firm could have sent a second letter had it chosen to do so.

The FSA introduced new rules on 1 February 2003 for mortgage endowment complaints to deliver better protection for consumers, and for the majority of people, a longer period in which to complain.

DISP 2.3.6 says:

(1) If a complaint relates to the sale of an endowment policy for the purpose of achieving capital repayment of a mortgage and the complainant would, as a result of this rule DISP 2.3.6, have more time to refer the complaint than under DISP 2.3.1R(1)(c), the time for referring a complaint to the Financial ombudsman Service:

(a) starts to run from the date the complainant receives a letter from a firm 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.

It is clear that DISP 2.3.6 only applies if it provides a customer with more time to complain than that provided in DISP 2.3.1. I must therefore consider both sets of rules when considering whether a complaint has been made within the time limits that apply.

Mr and Mrs Z were sent a high risk warning letter on 5 May 2001. This is sufficient to start the time limits running under both DISP 2.3.1 and DISP 2.3.6. Mr and Mrs Z then surrendered their policy in May 2002.

Mr A contends that if it had chosen to do so, the firm could have sent a second letter or other reminder of the need to act. I disagree. The re-projection letters were sent to provide customers with an illustration of what their policies may achieve on maturity based on certain growth rate assumptions and provided encouragement to take action where there was a high risk of a shortfall. A firm could not have sent a re-projection letter on a policy that no longer existed.

In any event, Mr and Mrs Z had in fact already taken action, that is, they had surrendered their policy and changed the mortgage to a repayment basis. They had therefore already acted and did not need and indeed could not therefore be sent a reminder to do so.

DISP 2.3.6 says:

(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

Therefore, it is clear from the rules that an ombudsman can apply DISP 2.3.1 if, in the circumstances of the case, I consider it appropriate to do so.

Mr A has argued that I have favoured the firm in choosing to apply my discretion. This is not correct. I have applied my discretion because objectively, it is appropriate to do so.

DISP 2.3.6 cannot work as intended. Mr and Mrs Z took action in May 2002 and surrendered their policy. As a result the firm could not send a second projection letter and did not need to send a reminder of the need to act as Mr and Mrs Z had already acted.

Where, in the circumstances of the case, the rules in DISP 2.3.6 cannot work as intended, I consider it entirely appropriate to apply DISP 2.3.1.

Under DISP 2.3.1 Mr and Mrs Z had until May 2004 to make their complaint. They did not do this until July 2006, after the time limits had expired.

final decision on jurisdiction

My final decision is that Mr and Mrs Z's complaint does not fall within my jurisdiction as it was made outside of the time limits I must apply.

Caroline Wayman
ombudsman

PROVISIONAL JURISDICTION DECISION	
consumers	Mr and Mrs Z
business	XYZ Ltd
complaint reference	
date of final decision	11 July 2007

In this case I have reached the same conclusion as the adjudicator but for slightly different reasons. I have issued this provisional decision to give the parties an opportunity to make submissions.

Subject to any further evidence and arguments that I receive by 10 August 2007, I propose to issue a final decision in the following terms.

summary of complaint

Mr and Mrs Z have complained about the sale of an endowment policy in November 1993 which they used as a means of repaying their mortgage. They are represented by a claims-management company.

background and circumstances

Mr and Mrs Z complained to the firm in July 2006. In its final response dated 25 July 2006, The firm said that the complaint had been made out of time. It said that it sent Mr and Mrs Z a 'high risk' warning letter in May 2001 and the policy was surrendered in May 2002.

Mr and Mrs Z referred their complaint to us in October 2006. The firm has objected to me considering the complaint because it says the complaint was made outside the time limits which I must apply.

The complaint was considered by one of our adjudicators who concluded the complaint falls outside my jurisdiction because it was not made within the time limits laid down by the Financial Services Authority.

The complaint handler did not accept the adjudicator's conclusions and asked for the complaint to be reviewed by an ombudsman. The following is a summary of the representations:

- this is a complaint about the advice given to take out a mortgage endowment policy and therefore DISP 2.3.6 applies;
- as Mr and Mrs Z have only been sent one red letter, they cannot be time barred as the rules require two letters to be sent;
- one red letter is insufficient for time barring - which was why DISP 2.3.6 was introduced;
- at a forum held for claims management companies at the ombudsman service the ombudsmen explained that two red letters were always required;

- a single red letter is not sufficient to start the time limits under DISP 2.3.6 and the ombudsman should not use the discretion to apply DISP 2.3.1 without modification – the surrender of the policy is irrelevant to any information which may have put Mr and Mrs Z on notice of a problem.

the relevant rules

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. I cannot investigate complaints that are not within my jurisdiction.

There are two parts to the Dispute Resolution rules (known as the ‘DISP’ rules) which set the time limits for making a complaint – the general time limits which apply to most complaints handled by the Financial ombudsman Service and special time limits which apply to mortgage endowment complaints.

The general time limit rules state that the time for making a complaint ends 6 years after the event complained of or, if later, 3 years from the date the complainant was aware or ought reasonably to have been aware they had cause for complaint.

The special mortgage endowment time limit rules may extend the time for making a complaint about the sale of a mortgage endowment policy. These special rules say that the time limit for making a complaint starts to run when the complainant receives a letter from the firm warning that there is a high risk that the policy will not produce its target amount at maturity. The time ends six months from the date the complainant receives a second letter from the firm containing the same warning or other reminder of the need to act.

The mortgage endowment time limit rules only apply if they give the complainant more time than the general rules. This means that in order for this complaint to be out of time it must be out of time under both the general and special mortgage endowment rules unless, in the circumstances of the case, it is appropriate for the ombudsman to disregard the special mortgage endowment rules.

The special rules for mortgage endowment complaints were modified from 1 June 2004, but these later modifications are not relevant to this complaint – as I explain below, Mr and Mrs Z’s complaint was already out of time on 1 June 2004, before the modifications came into force.

A copy of the rules relevant to this complaint is attached to this decision.

findings

I am satisfied that Mr and Mrs Z received a letter warning them that there was a high risk the endowment policy would not produce enough to repay their mortgage in May 2001.

the general rule (DISP 2.3.1)

The policy was sold in 1993. Mr and Mrs Z complained to the firm in July 2006. They made the complaint more than six years from the sale so the complaint is out of time under the six year limit set out in the general time limit rules.

Mr and Mrs Z say that they were not made aware, at the point of sale, that the policy might not repay their mortgage. It is clear from their complaint that they believed that they had bought a policy from the firm that would definitely pay off their mortgage.

The first red letter in May 2001 told Mr and Mrs Z that there was a high risk the policy would not pay off their mortgage and contained an illustration showing the potential shortfall against the target amount. Given their complaint, I find that this information is sufficient such that they ought reasonably to have been aware that they had cause for complaint –they had previously understood that the policy would definitely repay their mortgage and the warning letter told them that it was highly unlikely to produce enough to do so.

The complaint is out of time under the three year limit set out in the general rules.

the special mortgage endowment rules (DISP 2.3.6)

The first red letter sent in May 2001 contained a warning from the firm sufficient to start the time limit running under the special mortgage endowment rules.

Mr and Mrs Z did not receive further projection letters for their endowment policy as it was surrendered in May 2002.

There is provision within DISP 2.3.6 for an ombudsman to apply DISP 2.3.1 without modification, if in the circumstances of the case, the ombudsman considers it appropriate.

The firm argues, in these circumstances, that I should disregard the special mortgage endowment rules and apply DISP 2.3.1. Mr and Mrs Z's representative argues that I should not do so and that the complaint should not be time barred.

I have considered these arguments carefully.

DISP 2.3.6 requires the firm to issue warnings to consumers about the performance of a mortgage endowment policy and once the requirements of DISP 2.3.6 are fulfilled the firm is then able to prevent the ombudsman service from examining the merits of a mortgage endowment complaint.

It is the case that DISP 2.3.6 clearly sets out an additional requirement, which is not present in the general time limit rule, that the complainant should receive a second warning before a firm is able to prevent the ombudsman service from looking at the merits of a complaint.

If I were to apply DISP 2.3.6 in the circumstances of this case, the firm could never time bar Mr and Mrs Z's complaint under the rules applicable from 1 February 2003 to 31 May 2004. The "the same warning or another reminder of the need to act" required by DISP 2.3.6 relates to the risk that the policy will not produce enough to repay the mortgage. Once the policy was surrendered, however, it was no longer possible for the firm to issue a meaningful second letter containing the same warning or other reminder of the need to act to Mr and Mrs Z. They had in fact, already acted.

I do not dismiss the representative's arguments lightly but, on balance, I consider it appropriate in this case to apply DISP 2.3.1 without modification. Under DISP 2.3.1 Mr and Mrs Z's time to complain expired in May 2004.

The representative argues that that the surrender of the policy, in this case, does not indicate that Mr and Mrs Z were aware of any problem. My decision to apply DISP 2.3.1 without modification is not based on the reasons why Mr and Mrs Z surrendered the policy. As stated above, I find that the receipt of the high risk warning letter meant that Mr and Mrs Z ought reasonably to have been aware that they had cause for complaint.

I have noted Mr and Mrs Z's representative's comments about the forum held at the ombudsman service in December 2006. It may help the representative if I explain that it is not the case that two red letters are always required for a complaint to be time barred. The evidential requirement will depend upon the particular circumstances and the applicable rules. At the forum, I understand that a general discussion about time limits took place, but I have explained within this decision why it is not necessary for two red letters to have been received in this case.

I am permitted to consider complaints made outside of the usual time limits where I am satisfied that the failure to comply with the time limits was as a result of exceptional circumstances.

In this case Mr and Mrs Z have not claimed that the delay was a result of exceptional circumstances.

provisional decision on jurisdiction

My provisional decision is that Mr and Mrs Z's complaint does not fall within my jurisdiction as it was made outside the time limits which I must apply.

Caroline Wayman
ombudsman

Financial Services Authority's dispute resolution rules ("DISP")

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.

DISP 2.3.1R(2) states:

The ombudsman can consider complaints outside the time limits in (1) (b) or (c) when, in his view, the failure to comply with the time limits was as a result of exceptional circumstances orwhere the firm has not objected to the ombudsman considering the complaint.

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:

(3) If a complaint relates to the sale of an endowment policy for the purpose of achieving capital repayment of a mortgage and the complainant would, as a result of this rule DISP 2.3.6, have more time to refer the complaint than under DISP 2.3.1R(1)(c), the time for referring a complaint to the Financial ombudsman Service:

(a) starts to run from the date the complainant receives a letter from a firm 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.

(4) 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).

continued ...

There is also guidance given in the rules:

DISP 2.3.1A G says:

If the complaint relates to the sale of an endowment policy for the purposes of achieving capital repayment of a mortgage, the receipt by the customer of a letter which states there is a risk (rather than a high risk) that the policy would not, at maturity, produce a sum large enough to repay the target amount is not, itself, sufficient to cause the three year time period in DISP 2.3.1 R(1)(c) to start to run.

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 2.3.6 R affects the position of a complaint which, on 31 May 2004, could not have been considered by the ombudsman under DISP 2.3.1 R (1)(c); or DISP 2.3.6 R (1)(b) as it then stood.