FINAL JURISDICTION DECISION	
consumers	Mr and Mrs X
Name of business	Firm
complaint reference	
date of final decision:	25 April 2008

complaint

Mr and Mrs X's complaint concerns a mortgage endowment policy they took out in 1998 on the recommendation of the firm.

The firm has objected to the Financial Ombudsman Service considering this complaint.

This decision is limited to whether or not I have jurisdiction to consider the complaint.

circumstances

I issued a provisional decision on 14 March 2008 explaining why I considered this complaint did not fall within my jurisdiction. That decision forms part of this final decision on jurisdiction.

The firm responded by letter on 28 March 2008 and confirmed that it had nothing new to add, but it maintained the same arguments as in its letters of 12 February 2007 and 1 October 2007.

The complainants' representative responded by email on 14 April 2008. The following is a summary of the additional points raised:

- it agrees that the rules should be interpreted purposively, but it is clear that the objectives of the modifications to DISP 2.3.6R with effect from 1 June 2004 were to ensure that individuals were aware that there were deadlines for their complaint, that they were to be provided with written notice of that deadline and that it was the firm's responsibility to ensure that it complied with the disclosure requirement without prejudicing the rights of the complainants;

- it says that the firm asserts that it cannot say for certain when the re-projection letter was received, so cannot comply with the rules. In the absence of a deemed receipt rule, it should be allowed to quote incorrect final dates to avoid an open ended limitation period. Where the firm is attempting to serve notice, this is an absurd scenario given that the letters were not sent by recorded delivery and no acknowledgement was sought;

- it agrees that a straightforward, common sense interpretation of the rules in relation to the timing of the final date has been provided, but it does not agree with the conclusion reached in my provisional decision of 14 March 2008, that "the error (made by the Firm) was marginal and immaterial".

I thank both parties for their comments.

findings

I have carefully considered all of the parties' representations, including the representative's response to my second provisional decision on behalf of Mr and Mrs X.

The relevant rules were set out in full in my provisional decision of 14 March 2008, which forms part of this final decision on jurisdiction.

It would appear that there is now some common ground. I note that the consumers' representative has indicated that it believes that the rules should be interpreted purposively. The firm has also asserted that this is the case.

The consumers' representative has stated that it is also clear that the purpose of the rules was to ensure that customers were aware that there was a deadline, were given notice of that deadline and it was the responsibility of the firm not to prejudice the rights of the 'claimant'. It also says that it is absurd that the firm should be allowed to quote incorrect dates because of the lack of certainty about when letters were received.

It seems to me that the fact that the firm made the customer aware that there was a deadline and that written notice was sent, is not in dispute. I have seen evidence that the firm issued a letter to Mr and Mrs X on 11 June 2003 informing them that there was a high risk that the policy may not produce enough at maturity to repay the mortgage and that a further letter was issued on 17 May 2005 that included the following statement:

"If you think you should consider complaining about the original sale of the policy, you should take action now. If you make a complaint after 11 June 2006, you will probably have lost your right to compensation."

I have not seen evidence that suggests that there is any specific reason why these letters were not received by Mr and Mrs X. In the absence of any such reasons, as I have previously explained, I will normally conclude that it is more likely than not that the letters were received two days after they were posted (where they were sent first class).

It therefore seems to me that the firm did give Mr and Mrs X notice that there was a deadline for their complaint.

As I have previously explained, I do not accept the firm's assertion that the final date under DISP 2.3.6(1) is impossible to calculate. I explained in my provisional decision that in my judgement the final date under DISP 2.3.6(1) was 13 June 2006. The firm, in my view, incorrectly calculated the date as being two days earlier – the 11 June 2006.

So the firm did make an error in its explanation, but I as I have explained in my view I must also consider whether a reasonable recipient, exercising common sense in the context and circumstances of the individual case would have understood the explanation. And notwithstanding any error, whether the letter objectively achieved its purpose.

Having given the matter careful consideration, I concluded that an error had been made, but that it was marginal and immaterial when set in the overall context of the purpose of the letter and the framework of the relevant rules. Notwithstanding the error, the notice still objectively achieved its purpose and a reasonable recipient exercising common sense in the context of the individual case would have understood the explanation. The consumers' representative has indicated that it does not agree with this conclusion – specifically, it does not accept that the error was marginal and immaterial – but it has not provided any additional reasoning (except the points I have dealt with above) as to why it does not accept my analysis.

Mr and Mrs X complained in July 2006. The notice that they received said that if they did not complain before 11 June 2006 they may lose their right to complain. I remain persuaded that a reasonable recipient of this explanation would have understood the purpose of this communication, notwithstanding the marginal error, and I am satisfied that Mr and Mrs X did not rely upon it to their detriment.

In the absence of any further arguments and having given this matter considerable thought, I am not persuaded to alter the conclusions set out in my provisional decision of 14 March 2008. I will not repeat the conclusions set out in my provisional decision in full but would confirm that these conclusions have not altered. For the reasons set out above and in my provisional decision of 14 March 2008, I conclude that I am unable to consider the merits of this complaint – that is, I find that this case is not within my jurisdiction.

decision

My decision is that Mr and Mrs X complaint is not within my jurisdiction and I am therefore unable to consider the merits of the complaint.

Caroline Wayman
Lead Ombudsman

PROVISIONAL JURISDICTION DECISION	
consumers	Mr and Mrs X
Name of business	Firm
complaint reference	
date of provisional decision	14 March 2008

Having given this case careful further consideration, I am minded to reach a different decision to the one outlined in my initial provisional decision dated 6 August 2007.

Therefore, this decision is to be treated as a further provisional decision and not a final decision. Subject to any further representations received from the parties in response to this further provisional decision, I am minded to issue a final jurisdiction decision in the following terms.

complaint

Mr and Mrs X's complaint concerns a mortgage endowment policy they took out in 1988 on the recommendation of the firm.

The firm has objected to the Financial Ombudsman Service considering this complaint.

This decision is limited to whether or not I have jurisdiction to consider the complaint.

circumstances

I issued an initial provisional decision on 6 August 2007 explaining why I considered this complaint to fall within my jurisdiction.

The complainants' representative responded by email on 9 August 2007 and confirmed that it had nothing further to add and now awaits my final decision.

The firm responded to my initial provisional decision in a letter dated 1 October 2007 and made a number of further comments, which I will summarise below.

The complainants' representative was provided with a copy of the firm's response and confirmed in an email dated 2 November 2007 that it had nothing further to add.

Summary of the firm's response

The firm believes that the initial provisional decision was flawed in law in respect of the jurisdiction of the Financial Ombudsman Service, as well as containing (in the alternative) an unlawful and unreasonable failure to exercise the ombudsman's discretion.

After summarising its understanding of the initial provisional decision the firm then went on to make the following additional points:

Under the heading, "Summary of firm's response", the firm said:

- This is an issue of form over substance. Aside from arguments as to whether the second letter should have given a date of 13 June, the Financial Ombudsman Service agrees that the difference may be as little as 24 hours over a 3 year period.

- The firm sent three calls to action over a period of five years in relation to the performance of the policy. These letters told the X's, as any reasonable policyholder would have understood, that there was an urgent deadline for complaints. The last letter told them to complain by 11 June 2006, they ignored this and complained instead on 4 July 2006.

- The X's had adequate time to protect their position and to complain. They did not and this cannot in any conceivable respect be attributed to the allegedly erroneous date in the second letter.

- The firm does not accept the Financial Ombudsman Service's initial provisional decision is correct as a matter of law or jurisdiction, or is one within the ombudsman service's procedural powers and it contends in the alternative that it contains an unlawful and unreasonable failure to exercise the ombudsman's discretion.

The firm has then summarised its key points which it outlined in detail later in its response. I will summarise these below. It then outlined its summary of the background to the complaint. I will not summarise this here as in so far as the firm has relied upon any facts therein and in so far as they are material to my determination of jurisdiction, I will deal with them later. The firm's response included an extract from the DISP rules. The relevant rules are set out in full later in this further provisional decision.

The firm has made the following additional submissions:

1. The Financial Ombudsman Service's view is not a strict or literal interpretation of DISP 2.3.6. (1) and (2).

   The ombudsman service has fundamentally erred in proceeding on the basis that DISP 2.3.6 (1) requires a firm fairly to notify a consumer of a date that is <u>at least</u> three years from the date the red letter was received. The words "at least" do not appear in DISP 2.3.6(1) and only appear in DISP 2.3.6 (2). The ombudsman service's reasoning is therefore flawed as it contains an incorrect assumption that its interpretation follows the literal interpretation of the section. It ought to have proceeded on the basis that the literal wording produced an unworkable result and therefore it should be given a purposive construction.

2. Handbook Notice 33 clearly does not support the Financial Ombudsman Service's interpretation.

   The notice is not a rule, nor is it interpretative guidance. The statement in the notice that the final date should not be less than three years after the first red letter was not addressing the calculation of the date of the first red letter, it was

simply reflecting the rule that three years was the time period required. In particular, it did not indicate that a date precisely three years from the red letter was other than proper.

The notice does not require that if the final date is estimated, a margin of error should be reflected in the second letter as opposed to being applied in practice. Even if the notice did conclusively support the ombudsman service's conclusion (which it does not), it does not constitute rules or formal guidance.

3. A deemed receipt rule requires the sanction of the FSA.

There is no deemed receipt rule and even if there were a basis for such a rule, the FSA alone could make such a rule using its formal powers under the Financial Services and Markets Act 2000. Even if the FSA introduced such a rule, it could not apply retrospectively.

Accordingly, the Financial Ombudsman Service's suggested approach of providing a final date that is three years and two days from the date of the first red letter does not strictly comply with DISP 2.3.6 (1) and it should not be preferred to the firm's interpretation.

4. DISP 2.3.6 (1) and (2) are incapable of being precisely complied with; the ombudsman service's interpretation of them is unsatisfactory and inconsistent.

The provisions are not well drafted and firms have to do their best to interpret their requirements. Firms either have to guess the date of receipt or provide an extended long stop date, neither of which complies with a literal interpretation of DISP 2.3.6 (1). Alternatively, the ombudsman service seems to be suggesting that a firm should provide an explanation without an express date, which would be confusing for the policyholder.

The Financial Ombudsman Service's interpretation to the extent that it permits an extended long stop date gives rise to a remarkable position where the complainant may be given a date which is actually after the correct date (which is by the rule, the date of receipt). This would cause complainants to be mis-informed that they have longer than they in fact have to complain.

The Financial Ombudsman Service's reasoning as to the final date in the provisional decision is impossible to reconcile with its decisions on the issue of where firms give a final date that gives a month and a year, but not a precise date.

5. The firm's interpretation reasonably and practicably satisfies DISP 2.3.6 (1) and (2)

The firm provided a date which was three years from the first red letter and allowed a further 15 day grace period for receipt of letters and complaints. The date of the first red letter is the only date that can be known with any precision, it was therefore prudent and appropriate to take this date as the appropriate one. The non-absolute nature of the wording did not mislead complainants to think that if they missed this by a few days, they could not complain. The firm does not accept that its interpretation of the rules could lead to the adoption of a date that

was much earlier. The adoption of the date of posting was reasonable, a date much earlier would not be.

6. The firm's approach achieved the purpose of DISP 2.3.6 (1) and (2)

The firm provided effective and adequate warning of the ending of the limitation period for complaining and therefore conformed with the FSA requirement set out in GEN 2.2.1 that rules be interpreted purposively.

The purpose of the rules was achieved by the repeated and regular letters and FSA leaflets that were sent before the time limit expired. The final date should be seen in the context of the fact that the policyholder received such letters, not a matter of days or weeks before the final date, but over several years. The Financial Ombudsman Service's interpretation that the date of 11 June did not comply, but a date of 12,13 or 14 June would comply provides an open ended limitation period where the former date (11 June) was issued and this is absurd.

7. Complainants were not prejudiced

If (which is not accepted), the final date specified was a few days short of the three years from the date of receipt, this had no prejudicial effect on potential complainants and this should be crucial in how the rule is interpreted.

The complainants self evidently placed no emphasis on the actual date; a 15 day grace period was allowed and the wording of the letter was such that indicated to the complainants that missing the date was not necessarily fatal to their complaint and there would be circumstances where their complaint would still be investigated. It placed the right amount of emphasis on the need to complain by that date.

8. The Financial Ombudsman Service's approach would have a disproportionate outcome.

The ombudsman's initial provisional decision would produce a serious injustice and would create a wholly undeserved gain for complainants, potentially extending time for thousands of persons who have placed no reliance upon the final date.

If the second letters are deemed invalid, the firm considers that a combination of FSA's Treating Customers Fairly and the requirement under DISP 1.2.22 to identify and remedy any systemic problems identified by a complaint may place obligations on the firm to take remedial action, not just in relation to those that have complained but also across the wider population of policyholders that have received second letters. This must be balanced with the firm's obligation to protect the interests and treat fairly the whole population of with profits policyholders.

Whilst the firm has not formed a view about what will be necessary and would discuss this with the FSA, the costs of such action could be in the region of £40 million. The level of cost is disproportionate in light of the minimal if any effect on policyholders and would need to be covered by the with profit fund estate.

The Financial Ombudsman Service has accepted that this is a generic issue and as such it is not considering cases on a case by case basis. Therefore, there is a disproportionate gain for a significant number of policyholders. The Financial

Ombudsman Service should have regard to the consequences of its interpretation, both in terms of the mischief sought to be addressed by the rule and the consequences for providers in reaching its conclusion.

9. Even if the ombudsman considers that DISP 2.3.6 is not satisfied, the Financial Ombudsman Service should exercise its discretion to apply 2.3.1

The Financial Ombudsman Service has wrongly failed to exercise its discretion and the interpretation in the initial provisional decision that the discretion provided for in DISP 2.3.6(5) should be used where DISP 2.3.6 could not work as intended (which the firm contends is the case in any event), is improperly restrictive. It should be applied if the ombudsman thinks that it is appropriate.

The Financial Ombudsman Service ought to apply its discretion in cases where an error (which the firm does not accept has been made) in the final date provided has no prejudicial effect to the complainant. In these circumstances, there is no good or rational reason not to apply the discretion and to fail to do so is an impermissible fetter upon that discretion.

Mr and Mrs X's complaint is one where the ombudsman's discretion should be applied. They complained some four weeks after the final date provided by the firm, without any exceptional or extenuating circumstances having caused this. Furthermore, the firm explanation and repeated warnings achieve the purpose of DISP 2.3.6 (1) and (2) and accordingly, acting rationally, the Financial Ombudsman Service could only decide to apply its discretion. It is not argued that the discretion should be applied where there has been prejudice to the complainant and it is accepted that it would be incumbent on the firm to demonstrate that no prejudice has occurred.

The Financial Ombudsman Service should be aware that no discretion attaches to DISP 2.3.1 (1) (b), therefore any cases submitted six months after the firm's final decision would not be within the jurisdiction of the ombudsman service.

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 VJ participant 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 or ……where 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:

(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 or VJ participant 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 or VJ participant containing the same warning or other reminder of the need to act.

(1) 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).

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 complainant 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.

findings

As I explained in my earlier provisional decision, I do not have a free hand to consider all of the complaints that are referred to me. The extent of my jurisdiction is determined by the rules set by the industry regulator, the FSA, in what are known as the ‘DISP rules’ or simply ‘DISP’.

Contained within DISP there are general time limits applicable to complaints referred to the Financial Ombudsman Service set out in DISP 2.3.1 and there are special time limit rules that are applicable in the case of complaints relating to the sale of a mortgage endowment policy set out in DISP 2.3.6. These rules are set out in full in above.

To briefly recap. The firm argues that it has complied with the relevant rules, but that in any event the relevant rules should be given a purposive interpretation and it has complied with any reasonable interpretation. It has also argued that I should use my discretion to apply the general time limits under DISP 2.3.1.

The firm also asserts that I should have regard to the wider impact of my decision in deciding whether I have jurisdiction to consider this complaint. I understand the point that the firm makes, but I do not believe that this is a relevant consideration. In deciding whether I have jurisdiction in a particular case, I must do so based on my assessment of individual circumstances against the relevant time barring rules.

I have carefully considered all of the submissions and I have reviewed all of the evidence afresh. I have set out my revised provisional conclusions and my reasoning below. This decision should be read alongside my earlier provisional decision.
I have explained below the ways in which I have departed from my earlier provisional decision and my reasons for doing so.

What was the correct final date pursuant to DISP 2.3.6(1)?

The firm issued a re-projection letter to Mr and Mrs X on the 11th June 2003. This letter included the warning:

"There is a high risk that your plan won't pay out enough to cover the target amount of £11050.00. This is because the rate of growth needed to reach this target is higher than the maximum rate we use for illustrating future investment returns. If you have not already done so, we strongly suggest you consider taking action to make sure you'll be able to repay the whole of your mortgage loan. Read the enclosed factsheet which explains your options."

The firm then issued a further re-projection letter to Mr and Mrs X on 17 May 2005. It included the warning:

"*There is a high risk that your plan won't pay out enough to cover the target amount of £11050.00. If you have not already done so, we strongly suggest you consider taking action to make sure you'll be able to repay the whole of your mortgage loan. Read the enclosed factsheet "Your endowment mortgage – have you acted yet?" from the Financial Services Authority (FSA), the independent watchdog set up by the Government, which provides more detailed information and explains your options".*

The relevant rules are those in place from 1 June 2004. As I explained in my earlier provisional decision, I do not consider that this complaint was already time barred by 31 May 2004 and the firm does not dispute this. Therefore, it is the DISP rules that came into effect on 1 June 2004 that I must apply to this complaint.

Under those rules, in order for the firm to make a valid objection to me considering this complaint, it must demonstrate that it has satisfied the requirements of DISP 2.3.6 (1) and (2).

DISP 2.3.6 (1) states that:

> *(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").* (my emphasis)

So, it is clear that under the provisions of DISP 2.3.6(1), the time period begins when the customer *receives* a high risk warning letter and ends three years from that date. The re-projection letter sent to Mr and Mrs X on 11 June 2003 contained a warning that there was a high risk that at maturity the policy would not produce enough to

repay the target amount. Time started when this letter was received. I explained within my initial provisional decision that in the absence of evidence to indicate exactly when receipt occurred, it would be reasonable to assume that the letter would have been received on the second business day after the date it was posted (as indicated by the letter's date).The firm argues that this introduces a 'deemed receipt' rule. It does not. It is simply a matter of an ordinary, common sense interpretation of the rules, which describe the receipt of the letter as the trigger for the start of the three year period.

Therefore, as I am not aware of any unusual circumstances surrounding the postage of this letter, allowing two days for postage to enable the complainant to receive that letter, ordinarily the date of receipt would be 13 June 2003. Time ends three years from this date, so on this basis, my conclusion remains that the final date to complain was 13 June 2006

It is clear to me that the final date under DISP 2.3.6 (1) is fixed. It starts on receipt of the first high risk warning letter and ends three years later. Nothing that the firm says in any later communication can have the effect of changing *this* date. I am satisfied that the final date to complain in accordance with DISP 2.3.6 (1) was 13 June 2006.

Did the firm fail to comply with DISP 2.3.6 (2)?

In considering this question, I must have regard to what complying with this part of DISP actually means.

DISP 2.3.6 (2) provides:

> *(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.*

The firm's letter on 17 May 2005 included the following statement:

"If you think you should consider complaining about the original sale of the policy, you should take action now. If you make a complaint after 11 June 2006, you will probably have lost your right to compensation."

It is this explanation that the firm seeks to rely upon in demonstrating that it has complied with DISP 2.3.6 (2). In my initial provisional decision, I explained that my view was that the firm had erred in providing a date that is exactly three years from the date that the high risk warning letter was sent. The firm sent this letter on 17 May 2005 and so I am satisfied that it was sent at least six months before the expiry of the final date. However, as I have explained above, in my analysis, the final date was 13 June 2006. Therefore my conclusion remains that the firm has failed to provide the correct date – it has given a date which shortens the time period by two days to less than three years. It is clear to me that the firm did make an error in calculating the final date.

I am satisfied that Handbook notice 33 supports my conclusion and that my approach, when calculating the final date, of allowing two days for the letter to be received is reasonable. It also remains my view that it was not, as the firm claims, impossible to precisely comply with DISP 2.3.6 (2) – including the provision of the final date - in providing an explanation and notice of the final date to complain.

The firm indicated in the letter of 17 May 2005 that Mr and Mrs X should complain 'immediately' if they felt that they had a complaint and that if they complained after 11 June 2006, they may have lost their right to complain. So it seems to me that an explanation was provided, notwithstanding the fact that it did not include the correct final date, but a date two days earlier. Further, the firm did indicate that complaining after this date would mean that they would probably have lost the right to complain. This was a substantially accurate statement. The explanation incorrectly indicated that the final date was 11 June 2006, but I must consider whether this inaccuracy renders the whole explanation defective.

This is a very difficult area. There is an argument that, on a strict construction of the rules, the fact that a date two days earlier than the actual final date has been included in the explanation could have the effect of nullifying that warning, such that the firm has failed to meet the requirements of DISP 2.3.6 (2). I proposed to accept this argument in my initial provisional decision and took the view that this would have the effect of time continuing to run, as time ending is contingent on the requirements of DISP 2.3.6(2) being met.

However, I recognise that the firm did issue a letter in June 2003 sufficient to start the three year clock ticking and it did provide a further warning more than six months before the final date. In order to consider this question further, I must consider how I should interpret these time barring rules (and notices served under those rules) in assessing my jurisdiction. In short, I must consider whether I should conclude that the firm's defective explanation means that effectively no explanation has been given.

Should the rules (and notices served under those rules) be interpreted strictly and narrowly or should I apply a more common sense approach?

I have given this careful consideration. DISP 3.8.1 provides that I must determine a complaint on the basis of what is fair and reasonable in the circumstances of the case. However, this broader consideration is only applicable when I am determining the complaint on the merits. At this initial stage, I am deciding whether the complaint is within my jurisdiction. In assessing whether this case is within my jurisdiction, I must make my decision based on an objective interpretation of whether the complaint is one I am able to look at when its facts are assessed against the applicable DISP rules, in this case the time barring rules.

The firm has suggested that it has complied with the rules, but that in any event they should be given a purposive interpretation. I have explained above that I believe that the date that the firm included in its explanation was not actually the final date, but I must now consider whether this must render the explanation defective.

It seems to me that in assessing whether Mr and Mrs X's case falls within my jurisdiction, the matters that I must consider in assessing whether the firm has objectively met the requirements of DISP 2.3.6 (2) are:

- Was there an error in the explanation provided?

- Would a reasonable recipient, exercising common sense in the context and circumstances of the individual case, have understood the explanation? And notwithstanding any error, did the letter objectively achieve its purpose?

As I have explained, in my view the firm has incorrectly calculated the final date under DISP 2.3.6(1). This is fixed and in the circumstances of this case, I have found that the final date was 13 June 2006. Applying the test above, I find that there was an error in the explanation provided, but that the error was marginal and immaterial.

As to whether the letter objectively achieved its purpose, it seems to me that it did. Whilst the date stated was two days earlier than the actual final date, in my judgement this error was not material in the context of the overall purpose of the letter. It seems to me that a reasonable person would understand from the letter of 15 May 2005 that there was a deadline to complain and that he would lose his right to complain if he did not do so before 11 June 2006. The purpose of the letter was to give the complainants adequate notice of their right to bring a complaint within the time limits set by the rules. In this case, Mr and Mrs X did not complain until July 2006 and the firm allowed a 15 day grace period after the final date.

If the date provided was materially inaccurate and if the complainants relied upon this to their detriment, my conclusions may very well be different. But in this case, I am persuaded that a reasonable recipient of this explanation would have understood the purpose of this communication notwithstanding the marginal error and I am satisfied that the complainants did not rely upon the explanation to their detriment. The letter objectively achieved its purpose and the complainants were not prejudiced by the error.

Accordingly, in my view the firm's objection to my handling this complaint is valid and therefore I do not have jurisdiction to consider the merits of this dispute.

I appreciate that this produces a result that means that the firm have been able to prevent me considering the merits of this complaint and that this will be disappointing for Mr and Mrs X. If the firm did not raise an objection or waived its objection, in these circumstances, I would be able to go on to consider the merits of the dispute and whether the customer should be awarded any compensation.

But, where a firm does raise an objection to my handling a complaint, I must consider whether that objection is valid based on my assessment of the circumstances when set against the relevant DISP rules. Having done so, my conclusion is that under the rules set out at DISP 2.3.6, I am prevented from looking at this complaint.

Should I apply my discretion to disregard the special mortgage endowment rules and to apply the general rules instead?

The firm has argued that I should use my discretion to apply the general time limits set out in DISP 2.3.1, as opposed to the special time limits introduced in respect of the sale of mortgage endowment policies in DISP 2.3.6.

DISP 2.3.6 (5) provides:

"Paragraph (1) does not apply if the Ombudsman is of the opinion that, in the circumstances of the case, it is appropriate for DISP2.3.1 R(1) to apply."

Mr and Mrs X received a letter warning that there was a high risk that the mortgage would not be repaid on 11 June 2003. This would be sufficient to start the clock for the purposes of DISP 2.3.1 and their time to complain would have ended three years from the date that this was received. Mr and Mrs X's complaint was made in July

2006, therefore if I were to use my discretion to apply the general time limits under DISP 2.3.1, the complaint would be out of time.

The special time limits in DISP 2.3.6 were introduced in February 2003 and revised in June 2004 in respect of complaints about the sale of mortgage endowments. The June 2004 version of DISP 2.3.6 applies instead of the general rules in DISP 2.3.1. It is only as a result of the discretion provided for in DISP 2.3.6 (5) that the general time limits under DISP 2.3.1 can be applied – that is, only if I am of the opinion that it would be appropriate.

In this case, I have concluded that the complaint is out of time under DISP 2.3.6. I therefore do not consider it appropriate to apply DISP 2.3.1. In any event, as I have explained above, if I were to do so, the complaint would be time barred under DISP 2.3.1.

I would add that I explained in my earlier Provisional Decision that I did not consider that this discretion existed to cure any defects in the firm's explanation. It remains my view that this is not what the discretion is for and that whether to apply the discretion in an individual case is a matter of discretion for the ombudsman.

provisional decision

It is my provisional decision that this complaint is not within my jurisdiction and I am unable to consider the merits of this dispute. I now ask both of the parties to provide any further submissions to me by 14 April 2008.

Caroline Wayman
Lead Ombudsman