qualified licenced adviser, it poses the question, how can a firm expect an inexperienced and less knowledgeable individual to competently assess a complex, historic situation where there is often a contrasting account of what, when and why? Both the author and other advisers have encountered examples of FOS illogic which would not have survived a courtroom scrutiny.

An adjudicator's decision can be appealed to an Ombudsman but only 5% of adjudications are overturned, suggesting flawless, high quality adjudications or, alternatively, a cynical rubber-stamping exercise.

How do false reprojections impact on FOS deliberations?

"I do believe that generally within the UK there is a growing culture of compensation whether they perceive they have been treated unfairly or not", said John Goodfellow, Chairman of the Building Societies Association in a broadcast on Radio 4 Moneybox in April 2004. Endowment policies currently generate the majority of complaints to FOS – 63% during 2005. The catalyst is usually the annual reprojection letter mandated by the FSA. My article in *Money Management* (August 2005) explained how and why such reprojections often veer from reality proving highly misleading.

In 1999 the regulator reduced growth projections and instigated the mandatory sending of reprojection letters; until then few policyholders had suggested rule breaches. Had the reprojection been truthful the red letter might have been amber or even green and no complaint would have resulted.

Investment performance is not cause for a complaint but it is clear that the reprojection letters have launched an avalanche of dissatisfaction. The mathematical illogic of projecting future maturity values using surrender values is unacceptable. To then find that this nonsense has stimulated complaints is beneath contempt. "Some firms' complaints systems are currently snowed under by indiscriminate claims for compensation by endowment mortgage policyholders", said Sir Howard Davies, previous head of the FSA in July 2003.

Regardless of the specific complaint FOS assesses 'suitability'. Suitability is subjective and offers infinite scope for absurdity as the adjudicator takes a view regarding some historic action.

What is the impact of LAUTRO standard charges?

Between July 1988 and January 1995 the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO) insisted that providers use standard charges set by the regulator when providing illustrations for endowment and pension plans. *Money Management* campaigned vigorously against this practice on the grounds that it misled the buyer. Something not fully realised at the time was the impact that the false charges would have on the potential for these plans to hit their targets.

One example, first documented in the Money Management Comment piece in June 2005, concerned a Standard Life low cost endowment mortgage policy based on a 7.5% pa growth assumption and using standard charges as laid down by the regulator.

The effect of using the LAUTRO charges pushed the plan off-course and in reality the true premium should have been 11% higher than that quoted using the standard charges basis. The plan was never on course from the outset. Standard Life knew this, LAUTRO/FIMBRA/PIA and the SIB all knew this, only the adviser and the policyholder remained unaware.

This is extremely significant because it is reflected within the reprojection shortfall figures, which then prompt the complaint. FOS and the FSA consider this a red herring and FSA redress guidance ignores the impact of LAUTRO's standard expense charges. Ludicrously the FSA also argues that LAUTRO was a non-connected body and therefore it bears no responsibility for its predecessor's initiatives. Perhaps, like FOS, we should ignore law and look at what is 'fair and reasonable'.

The recent case of Seymour v Ockwell & ZIFA Ltd highlighted the concept of shared liability due to malfeasance. I suggest that the FSA, as the current regulator, should be liable for a substantial portion of redress for the majority of investment contracts purchased between 1988 and 1995.

Why are redress calculations unfair and unreasonable?

A firm adjudged guilty of mis-advice has to abide by FSA rules regarding redress. This involves calculations to determine whether there has been a financial loss. Such a calculation will use the surrender or transfer value to arrive at a conclusion.

This again promotes injustice as the surrender or transfer value involves a financial penalty, sometimes ferociously high. Indeed, the annual *Money Management* with profits endowment surveys highlight the disparity between surrender and maturity values. "The standards prescribed for compensation on a mass basis may not be those that a court would use in a single case": Merricks again in his address in October 2002.

If the successful complainant retains the tainted endowment it further inflates the injustice to base redress on the penalised surrender value when the ultimate maturity is penalty-free. After all, if the surrender value is representative of the true value why are so many second-hand endowment companies clamouring to buy them?

> The FSA/FOS axis has contrived a system which mitigates against fairness, justice and accountability

Conclusion

At the beginning I asked if FOS procedures were fair and reasonable. I believe this not to be the case. The FSA/FOS axis has contrived a system which mitigates against fairness, justice and accountability, in each instance factored against the firm. "An unappealable, compulsory, summary jurisdiction against small traders making awards as great as £100,000 is, in my view, both wrong in principle and producing injustice in practice" said QC Anthony Speaight.

The FOS case fee structure is currently being consulted on but, even if the current one-sided system is altered, it is akin to applying a small bandage to a massive area of infection. Powerful medicine is needed in the form of changes to FSMA 2000, which is only likely to be achieved by application to the European Court of Human Rights in Strasbourg.

Two quotes sum up the current situation perfectly: "On its face, the entire scheme is hopelessly non-compliant with European Court of Human Rights (ECHR) requirements" said Philip Parish of Linklater's and Alliance in the Journal of International Business Law in 2000.

And, "The Ombudsman procedure clearly does not comply with Article 6 (1) of the ECHR", said Tim Pinto of Taylor, Johnson Garnett in the International Company and Commercial Law Review in 2001.

There is no doubt that the FOS does some sterling work on behalf of the consumer, but unfortunately, from practical experience over the last couple of years, its powers have become too great and we need to take stock of where we go from here – change is vital if we are to see justice in the future.