

## Outcry over the FOS non-disclosure of evidence

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It is also hard not to conclude that things will never change because there are more votes to the politician from satisfied compensation recipients than there ever could be from the IFAs who have to fund it.

I strongly suspect that if the civil and criminal law and courts were run in the manner in which the FOS operates, then civil libertarians the length and breadth of the UK would be up in arms, as indeed would every single lawyer who collectively can be a very powerful lobby group. But more of them later.

In handling IFA complaints, I very often find that deficiencies in the IFA's file paperwork - and none of us keeps perfect files - can be made up from papers produced by the complainer or from the product provider. I do not just mean illustrations and KFDs.

Sometimes their correspondence, and especially emails, at the time of the sale or after or even within the complaints process itself can be very useful in establishing the "innocence" of the IFA.

In one recent complaint about a product the IFA had originally discussed with the client before escaping from his network but which he actually sold just after he was directly authorised, I argued that there was no jurisdiction because more than six months had passed since I had issued the FMDL rejecting the complaint.

The complainer countered that he had not raised the complaint to the FOS within the six months because the network, which was dealing with another complaint about a product sold by the IFA to the same client during his network membership (a complaint later rejected by the FOS) had told him not to have any dealings with the IFA about any of the complaints.

The FOS expressed the view that there might be special circumstances which would enable it to deal with the complaint outwith the sixmonth period after the FMDL. The complainer could not be prejudiced by the network's comments but no consideration was apparently to be given to the IFA possibly being prejudiced.

The complainer was represented by an IFA complaint handler. In the course of the complaint investigation, the FOS adjudicator referred to "other" communications with the complaint handler which I had not seen.

I asked why that had not been disclosed to me and requested it. I did get it eventually and there within the string of emails was a thread which, when pieced together with the evidence from the IFA's file, enabled me to argue successfully that on the balance of probabilities, the complainer knew all along that he should have complained within the six months. The complainer grudgingly dropped the complaint but, hey, a win is a win.

So I complained about the FOS adjudicator's non-disclosure of what turned out to be important evidence. Guess what? They rejected my complaint on the basis that the DISP gives the FOS complete discretion to disclose or not to disclose to you any or all evidence relating to a complaint or to provide their synopsis of that evidence.

Imagine the outcry from the civil libertarians if the criminal and civil courts were conducted like the FOS.

The investigator is the judge (there being no jury) and it is he (I use this term for convenience and not intending to be gender specific) who decides what evidence the accused (defendant in England) sees or does not see or, if he is feeling generous, he may give the accused the investigators/judge's own synopsis of that evidence.

Whatever the pursuer (plaintiff)/prosecutor says is accepted with or without corroboration. After all, why would a complainer lie?

The accused may respond but the investigator, sorry, now the judge, will be free to interpret that in whatever way he feels and may well decide that the documentary corroboration of the accused's evidence may safely be disregarded.

The investigator has wide discretion, even to the point of bringing fresh charges which the complainer did not raise which, swiftly changing his headgear, he now upholds.

The accused, not having seen all the evidence or perhaps only the judge's own version of that evidence, has no right of appeal. Oh sure, you can ask for an ombudsman to review it. Hardly independent is it?

The criminal law equivalent of that would be a quick hearing down the local nick in front of the desk sergeant and when he found you guilty - well, if you weren't, why would you be in the police station in the first place? - you would be wheeled out to the back yard for summary justice to be applied.

Appeals would be to the desk sergeant's immediate superior inspector. Confidence inspiring or what?

And the High Court said that the postal voting fraud in the last election would discredit a banana republic?

What of the lawyers? Well, I don't know what system my legal brethren and sisters will get in England but it was with some degree of horror that I learned that the Scottish Executive was intent on importing the FOS system into Scotland to deal with complaints against Scottish solicitors.

I am no luvvie of the Law Society of Scotland - they know that as I have told them - but I am more than happy to take my hat off to them. Following on their vigorous discussions with the politicians, the system we will be getting requires the law of the land to be applied and gives us a right of appeal.

It is about time that the same rights were given to IFAs.

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