Regulation, responsibility and redress: recent developments for IFAs (and their PI insurers!)

Panel discussion with Lucy Tolond (DWF), James Hall (Gatehouse Chambers) and Paul Freeman (Folgate Underwriting)

IMC Professional Indemnity Insurance Conference

27th August 2026

~~UN~~CERTAINTY(?)

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- **Responsibility** - Appointed representatives

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- **Regulation** - enforcement against rogue advisors

BUT areas of uncertainty remain – what about coverage?

* Instruction to Copilot: *"generate an abstract image showing the concept of coverage"*

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Appointed Representatives and s39 FSMA 2000

- ***Kession Capital v KVB Consultants Ltd***[2026] UKSC 11 (on appeal from ***KVB Consultants Ltd v Jacob Hopkins McKenzie Ltd*** [2024] EWCA Civ 765)

- Court of Appeal:
  - There is a distinction between 'what' an AR may do and 'how' they are permitted to do it: ***Anderson v Sense Network Ltd*** [2019] EWCA Civ 1395. Is client classification (professional or retail) 'what' or 'how'?
  - The stipulation in the AR agreement that the AR should not deal with retail clients operated as a contractual term between AR and principal but did not affect the scope of the permission given by the principal, or the responsibility which it accepted, for the purposes of s39 FSMA 2000, as it was 'how' not 'what'

The Supreme Court

- The extent of the AR's exemption under section 39(1), and the authorised person's responsibility under section 39(3), are coterminous
- The principal purpose of the regulatory regime for financial services is to provide protection for users of financial services. It is no surprise that distinctions are drawn between retail clients and professional clients, who can be expected to be more sophisticated and better able to make decisions as to what is in their own best interests.
- Professional clients do not need the same level of protection as retail clients.
- The regulatory burden on firms which choose to deal with retail clients is therefore greater than on other firms. Firms will be held to higher standards of conduct in their dealings with retail clients and are required to ensure that employees who deal with retail clients meet specific training and competence standards.

Broadly, in the ***Anderson*** sense whether a client was a retail client or a professional client was a 'what' distinction rather than 'how'.

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The Supreme Court

- Regulatory legislation is a compromise between the protection of consumers and the avoidance of "*regulatory overkill*": *Financial Conduct Authority (formerly Financial Services Authority) v Asset LI Inc (trading as Asset Land Investment Inc)*
- The different treatment of retail and professional clients forms a very important element of the regulatory regime, on account of their significantly different needs. If the FCA is permitted to restrict a Part 4A permission to dealing with professional clients only, it must follow that "part" of a business can be identified on the same basis for the purposes of section 39.
- Whilst it is important that remedies are available when things go wrong, the Court of Appeal was wrong when it held that that the point of S39(3) is to ensure a 'safeguard' for clients who deal with Appointed Representatives.
- It would defeat the regulatory purpose of the AR regime and be contrary to the interests of consumers if an authorised person, whose experience and expertise lay in dealing with professional clients, was required to assume responsibility for an AR's conduct of retail business.
- The contrary argument would lead to the "*startling proposition*" that an authorised person could be responsible for an AR's conduct in dealing with retail clients, even though its own Part 4A permission *excluded* dealing with retail clients. This would make little sense, and would make it impossible to ensure adequate arrangements for training and competence.

Financial Ombudsman Service

- July 2025 – Government sets out conclusions of review of the FOS – changes needed to the framework in which the FOS operates to prevent it acting as quasi-regulator and provide greater regulatory coherence with the FCA
- July to Oct 2025 – consultation on reform proposals – 601 responses – overall support for proposed reforms
- March 2026 – Govt response to consultation – intends to legislate (when?)

Financial Ombudsman Service

1. **Adapt the 'Fair and Reasonable' test** used by the FOS to determine cases, to set out that where firms have met their obligations under relevant FCA Rules, firms must be found to have acted fairly and reasonably by the FOS
2. **Introduce a referral mechanism between the FOS and the FCA** to require the FOS to seek a view from the FCA on matters of interpretation where the FOS considers there may be ambiguity in what FCA rules require, or where it considers an issue raised may have wider implications
3. **Introduce an absolute time limit of 10 years for bringing FOS complaints** (with FCA able to make exceptions)
4. **Make structural changes to the FOS to provide greater consistency in decision making** - Chief Ombudsman to have overall responsibility for FOS determinations
5. **Make it easier for firms and consumers to understand and learn from FOS determinations** by introducing a requirement for the FOS and FCA to publish regular thematic reports
6. **Ensuring the FCA, has the tools it needs to respond to mass redress events** quickly and effectively

Financial Ombudsman Service: JR success

- ***R (Barclays & Ors) v FOS*** [2026] EWHC 1555 (Admin) – re: unfair relationships and lenders but confirms that the DISP rules are self-contained and do not take account of the limitation position as would apply in court in relation to s140A CCA 1974. In other words, FOS' position was overreach – it had no discretion to disapply the DISP 2.8.2R time limit
- ***R (Wills & Trust Independent Financial Planning Ltd) v FOS*** [2026] EWHC 1566 (Admin) –rare example of JR success against FOS: irrationality in relation to quantum of redress. Complaint against financial planning firm relating to discretionary fund management. FOS irrational in awarding compensation including the period after the respondent had ceased having responsibility. Compensation should have been calculated by reference to the time at which responsibility ended, plus benchmark return or interest thereafter

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Limitation in court claims

- ***Kay v Martineau Johnson*** [2026] EWCA Civ 224 (on appeal from [2024] EWHC 2451 (Ch))
- Court of Appeal dismissed C's appeal relating to s14A Limitation Act 1980 on the facts, but accepted that in 'rare' cases the impecuniosity of a claimant could be relevant to whether they had taken 'all reasonable steps to obtain expert advice' under s14A(10)(re: constructive knowledge)
- In any case where a financial advisor's negligence leads to outright impecuniosity, time may not start running until the claimant can afford to take independent advice

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Regulatory enforcement: rogue advisors

- ***Burdett and Goodchild v FCA*** [2026] UKUT 00068 (TCC) – The tribunal found both acted without integrity, with Burdett knowingly performing director duties without approval and both involved in high-risk, illiquid pension investments for retail clients. Upheld prohibition orders re: all functions re: any regulated activity, emphasizing the importance integrity in regulated activities and protection of the public. Substantial fines also imposed

- ***Fenech and Dunne v FCA*** [2026] UKUT 00162 (TCC) [2026] UKUT 00281 (TCC) - The Tribunal agreed that both acted dishonestly by providing a backdated appointed representative agreement to the FCA. Found that Ms Dunne falsely claimed she had given advice to some pension schemes before she had done so; and that she had failed to take proper care when giving pension transfer advice. Mr Fenech failed to properly oversee her work. Ms Dunne advised about 92% of her clients to move out of defined benefit pension schemes between April 2015 and June 2017. This led to more than £126m being transferred, including when it was not in clients' best interests. Tribunal upheld bans but reduced fines

Coverage – fines and penalties

"For the reasons given in this Final Notice, the Authority hereby: imposes on Mr A a financial penalty of £106,100 pursuant to section 66 of the Act; and makes an order prohibiting Mr A from performing any function in relation to the regulated activity of advising on Pension Transfers and Pension Opt Outs carried on by an authorised or exempt persons, or exempt professional firm pursuant to section 56 of the Act. Mr A agreed to resolve this matter and qualified for a 30% (stage 1) discount under the Authority's executive settlement procedures. Were it not for this discount, the Authority would have imposed a financial penalty of £125,488 on Mr A. However, the Authority will not enforce the financial penalty provided that Mr A pays £106,100 to the Financial Services Compensation Scheme (the "FSCS") to contribute towards any redress that may become due to customers of X Limited (in liquidation)."

- What power does the FCA have to make this order?
- Are insurers responding with changes to insuring clauses and exclusions?

Coverage – past business reviews

- Disputes with insurers around exclusions re: costs of past business reviews
- Are redress payments resulting from such reviews also excluded, given that such payments are effectively settling claims? – *J Rothschild v Collyear* revisited.

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Any (more) questions?

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Any answers?