The Insolvency Service

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Your ref:
Our ref: UK Finance Letter to OR 16 August 2019
e-mail: David.sanderson@insolvency.gov.uk
Date: 17 September 2019

Dear Ms Barodekar

**Payment Protection Insurance ('PPI') and the Official Receiver – Limitation Periods**

Thank you for your letter dated 16 August 2019 in which you set out UK Finance's views in relation to limitation periods provided by the Dispute: Resolution section ('DISP') of the Financial Conduct Authority's Handbook.

In that letter, you request that we respond to your letter, and the points made within it, so that UK Finance's members are able to understand our position (on limitation) in full and why it diverges from UK Finance's understanding.

Prior to setting out our position on limitation it may be beneficial to set out our understanding of how limitation applies to the complaints process as a whole; as well as setting out our understanding of the approach that UK Finance's members appear to be taking.

## 1. Limitation within the DISP complaints process

i. A complainant may raise a complaint about a firm's actions or omissions by any reasonable means; the firm is required to recognise that complaint and resolve it (see DISP 1.3.2G).

ii. The firm should aim to resolve the complaint at the earliest opportunity (see DISP 1.4.3G) and, in any event, that resolution must take place

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within 8 weeks of the firm receiving the complaint (see DISP 1.6.2R) or, if the firm is unable to resolve the complaint within 8 weeks, the firm must inform the customer of this and provide an indication of when a response will be forthcoming (see DISP 1.6.2R(2)(a)).

iii. If the firm believes that the complaint is outside the time limits for referral to the Financial Ombudsman Service ('FOS'), the firm may reject the complaint without considering the merits, but it must explain this to the complainant in its final response (see DISP 1.8.1R). The time limits for referral to the FOS are set out in DISP 2.8. In particular, DISP 2.8.2R refers to the 'six-year rule' and the 'three-year rule' – which we will refer to under the term 'DISP limitation periods'.

iv. The DISP limitation periods are a defence that may be raised by a firm within its final response. The complainant is not required, as part of the complaint, to justify whether the complaint is within the DISP limitation periods or not. This is particularly the case because a firm may set aside the DISP limitation periods if it so chooses (see DISP 2.8.2R(5)).

v. As such, the following paragraphs are designed only to assist UK Finance and its members in its response to our complaints. Whilst they set out our current understanding of the DISP limitation periods, they are for information only. We reserve the right to amend, change or add to our understanding of the DISP limitation periods in the event that your members purport to time bar our complaints under DISP2.8.2R and we subsequently refer your members' responses to the FOS.

## 2. UK Finance's current approach

i. We have some concerns that UK Finance's current approach is inconsistent with its members' earlier approaches and that, as such, UK Finance's members are not treating customers fairly.

ii. In particular, and as set out in paragraph 3.2 of your 16 August 2019 letter, the Insolvency Service has been dealing with mis-selling complaints for some time. During that time, we cannot recall any of your members having raised DISP limitation periods as a defence to PPI mis-selling of debtors subject to bankruptcy.

iii. In addition, and having regard to a number of published FOS final ombudsman decisions, it seems that if the debtors raised these complaints directly, your members would not seek to either: refuse to consider a complaint from a consumer on the basis that the consumer ceased to be an eligible complainant at the point of bankruptcy or, if considering the complaint, raise the DISP limitation periods as a defence.

iv. Your members' current position appears to have been reached only because of the volume of complaints they have received, as opposed to

the merits of those complaints. Also, it seems that your members are trying to remove their liability simply because certain customers have been declared bankrupt, i.e. if the customers had not become bankrupt, your members would have almost certainly paid any compensation due. This seems a particularly unfair stance considering that it could be argued that the sale of PPI was a contributing factor to the bankruptcy itself.

v. We are therefore mindful that entering into correspondence with you in relation to your members' changed position could be interpreted as giving credence to that position. For clarity, we do not consider your members' current position has any merit and we consider that this change to your members' position means that customers are not being treated fairly by your members. However, in consideration of the uniqueness of this situation, we are willing to enter into brief correspondence with you in order to provide you with our current understanding of the pertinent issues you have raised.

**3. Who is the eligible complainant?**

i. Subject always to the two caveats given above, you suggest that the limitation periods hinges upon who the eligible complainant is.

ii. In paragraphs 2.1(C)(1) to (3) of your letter dated 16 August 2019, you set out three cases decided by the Courts to explain how the bankrupt's PPI claim is property which vests in the trustee in bankruptcy following a person being declared bankrupt. In paragraph 2.1(C)(4) you state that, by analogy, the rights of the 'eligible complainant' are property which vest in the trustee in bankruptcy.

iii. Whilst it would seem that the right to complain does transfer from the bankrupt to the trustee in bankruptcy, it does not follow that the attributes of the bankrupt person transfer to the trustee in bankruptcy nor does it follow that the trustee becomes the eligible complainant.

iv. To expand upon that further, DISP 2.7.3R sets out seven attributes that an eligible complaint must have. DISP 2.7.6R goes on to state that an eligible complainant must also have one or more of twenty defined relationships with the firm (to which the complaint relates). In relation to the PPI complaints raised, the trustee in bankruptcy does not, nor did have, one or more of those relationships. It is therefore not possible for the trustee in bankruptcy to be the eligible complainant.

v. The FOS has considered these matters in Trustee in Bankruptcy of Mr B v HSBC (23rd October 2013, DRN2094690). In that case, the Ombudsman stated: 'my power to consider this complaint only arises from the fact that Mr B is an eligible complainant under our scheme rules. Neither S [solicitor of TIB] nor [TIB] meets the relevant criteria.'

## 4. How can the trustee in bankruptcy legitimately raise a complaint?

i. Once we have concluded that it is the bankrupt person that is, and remains, the eligible complainant, the additional question arises which is: how can the trustee in bankruptcy bring the complaint?

ii. DISP 2.7.2R states: 'A complaint may be brought on behalf of an eligible complainant (or a deceased person who would have been an eligible complainant) by a person authorised by the eligible complainant or authorised by law. It is immaterial whether the person authorised to act on behalf of an eligible complainant is himself an eligible complainant.'

iii. Our understanding of the position is that: the trustee in bankruptcy is raising a complaint on behalf of the debtor and it is the debtor that is the eligible complainant. As per the cases cited in your letter dated 16 August 2019 (and others) the trustee in bankruptcy is authorised to raise that complaint 'by law'. Whether or not the trustee in bankruptcy is also an eligible complainant is immaterial.

iv. As such, when your members are considering the DISP limitation periods in relation to particular complaints submitted to them, they should, as they have previously done so (see paragraph 2.2 above), limit themselves to considering the particular debtor's state of knowledge.

v. In any case, it is very difficult for the trustee to ascertain whether PPI was an asset in a bankruptcy to begin with. Most bankrupts will have been unaware that they had PPI, or they may not have provided full information or retained relevant documentation or even cooperated during their bankruptcy. As a result, it is very difficult to argue that the Official Receiver would have been aware of PPI claims at the point of bankruptcy.

## 5. Conclusion

i. If your member firms are of the opinion that they can reject these complaints without a review of the merits, they should, as per 1.3 above, set that position out in full in respect of each submitted complaint. We will then consider the most appropriate next steps, which may include referring each rejected complaint to the FOS.

ii. As per paragraph 2.4 above, we do not think that the FOS would be attracted to your members' attempts to avoid liability in circumstances where, but for the bankruptcy, redress would have been paid. Especially in circumstances where the mis-sale of PPI may very well have contributed to the bankruptcy itself. And, where your members' approach is prejudicial to a body of creditors including HMRC and various local authorities.

iii. We maintain that firms accept our position and act in the best interest of your ex- and existing-customers and ensure they are treated fairly and process our cases without resort to further challenge.

iv. Should your member firms not accept our conclusion and apply a blanket limitation approach to rejecting the Official Receiver's claims, a further option is for the Official Receiver to take legal action to realise the interests in PPI redress due to bankruptcy estates, which, in our view, is in neither parties' interests for the Official Receiver to be forced down this route.

Yours sincerely,

David Sanderson
Deputy Official Receiver

Copy:
Chris Preston, Financial Conduct Authority
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