ombudsman
news
October 2002 **issue 21** from the Financial Ombudsman Service

essential reading for financial firms and consumer advisers

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edited and designed by the publications team at the Financial Ombudsman Service

new format for ombudsman news

chief ombudsman, Walter Merricks, explains

This month marks an important development for *ombudsman news*. Until now, each issue has concentrated on just one area of our activity – dealing in turn with banking, investment or insurance complaints. And initially, a number of the financial firms that form the bulk of our readership subscribed just to the banking, investment or insurance editions (colour-coded blue, pink and green respectively).

But we have noticed a steady increase in the number of firms wanting to read about all three areas of our complaints work. And of course there has always been a demand for information about all our complaints work from the consumer advisers in citizens advice bureaux and other agencies who form another important sector of our readership. 2

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But we have noticed a steady increase in the number of firms wanting to read about all three areas of our complaints work. And of course there has always been a demand for information about all our complaints work from the consumer advisers in citizens advice bureaux and other agencies who form another important sector of our readership.

So from now on – each monthly edition of *ombudsman news* will contain a mix of items from all three subject areas – including the case studies that so many of you tell us you find particularly valuable. We believe this integrated approach offers a number of benefits. Not least of these is improved flexibility. We will – for example – be able to give prompt coverage to any significant developments affecting complaints about a particular area of financial services. Previously we would have had to wait up to three months until the next edition that dealt with the industry sector concerned.

The new format also reflects some recent organisational changes

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1 insurance fraud

Fraudulent and dishonest claims are a major problem for the insurance industry and fraud is alleged in a number of the cases we see. These can be difficult to assess. To establish that fraud has taken place, some concrete evidence of lies, inconsistent statements or acts of deception must be present. The fact that members of a firm's staff are personally satisfied of the claimant's bad faith is not sufficient proof of dishonesty.

The essential components of fraud are intent to deceive and desire to induce the firm to pay more than it otherwise would. Establishing these points can require an analysis of the claimant's motives. Inevitably this is a largely subjective exercise. However, by the time a case reaches us, it is normally too late to uncover any new evidence. And by then, claimants are usually well aware of any problems in their version of events, and will have had ample opportunity to concoct an explanation – or to cloud the issue with extraneous pieces of information. It is far better if a firm has investigated the matter carefully at an earlier stage.

Where a firm suspects fraud, it should make its views known to the customer, who can then respond to the allegations. We are unlikely to support a firm's position if, instead, it uses a separate and spurious reason to justify rejecting a claim.

When we look into cases involving an allegation of fraud, we examine all the facts and use the following guidelines to help us reach an overall assessment.

- An exaggeration is not always fraud. And the firm should not repudiate the entire claim simply because the customer has mistaken the cost of replacing the item claimed for — or has an inaccurate recollection of its purchase price. To repudiate the claim, the firm must be able to show that the customer was trying to obtain more than he or she was entitled to.

  For example, many people consider their car is worth more than the value placed on it by the firm's engineer. But since they will not normally receive more than the 'market value' when their claim is settled, their exaggerated view of the car's worth will not render their claim void.

- The fact that a customer may have lied in another context is not sufficient proof of fraud in the current claim. Some firms have relied on a loss adjuster's evidence about a different claim under another policy to demonstrate that a customer has lied in connection with a current claim.

  Such evidence may raise doubts about the accuracy of the customer's version of events in the current claim, but is not in itself conclusive.

... the fact that a customer may have lied in another context is not sufficient proof of fraud in the current claim.

- A customer who presents a forged document to support a claim is not necessarily guilty of fraud. There must be some evidence to show that the customer knew the document's true source. Even if a customer knowingly produces a false document, the firm may not be justified in rejecting the claim.

  By insisting that customers produce receipts for all the items they claim for, firms sometimes put customers in a position where they may be tempted to create substitutes for lost receipts. So if customers do produce false receipts, it is essential to determine why they did this. Was it solely to substantiate transactions that really took place, or did the customers intend to obtain more than they were entitled to?

- Where the firm has sufficient evidence to justify rejecting a claim and/or cancelling the policy, it is only entitled to recover any payments made in connection with earlier claims if it can show that the customer completed the insurance proposal fraudulently. Firms are not justified in retrospectively cancelling a policy on the grounds that the customer used counterfeit documents to support a claim.

... a customer who presents a forged document to support a claim is not necessarily guilty of fraud.

In some recent cases involving claims for written-off vehicles, firms appear to have asked customers to substantiate the original purchase price of their vehicle. As a result, some customers who had lost the original sales material (or perhaps purchased the car through somewhat informal routes) have sent in false documents.

Other customers have produced false documents to try and substantiate a higher price than they actually paid. This is clearly improper, but it does not justify the firm voiding the policy. The customer's claim is for the present market price, not the original purchase price. As long as there is no doubt about ownership and no suggestion of fraud, the firm should meet such claims on the basis of the normal market value.

Where we can reach a view about whether the firm has obtained enough evidence to show that a claim is fraudulent, we will decide whether or not to uphold the firm's rejection of the claim. Where the issue is uncertain and relies on the evidence of third parties, we may decide it is more appropriate for the courts to determine the outcome.

case studies – insurance fraud

■ 21/1

household contents – exaggerated claim – whether insurer entitled to reject claim in full – whether policyholder pressed to disclaim part of loss.

When Mr J was burgled, he notified the police and put in a claim to the firm. His claim – totalling £3,000 – included a DVD player, 14 DVD discs, other audio-visual equipment and jewellery.

When the firm questioned Mr J, it emerged that although he initially said that he had bought one of the stolen items (a hi-fi) for £150, he had actually bought it from his brother for £60.

The firm's investigator noticed that some of the DVDs he had listed in his claim had not yet been released in the UK. Mr J was unable to explain how he had bought them. He then admitted he had never owned a DVD player or discs, and he said he wished to withdraw that part of his claim.

The firm rejected Mr J's claim, citing the policy exclusion that enables it to do this if any part of a claim is false or exaggerated.

Mr J's solicitor then said that Mr J had been told by the firm's investigator that if he said that he had never owned a DVD player, the rest of the claim would be paid more quickly. The solicitor also said that Mr J had reported the theft of the DVD player to the police and this proved it was a valid claim.

complaint rejected

We were unable to reconcile Mr J's statement with his solicitor's assertions. It was hard to believe that, merely to progress payment for the rest of his claim, Mr J was willing to admit he had claimed for something he did not own. The only logical explanation was that Mr J had deliberately exaggerated his loss. So the firm was entitled to refuse to make any payment.

■ 21/2

permanent health – 'disabled' – evidence that policyholder engaged in activities inconsistent with his statements – whether insurer justified in ceasing claim payments.

Mr G received monthly benefits from the firm after it accepted his disability claim in March 1992. His case was reviewed periodically and his disability was described as a 'non-specific' problem, which caused him to feel unwell and lethargic, with aching muscles and weakness. His GP confirmed that his condition remained static and that he was suffering from '*psychogenic pain unspecified*'.

The firm arranged for another doctor, Dr L, to examine Mr G at home. Mr G told Dr L that he spent most of the day either sitting in a chair and staring into space or sitting

outside in the garden. Mr G also said that he needed help to load shopping into the car and had not been able to drive for two to three months. However, Dr L could find nothing wrong with him.

The firm's investigators filmed Mr G in the weeks before and after Dr L's visit. These videos showed Mr G getting out of his car, opening the boot without difficulty, pushing a supermarket trolley and loading shopping into his car. They also showed him jet-washing and drying his car and driving long distances.

The firm concluded that Mr G did not satisfy the policy definition of 'disabled' and it stopped the benefit payments. In response, Mr G presented the firm with a letter from his GP saying that his condition had deteriorated. The GP did not appear to have been aware of the video evidence of Mr G's activity, or of why the firm had stopped the payments.

complaint rejected

We were satisfied that the firm had acted fairly. We did not think Mr G was medically unable to perform his normal occupation. He had been unable to explain either the level of activity shown in the videos or the disparity between this activity and his statements to Dr L about what he could – and could not – do.

... the firm concluded that he did not satisfy the policy definition of 'disabled' and it stopped the benefit payments.

■ 21/3

household contents – fraud – police not informed of full loss – whether sufficient reason for rejecting claim.

Mr and Mrs B returned home from an evening out to find they had been burgled. They notified the police right away and rang the firm the next morning. The claim form they sent the firm listed 63 stolen items, with a total value of over £20,000.

The firm's investigator was suspicious about the claim and his enquiries continued for the next eleven months.

During the enquiries, the couple's insurance came up for renewal. The firm took more than two months to consider the matter and then refused to renew. The couple were unable to obtain any replacement insurance.

Almost a year after the loss, the firm rejected the claim. It said that when Mr and Mrs B reported the loss to the police, they had not mentioned all the items they later claimed for. It also said that Mr and Mrs B had not provided all the help and information it needed.

complaint upheld

Mrs B said that she had still been in shock when she reported the burglary to the police and she had only mentioned the most obvious items that were missing.

... she had still been in shock when she reported the burglary to the police.

This explanation was entirely credible. Theft victims may well not be aware of the full extent of their loss within a few minutes of discovering it. In any case, Mrs B had mentioned most of the missing items when she telephoned the firm the morning after the burglary. And the couple had receipts for nearly everything.

We required the firm to settle the claim and to pay £500 compensation for its maladministration. We did not think it had handled the claim well, and it had not given Mr and Mrs B sufficient notice that it would not renew their insurance.

- 21/4

motor – proof of purchase – cash purchase – lack of substantiation – conflicting information – whether claim valid.

Miss D insured her campervan in June 2000. A few weeks later, on 12 July, she went on holiday to Grenada. When she returned on 28 August, she reported the campervan missing, presumed stolen. It was never found.

When the firm questioned her about the claim, Miss D said she had bought the campervan on 10 May 2000 and had paid £9,700 in cash. She said it had been advertised for sale in a newspaper and that she and a friend, Mr W, arranged to meet the seller in a pub. She said she had bought the campervan on the spot and had driven it home.

She later explained that most of the cash for the campervan had come from the sale of her previous car for £6,250 some six months earlier. She said she had kept that cash in her flat until she bought the campervan. She could not explain how she obtained the balance of £3,450.

The firm was unable to contact Mr W, any of his neighbours, or the previous owner of the campervan. It discovered that the dealer to whom Miss D claimed to have sold her car did not exist. A jeweller had been operating for the last six years from the address she gave as the car dealer's. The firm also found that the campervan had been written off in 1990.

complaint rejected

It is not normally the business of a firm to investigate how a policyholder has financed the purchase of a vehicle. But it is legitimate for the firm to make enquiries when there is doubt about the vehicle's ownership. No one else beside Miss D had claimed to own the vehicle, but there were many conflicting details in the case and Miss D was unable to explain them. The firm was therefore justified in refusing to pay the claim.

... the dealer to whom she claimed to have sold her car did not exist.

2 complaints about 'dual' variable mortgage rates

We recently issued our final decision in the last of a series of 'lead' cases on 'dual' variable mortgage rates.

This complex and high-profile subject has undoubtedly been the hottest banking topic we have dealt with over the past year.

Here, we summarise our approach and explain the decisions we took in each of the lead cases.

introduction of new rates

Some mortgage lenders moved from having a single standard variable mortgage rate by introducing an additional variable rate, which was lower than the lender's so-called 'standard' variable rate.

They said this was to give loyal existing borrowers the same benefits as borrowers who kept switching from lender to lender in pursuit of the best new deal. How far the lenders' actions appeared consistent with that objective varied from lender to lender.

The change provoked complaints from various existing borrowers who had taken out their mortgages when there was a single standard variable rate, and who did not get the benefit of the new lower rate. Most of the complaints we received related to five particular lenders.

withdrawal of rates

The position was further complicated when some of the lenders withdrew rates following – or sometimes anticipating – our decisions. We not only had complaints from borrowers who were refused the rates when they were available. We also had complaints from borrowers who had not applied for particular rates until after they were withdrawn.

lead cases

We decide each case on the basis of its own circumstances. But if we receive lots of cases about the same financial product and similar circumstances, we may choose one or more apparently typical cases as 'lead cases'. Focusing initially on these lead cases can help to save duplicated effort for all concerned. We identified one or more lead cases for each of the five lenders.

commercial decisions

Many a business decision by a financial firm risks criticism by one group of customers or another. A firm's business strategy will ultimately be judged by success or failure in a competitive market. A business decision is not necessarily unfair just because it could be criticised or because its benefits for customers might be debatable.

... we decide each case on the basis of its own circumstances.

... we never said that lenders cannot have more than one variable rate.

We have never said that lenders cannot have more than one variable rate. We have decided the lead cases on the basis of what rate those borrowers were entitled to in the light of their mortgage contracts and the legitimate expectations they were entitled to have under those contracts.

interpretation

We did not approach the lead cases solely on the same basis as a court, as some of the lenders said we should. We are required to decide what is fair, taking the law (among other things) into account.

We took into account the legal principles of interpretation. Legally, if a contractual term is ambiguous, it is given the interpretation that is less favourable to the party who supplied the wording (in this case, the lenders). And the *Unfair Terms in Consumer Contracts Regulations* require an unclear term in any consumer contract to be given the interpretation most favourable to the consumer.

The House of Lords (acting as ultimate appeal court) considered the principles for interpreting contracts in the case of *Investors Compensation Scheme Ltd v West Bromwich Building Society and others* – reported in volume 1 of the *Weekly Law Reports* for 1998, starting at page 896.

Lord Hoffman's judgment at pages 912 and 913 of that publication contains a helpful summary. He said the aim is to decide what the contract would have meant to a reasonable person who had all the background knowledge reasonably available to the parties at the time of the contract.

background knowledge

Previously, each of the five lenders had a single standard variable mortgage interest rate. This was the rate generally paid by its existing and new borrowers who had 'no-frills' mortgages (mortgages without any 'special deal' or 'tie-in').

A 'special deal' involves a fixed/discount/capped rate for a specified period, or a cashback. But, after the specified period, the rate reverts to the standard variable mortgage rate payable on no-frills mortgages. A special deal might involve a 'tie-in' in the form of an early repayment charge, or a requirement to repay a cashback.

… the lender was in a much more powerful position than the borrower.

The single variable mortgage rate was seldom linked directly to any external benchmark. So the lender was in a much more powerful position than the borrower, because the lender could vary the interest rate from time to time.

So why did borrowers enter into such an apparently one-sided bargain? The one-sidedness was mitigated, to a very limited extent, by the *Unfair Terms in Consumer Contracts Regulations* and the *Consumer Credit Act*. But many borrowers know little or nothing of these.

The main reason, as lenders well knew, was because borrowers had a legitimate expectation that their lender intended to retain its customer base in a competitive market, and would set its available going rate for no-frills mortgages accordingly.

It would defeat that legitimate expectation if the standard variable rate ceased to be one where the lender competed in order to retain its existing borrowers. That would be especially important where existing borrowers were tied-in and had to pay an early repayment charge to escape.

lender A

Originally, lender A had one standard variable mortgage rate. It introduced a new, lower, variable rate with a different name. It transferred most of its existing variable-rate borrowers to the new lower rate automatically, and also used the new lower rate for new variable-rate borrowers.

We considered one lead case from lender A. The borrowers in this case had a discount-rate mortgage. They said that the discount should be calculated from the new rate to which lender A had automatically transferred most of its existing variable-rate borrowers. But lender A calculated its discount from a higher rate, which it said was its standard variable rate.

We decided that the borrowers' mortgage contract entitled them to have their discount calculated from the no-frills rate for existing borrowers. That was the new lower rate from the date lender A automatically transferred most of its existing variable-rate borrowers to it.

So we said that the borrowers in this case were entitled to have their mortgage recalculated, backdated to the introduction of the new rate, plus £150 compensation for inconvenience.

Lender A agreed to compensate similarly those borrowers with similar cases who had complained to us. And we received no further complaints, which suggested that lender A also compensated other borrowers who complained to it.

lender B

Lender B's circumstances were similar. It introduced a new and lower variable rate with a different name. It transferred most of its existing variable-rate borrowers to the new lower rate automatically, and also used the new lower rate for new variable-rate borrowers.

We considered one lead case. The result was also similar. The borrowers had a discount-rate mortgage. In the light of their mortgage contract, we decided that they were entitled to have their discount calculated from the no-frills rate for existing borrowers. That was the new lower rate from the date lender B automatically transferred most of its existing variable-rate borrowers to it.

We said that the borrowers in this case were entitled to have their mortgage recalculated, backdated to the introduction of the new rate, plus £150 compensation for inconvenience.

To its credit, lender B then decided to compensate all other borrowers whose circumstances were similar – whether or not they had complained.

lender C

The situation regarding lender C presented significant differences. Lender C originally had one standard variable rate. It introduced a new and lower variable rate with a different name and used this for new borrowers. It advertised widely that its existing variable-rate borrowers could apply to transfer to the new lower rate.

Lender C did not automatically transfer any of its existing variable-rate borrowers to the new lower rate. It said this was because the new lower rate came with interest calculated daily, rather than yearly as before. Existing borrowers needed to sign up to new mortgage conditions before they could transfer to the new lower rate.

We considered a number of lead cases, as different issues emerged. In the first of these cases, the borrowers had a capped-rate mortgage – under which they were to pay the standard variable rate or a specified capped rate (whichever was lower) – and they were subject to an early repayment charge.

The new lower rate was less than the specified capped rate. The borrowers in the first lead case complained that the lender refused their application to link their capped-rate mortgage to the new lower rate unless they first paid the early repayment charge attached to the capped rate.

... so why did borrowers enter into such an apparently one-sided bargain?

In the light of the borrowers' mortgage contract, we decided they had agreed to pay the early repayment charge in return for the cap on the mortgage interest rate. Lender C had agreed that otherwise it would treat them (on interest rates) like borrowers who had the ordinary no-frills variable rate with no tie-in.

Borrowers who had the ordinary no-frills variable rate with no tie-in were not transferred to the new lower rate automatically. But they were allowed to transfer to the new lower rate if they applied to do so. The borrowers in the first lead case should have been treated the same, and allowed to link to the new lower rate – when they applied – without paying the early repayment charge.

The early repayment charge was the price of the cap, and should not have been used to try and tie them into a rate higher than that available to borrowers who had the ordinary no-frills variable rate with no tie-in.

We said that the borrowers in the first lead case were entitled to have their mortgage recalculated, backdated to when they applied to be linked to the new rate, plus £150 compensation for inconvenience.

Lender C announced that it would similarly compensate capped-rate borrowers and discount-rate borrowers who had similar cases and who had complained either to us or to lender C. But it closed the new rate for anyone else.

Lender C later clarified that, in practice, it backdated the compensation to the earliest date (before the new rate was withdrawn) when the borrowers concerned:

- asked to be linked to the new rate or complained that they had *not* been linked to the new rate; *or*
- had demonstrably read something from which they reasonably concluded there was no point in applying because they would be refused; *or*
- took part in a mortgage review after the date the new rate was first announced.

In one of the subsequent lead cases, we decided that lender C's borrowers were not entitled to have their compensation backdated to when the new rate was first introduced. In another of the subsequent lead cases, we decided that those borrowers who had not applied for the new rate (or complained) until after the new rate was withdrawn were not entitled to compensation. The reasoning in both cases was similar.

… we did not approach the lead cases solely on the same basis as a court, as some of the lenders said we should.

There was nothing in the borrowers' mortgage contracts that prohibited the introduction of the new rate or required that the borrowers be linked to it automatically. Making the new rate available only on application was a commercial decision for lender C to take. It did not breach the borrowers' mortgage contracts, nor did it defeat any reasonable expectation they ought to have had.

There were no grounds for us to interfere with lender C's commercial decisions about the way it publicised the availability of the new rate. The later withdrawal of the ability to apply for the new rate was a commercial decision for lender C to take. The borrowers ought to have had no reasonable expectation that the new rate would remain available indefinitely.

Borrowers in the subsequent lead cases were entitled to the same access to the new rate (no better and no worse) as borrowers who had an ordinary no-frills variable rate with no tie-in. Such borrowers were only entitled to the new rate if they applied for it while it was still available.

lender D

Lender D's situation had some similarities to lender C's and some unique features. Originally, lender D had one standard variable rate. It introduced a new and lower variable rate with a different name. This was not available to new borrowers. It was only for existing borrowers. But existing borrowers were not transferred automatically; they had to apply. Then, after hearing about our initial decisions on lenders A and B, lender D closed the new rate to fresh applications.

We decided two lead cases relating to lender D. Both concerned borrowers who, after their fixed rate had expired, were tied-in to the standard variable rate. In the first lead case, the borrowers applied for the new rate while it was still available. Lender D refused to transfer them to the new rate unless they first paid the early repayment charge.

In the light of the borrowers' mortgage contract, we decided that they had agreed to pay the early repayment charge in return for the fixed rate. Lender D had agreed that, when the fixed rate expired, it would treat them otherwise (on interest rates) in the same way as borrowers who had an ordinary no-frills variable rate with no tie-in.

> ...many a business decision by a financial firm risks criticism by one group of customers or another.

Borrowers who had an ordinary no-frills variable rate with no tie-in were not transferred to the new rate automatically. But they were allowed to transfer to the new rate if they applied to do so. The borrowers in the first lead case should have been treated the same, and allowed to transfer to the new lower rate – when they applied – without paying the early repayment charge.

The early repayment charge was the price of the cap, and should not have been used to try and tie them into a rate higher than that available to ordinary borrowers who had the no-frills variable rate with no tie-in.

We said that the borrowers in the first lead case were entitled to have their mortgage recalculated, backdated to the date they applied for the new rate, plus £150 compensation for inconvenience.

Lender D said that it would compensate similarly other tied-in existing borrowers with similar cases who had complained either to us or to lender D about being refused the new rate while it was available.

The borrowers in the second lead case had not applied for the new rate while it was available. But they complained about it after the new rate was withdrawn. We decided that borrowers who had not applied for the new rate (or complained) until after the new rate was withdrawn were not entitled to compensation.

As with lender C, there was nothing in their mortgage contracts that prohibited the introduction of the new rate or required that they be linked to it automatically. Making the new rate available only on application, the way in which information about the new rate was communicated, and the later withdrawal of the rate, were all commercial decisions for lender D to take.

The borrowers in the second lead case were entitled to the same access to the new rate (no better and no worse) as borrowers who had the ordinary no-frills variable rate with no tie-in. Such borrowers were only entitled to the new rate if they applied for it while it was still available.

lender E

Lender E's sitation also had some similarities to lender C's and some unique features. Lender E originally had one standard variable rate. It introduced new and lower variable rates that tracked the Bank of England base rate. Its press release said that its announcement *'stamps a definitive sell-by date on our present standard variable rate – good news for existing and new customers.'* And the notes attached to the press release described the new rates as *'new standard variable rates'*.

Lender E used the new tracker rates for new borrowers. It did not transfer any of its existing variable-rate borrowers to the new rates automatically. It said this was because the new rates came with interest calculated daily, rather than yearly as before. Existing borrowers needed to sign up to new mortgage conditions before they could transfer to the new lower rates.

We considered a lead case about borrowers on the standard variable rate who had received a cashback, and were subject to an early repayment charge equivalent to repaying the cashback. The borrowers complained that Lender E refused their application to transfer to the basic version of the new tracker rate unless they first paid the early repayment charge attached to their cashback.

In the light of the borrowers' mortgage contract, we decided that they had agreed to pay the early repayment charge in return for the cashback. Lender E had agreed that otherwise it would treat them (on interest rates) like borrowers who had the ordinary no-frills variable rate with no tie-in.

Borrowers who had the ordinary no-frills variable rate with no tie-in were not transferred to the basic tracker rate automatically. But they were allowed to transfer to it on application. The borrowers in the lead case should have been treated the same.

The early repayment charge was the price of the cashback, and should not have been used to try and tie them into a rate higher than that available to borrowers who had the ordinary no-frills variable rate with no tie-in.

We did not consider that lender E breached the mortgage contract of the borrowers in the lead case by introducing the new tracker rates, and it would not have been required to transfer them to the basic tracker rate automatically. But it should have transferred them when they asked, without asking them to pay the redemption charge.

We said that the borrowers in the lead case were entitled to have their mortgage recalculated, backdated to the date they should have been transferred following their request, plus £150 compensation for inconvenience.

Lender E said that it would similarly compensate tied-in borrowers with similar cases who had complained either to us or to lender E. But it closed the new rate for anyone else.

follow-on cases

We are now working through the follow-on cases, dealing separately with those that raise additional issues to those decided in the lead cases. It might possibly turn out that some further lead case decisions are required.

3 investment case round-up

This small selection illustrates some of the complaints we have dealt with recently about a wide range of investment matters.

- 21/5

individual savings account – internet banking – maladministration

Mr and Mrs W decided to switch to internet banking and they opened a joint account with the firm. It sent them a password for logging on to the account. As it was a joint account, they assumed they only needed the one password. In fact, the password was only for Mrs W; Mr W should have received a separate one.

Some time later, Mr W decided to invest in a share-based ISA (Individual Savings Account) before the end of the tax year. Mrs W completed the application for him on-line, using the password the firm had sent. Since she logged on using her name, it was her name that appeared automatically on the application form. She corrected this to show her husband's name, entered his details and then submitted the application.

When the firm sent her a copy of the application form to sign, she found it was in her name, not her husband's. She amended the form to show her husband's name and sent it back right away, unsigned. Despite this the firm set up the ISA in her name.

The time taken to sort all this out meant that Mr W lost the opportunity to invest before the end of the tax year.

complaint upheld

A number of aspects of the firm's procedures concerned us. First, it failed to tell the couple that they each needed a separate password, and it then only sent them one password. This is why the computer would only recognise and save Mrs W's name on the application form.

Second, although the computer would save only Mrs W's name on the application form – not her husband's – it saved all the other details relating to her husband that she had typed in (National Insurance number, date of birth *etc*). But at no stage did the firm notice these discrepancies.

… the firm went ahead and set up the ISA, even though it did not have signed instructions to do so.

… the couple were shocked when the firm told them their policy had lapsed, without value.

Third, the firm went ahead and set up the ISA, even though it did not have signed instructions to do so. In fact, we discovered that it had set up the ISA as soon as it received the on-line application, before it had even sent Mrs W the application form to check and sign. This was particularly worrying bearing in mind that the system had automatically changed the applicant's name.

Then, the firm ignored the fact that Mrs W had sent back the form, pointing out that her husband's name should have been on it – not hers.

We required the firm to refund the difference between the amount the investment was worth by the time the firm cancelled it, and the amount it would have been worth, had the firm set it up correctly when asked to do so. We asked the firm to add to this an amount of interest, calculated at our normal rate.

■ 21/6

savings endowment policy – cancellation by firm as premiums not paid

Mr and Mrs C took out a savings endowment policy in May 1992. They were expecting the policy to mature in May 2002, so they contacted the firm when they had heard nothing by the end of that month. The couple were shocked when the firm told them that their policy had lapsed, without value, in November 1992. The firm said this had happened because the couple had stopped paying the premiums.

Mr and Mrs C were very concerned that the firm had never told them the policy had lapsed. They insisted that they had not cancelled the standing order for the premiums.

The firm was unable to establish exactly what had happened or whether it had written to the couple about the premiums. It was only obliged to keep its records for six years after the end of a contract, so it no longer had any details of the couple's policy or of its correspondence with them.

complaint rejected

We explained to Mr and Mrs C that the onus had been on them to ensure they paid the premiums for their policy. We thought they should have noticed that they had not been paying their premiums for 10 years. We did not consider that they had suffered a loss, since they had the benefit of the money they would otherwise have paid in premiums.

■ 21/7

spread betting – breach of agreement by customer

Mr U opened a spread betting account. Spread betting is a risky activity that, essentially, involves betting on future events such as the movement of a financial index or the outcome of sporting fixtures. Unlike conventional gambling, you can lose more than your original stake. And you are legally obliged to pay up, no matter how much you lose.

The account had only been open a short while when the firm contacted Mr U to say that he had already exceeded his margin (credit limit) and that it required full payment of the amount outstanding.

Mr U telephoned the firm and, after discussing the situation, paid enough to reduce the amount he owed to below his margin. He believed this would enable him to keep his bets open, and he said that the firm had agreed to this. So he had been very annoyed when the firm cancelled his bets on the grounds that he had not paid off all of the amount outstanding. It asked him to pay the balance immediately.

Mr U refused, believing that the company had backtracked on an agreement. The firm denied ever having agreed to his paying off only a part of the amount he owed.

complaint rejected

The firm sent us a tape recording of the relevant telephone conversation with Mr U. This established that Mr U's version of events was incorrect; no agreement had been reached and the firm had asked for full payment. The firm's terms and conditions entitled it to ask for full payment and to cancel his bets if he did not pay up.

... we thought the customers should have noticed that they had not been paying their premiums for 10 years.

... by this point, the shares had gone down considerably, largely because of the events of 11 September.

Mr U did not accept our view of the matter and, complaining that we had considered his case too quickly, he asked for it to be passed to an ombudsman for a final decision. The ombudsman upheld our initial view.

The firm then decided to take Mr U to court to recover the debt. Mr U refused to accept that the firm had acted correctly. However, shortly before the case came to court, he finally agreed to pay the amount he owed.

■ 21/8

loss of share certificate – delay in issuing letter of indemnity

In early August 2001, Mrs T decided to sell some of her shares. She thought she had sent the firm all the necessary paperwork. But it told her it could not carry out her instructions as she had not sent the share certificate. She was sure that she *had* sent the certificate, but the firm had no record of receiving it.

The firm said it would send her a letter of indemnity to sign and return. It would then be able to use this in place of the certificate and sell her shares. But when Mrs T still hadn't received the letter of indemnity by 14 August, she wrote to the firm. It replied, saying that the indemnity it had sent her on 8 August must still be on its way to her. Mrs T was reluctant to wait, so she asked the firm to go ahead and sell her shares, using her letter telling it this in place of the indemnity.

The firm wrote back saying that it could not do this and that she would have to sign and return its letter of indemnity. But Mrs T was away on holiday, so she did not receive this response until 6 September. She then asked the firm to send her a replacement letter of indemnity, as the original had never arrived.

The replacement did not reach her until 19 September. By this point, the shares had gone down considerably, largely because of the events of 11 September. Mrs T asked the firm to sell the shares using their pre-11 September price.

complaint upheld

We did not think the firm had any responsibility for the loss of the original certificate, as Mrs T had no proof that she had sent it to them. And we did not feel that the firm was responsible for her not receiving the first letter of indemnity.

But we did conclude that when it received Mrs T's letter of 14 August, the firm should have issued a replacement letter of indemnity right away. If it had done this, it could have sold her shares well before 11 September.

We asked the firm to sell Mrs T's shares at their 10 September price. As a goodwill gesture, it also agreed to bear the charges incurred in obtaining the letter of indemnity.

■ 21/9
mortgage endowment policy – firm's failure to establish affordability after customers' retirement

Mr and Mrs G's complaint concerned the advice they were given to take out an additional mortgage endowment policy when they needed £34,000 for home improvements. The new policy was set up on an 18-year term and it finished three years after Mr G retired at the age of 65.

The couple claimed that the adviser had told them the policy would produce enough to pay off all of the additional borrowing when Mr G retired.

complaint upheld
We found that the adviser had made no attempt to establish how the couple would be able to afford the premiums and the interest payments after Mr G retired.

The firm accepted liability and agreed to calculate compensation in line with Regulatory Update 89. It did this on the assumption that the couple should have been sold a policy with a shorter term, that matured on Mr G's 65th birthday.

The firm ignored any notional 'savings' that the couple had made as a result of having a policy with a longer term. It also provided replacement life cover at the price it would have cost when the couple took out the additional endowment. Finally, the firm paid the fee the couple were charged for switching to a repayment mortgage and paying off a lump sum from the outstanding capital.

4 welcome to credit unions

We are now able to deal with complaints about credit unions in Great Britain (but not in Northern Ireland), as long as the complaints concern events that took place from 2 July 2002.

The procedures and time limits in the Financial Services Authority's complaint-handling rules apply to credit unions for the first time, and may represent some new challenges for them, since most credit unions are run by volunteers on a part-time basis.

We have engaged in a helpful dialogue with credit union organisations to help ensure that we – and they – are ready for cases when they come through. We have attended two credit union conferences already, and run workshops. Another two credit union conferences are already in our diary.

We have also trained up some specialist casehandlers and an ombudsman to deal with credit union cases. They are aware of the special characteristics of credit unions and their relationship with their members. They will not judge credit unions against standards of service inconsistent with what members can reasonably expect, having regard to the credit union's resources and organisation.

... the Financial Services Authority's complaint-handling rules apply to credit unions for the first time.

Credit unions will find lots of information in *ombudsman news* about how we operate. Our website (www.financial-ombudsman.org.uk) also contains much helpful material including, for example, a briefing about how we approach compensation for distress and inconvenience. And credit unions are always welcome to call our technical advice desk. Details are on the inside back cover of this issue.

Consistency in the terms we use is very important, as credit unions will discover. Like the Financial Services Authority – when we refer to 'firms', that includes credit unions. And our documents and correspondence will refer to 'customers' rather than members, because we deal only with their customer rights, as depositors or borrowers – not their rights as members (such as issues relating to election of officials).

We are aware that some credit unions may initially see the new arrangements as burdensome. But we hope they will soon come to recognise, as others have already done, that they bring considerable advantages. The existence of independent complaint-handling arrangements helps underpin consumer confidence – and can bring finality to disputes so they don't continue to rumble on.

5 round-up of banking cases

This small selection of case studies illustrates a few of the banking complaints we have dealt with recently.

■ 21/10
debit card – maladministration – financial difficulties

Mr and Mrs I opened a current bank account with the firm. It provided them with debit cards – but mistakenly linked the cards to someone else's account. As the other person's account was then overdrawn beyond its agreed limit, payments using the debit cards were refused. The bank apologised and promised to sort it out. It issued replacement debit cards, but again linked these to someone else's account.

Around this time, Mrs I became chronically ill. She had to give up work, and her husband had to change jobs so that he could help look after their children. The couple were putting about £300 per month into the account and they said they checked the balance regularly through the firm's telephone banking service. ➔

... the firm had mistakenly linked the cards to someone else's account.

About a year later, the firm wrote to the couple out of the blue. It told them that £2,900-worth of their debit card transactions had been wrongly debited to someone else's account. Now this had come to light, the firm said it would knock off £250 as compensation but would then debit the couple's current account with £2,650. It wanted them to pay this off within the next year. Mr and Mrs I said they could not afford to do this, although they did not dispute having made the transactions.

complaint settled

We were able to arrange a mediated settlement. In view of Mr and Mrs I's financial circumstances, the firm agreed it would knock off £1,000 and not charge interest on the remaining £1,900. It would let them pay this off at £25 per month, subject to review if the couple's financial circumstances improved.

... we were able to arrange a mediated settlement.

■ 21/11

credit card – section 75 liability
fobbed-off – inconvenience

Mr E used his credit card, issued by the firm, to pay £600 for some carpets. These never arrived. He claimed from the credit card company under section 75 of the Consumer Credit Act – which, in certain circumstances, makes the supplier of credit equally liable with the supplier of goods/services for any misrepresentation or breach of contract. The firm said it was only required to meet Mr E's claim if he first got a court judgment against the supplier of the carpets.

When Mr E persisted with his claim against the firm, it repeated its stance several times – bringing in its in-house lawyers to lend weight to its position.

complaint upheld

We decided that the firm must have known, or definitely should have known, that its stance was entirely wrong.
We required the firm to refund the price of the carpets. We also required it to pay Mr E £250 for the inconvenience it had caused him by repeatedly fobbing-off his justified claim.

... she was astonished when the firm credited £85,000 to her account.

■ 21/12

incorrect payment – change of position – distress

The firm phoned Miss A about some bonds that were due to mature. She did not recall having the bonds, but the firm told her they came from an account that she had used for investment while she was abroad.

When the firm sent her forms to sign before it released the proceeds, she again queried whether the bonds were hers. The firm assured her they were. Even so, she was astonished when the firm credited £85,000 to her account. The firm again confirmed that the money was hers, so she reinvested most of it through the firm, and made considerable changes to her lifestyle and commitments.

About six months later, the firm discovered that the bonds had not belonged to Miss A after all. But it did nothing for a further four months. It then froze her accounts and took back all of the money that had not been spent. It asked her to repay the balance, which came to £20,000 with interest, and it registered this as a debt with a credit reference agency.

complaint upheld

We were satisfied that Miss A had acted in good faith. She would not otherwise have reinvested the money through the firm. She had spent money on things she would not otherwise have bought, and she had run down her business. We required the firm to write off the money she had spent, repair her credit rating and pay her £2,000 compensation for distress.

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help and advice for firms and consumer advisers

our technical advice desk can

- provide general guidance on how the ombudsman is likely to view specific issues
- explain how the ombudsman service works answer technical queries
- explain how the ombudsman rules affect your firm.

phone 020 7964 1400
email technical.advice@financial-ombudsman.org.uk

our external liaison team can

- visit you to discuss issues relating to the ombudsman service
- arrange for your staff to visit us
- organise or speak at seminars, workshops and conferences.

phone 020 7964 0132
email liaison.team@financial-ombudsman.org.uk

ask ombudsman news

your questions answered

Tax bill on top of mortgage endowment problems?

Q I work in a citizens advice bureau and have been helping a lady who was mis-sold a mortgage endowment policy. Earlier this year, the firm paid her compensation. She used this money, together with the amount she got for surrendering her policy, to repay part of her mortgage loan and switch to a repayment mortgage. She is now very worried because the accountant where she works has told her he thinks she will have to pay tax on this transaction.

A When your client surrendered her mortgage endowment policy she would have received a '*Chargeable Event Certificate*'. This surrender took place within 10 years of the date the policy started, so any gain she made will be added to her income for the year. If she is a higher rate taxpayer, this gain will be charged at the rate equal to the difference between higher rate and basic rate tax.

But the regulator's guidance on compensation for mis-sold mortgage endowment policies makes clear that firms are expected to reimburse customers who incur any additional tax liability as a result of surrendering a policy early. So if your client does face a tax bill, she should contact the firm.

Help needed with first-ever complaint

Q After 20 years as an independent financial adviser, I've just received my first-ever complaint from a client. It seems straightforward enough but how can I be sure I handle it properly?

A We'll be happy to talk things through with you on an informal basis. Just give our technical advice desk a call. Details are on the inside back page of this issue.

Is a 'final' decision really final?

Q Can an ombudsman re-open a complaint after making a final decision on it?

A A recent court case has confirmed that once an ombudsman has made a final decision on a complaint – and the consumer has accepted that decision (making it binding on the firm) – we have no power to re-open the complaint.

During the various stages while we are considering a complaint, we will make clear the grounds on which we propose to rely in our decision. So it is important that firms let us know all the points they want us to take into account, before we make a final decision. Otherwise it will be too late.