ombudsman news

Financial Ombudsman Service

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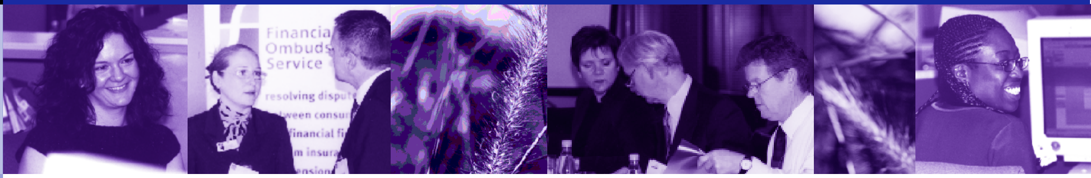
essential reading for financial firms and consumer advisers



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

about this issue – February 2003

This month's round-up of recent investment case studies includes complaints from:

- a pensioner who received inappropriate advice on investing his capital; *and*
- a couple who were sold a whole-of-life policy, when all they wanted was a simple savings plan.

We also include a case where a customer claimed over six hundred and fifty thousand pounds in compensation when the firm mistakenly sent documents relating to his maturing endowment policy to the wrong address.

Following our banking feature last month on disputes about cash paid in to bank accounts, we focus in this edition on disputed cash withdrawals, made via a cash machine or over the counter.

Finally, our insurance case studies illustrate a variety of recent complaints where, because the customer failed to disclose certain facts, the firm refused to meet the claim (and in some instances also cancelled the policy). We look, too, at how a recent High Court decision may affect some insurance complaints that involve the customer's failure to disclose 'spent' driving convictions.

1 investment case round-up

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

- 25/01

unexpected credit to bank account – money paid in error – customer refuses to pay it back

In December 1999, a pensioner, Mrs D, was surprised to find that £480 had been credited to her bank account. She telephoned her bank and was told the payment had come from an investment firm.

For well over a year after this, £480 was credited to her account every month. Finally, Mrs D contacted her bank manager about these payments, admitting she did not know why she was being credited with the money. She said she had not had any dealings with the firm. The bank manager contacted the firm on her behalf, established that the firm had paid the money in error, and passed on to Mrs D the firm's request that she should pay it back. By this stage, the total she had received was over £8,000.

Mrs D refused to pay. She said that the firm had 'unlawfully accessed' her bank account in order to pay in the money. She also said that she had changed her lifestyle as a result of the firm's error, so the firm was being unreasonable in expecting her to pay the money back. The firm did not agree and eventually she brought her complaint to us.

complaint rejected

In our view, it was not reasonable of Mrs D to have assumed the money was hers, since she had never had any dealings with the firm. We also noted that Mrs D had waited for well over a year before asking her bank manager to contact the firm about the payments.

We rejected Mrs D's complaint. We told her that the firm was legally entitled to recover the money. However, we pointed out that the firm was prepared to allow her to pay the money back in instalments over an extended period of time.

... she said that the firm had 'unlawfully accessed' her bank account.

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Mrs D refused to accept that she should pay back any of the money. She said that she was entitled to keep it, since it was the firm's fault that it had made the payments. She is currently waiting to hear further from the firm.

As Mrs D did not accept our explanation of the legal position, we were unable to take the matter forward. If the firm takes proceedings, she will have an opportunity to test her argument in court.

■ 25/02
mortgage endowment – suitability of a managed fund for a low-risk investor

On the firm's advice, Mr A took out a unit-linked mortgage endowment policy. The policy was invested in the firm's managed fund. This was similar to other managed funds on the market, with over 65% of the fund consisting of shares, including some overseas shares.

When the firm rejected Mr A's subsequent complaint that the policy had been mis-sold, he brought his complaint to us.

complaint upheld

It was clear that the policy represented too high a risk for Mr A's circumstances. The 'fact find' completed at the time of the sale noted that he was only prepared to take a low level of risk with his investment. Because the policy was invested in the firm's managed fund, we considered it suitable only for investors prepared to accept at least a medium degree of risk.

The firm argued that:

- Mr A had not complained specifically about the firm's managed fund, so there was no need for this to feature in our consideration of the complaint.
- It had provided Mr A with a copy of its funds guide. This included sufficient details to enable him to make an informed choice about the most appropriate fund.
- Compared with the other funds in the firm's range of funds, the managed fund represented only a low/medium risk.
- The firm's managed fund had demonstrated lower volatility than similar funds provided by other firms.

Our response was as follows:

- The essential point was that the firm's sale of this policy had been unsuitable for Mr A. It was irrelevant whether he had been able to pinpoint the precise reason for his dissatisfaction when he complained about mis-selling. A complaint to the ombudsman service is not the same as a legal pleading and we do not confine our examination of a complaint to the specific matters identified by the customer.
- Mr A did not appear to have made a conscious choice of the managed fund. He had gone to the firm for advice, not simply to give it his instructions, and the firm's representative had recommended this fund.
- The level of risk represented by this fund, compared with other funds in the firm's range, was immaterial to the issue of mis-selling, as was the fund's past performance.

We ordered the firm to transfer Mr A to a repayment mortgage and to provide appropriate compensation, calculated in accordance with Regulatory Update 89 (RU89).

■ 25/03

'whole-of-life' policy sold instead of a savings plan – firm's paperwork destroyed

In 1989, Mr and Mrs J contacted the firm to discuss how best they might save for future university fees for their daughter, then aged three. On the advice of the firm's representative, they made regular payments into a 'whole-of-life' policy.

They said that it was only around the time of their daughter's sixteenth birthday, when they decided to check how their 'savings' were doing, that they found they had not been paying into a savings plan at all. They complained to the firm that they had specifically asked for a savings plan, not life insurance.

The firm rejected the complaint, saying the couple had no evidence that their main aim had been to save for their daughter's future education. The couple then came to us.

complaint upheld

We found that, some years previously, the firm had destroyed all the paperwork relating to the original sale. We were not able to obtain a report from the adviser concerned, as he had long since moved to work elsewhere.

... they had specifically asked for a savings plan, not life insurance.

Mr and Mrs J's version of events appeared probable, and the firm was unable to produce any evidence to contradict it. We therefore upheld the complaint and required the firm to refund all the premiums the couple had paid, together with interest.

■ 25/04

inappropriate advice on pension arrangements – firm's promise to match what customer would have got from company scheme

When Mr D sought advice on ways of boosting his pension arrangements, the firm advised him to take out a free-standing additional voluntary contribution (AVC) policy, even though he had the option of joining the AVC scheme on offer where he worked.

It was some time before Mr D realised that he would have been better off joining his company scheme. After he complained to the firm, it accepted that its advice had been inappropriate. It attempted to put things right by transferring Mr D into his company AVC scheme. However, the rules of the company scheme meant that this was not possible.

So the firm suggested that Mr D should retain his existing policy and said that, when he retired, it would 'top-up' the benefits he received to ensure they matched what he would have got from his company AVC.

Mr D refused to accept this offer. He said he doubted whether the firm would honour its promise when he retired in 12 years' time. He also said that he did not trust the firm to make a correct calculation of the difference in benefits of the two schemes. He therefore referred the dispute to us.

complaint rejected

We considered that the firm had offered a fair and reasonable solution to the dispute. It had provided a written assurance that it would use information provided by the company scheme when it calculated the extent to which it would have to 'top-up' Mr D's benefits when he retired.

Mr D remained sceptical that the firm would honour its promise, but he accepted that he would have to trust the firm to do what it had promised.

■ 25/05

endowment policy documents sent to customer's previous address – customer accuses firm of colluding with third party to defraud him

Just before Dr C's endowment policy matured, the firm wrote to him.
It enclosed forms that it needed him to sign in order to authorise payment of the policy proceeds. But unfortunately, the firm sent the letter and forms to an address abroad, where Dr C had lived for a time several years earlier. He had given the firm his UK address as soon as he returned to this country.

It was only when Dr C contacted the firm, after realising that his policy's maturity date had already passed and that he had heard nothing from the firm, that he discovered the letter and forms had gone to the wrong address.

Dr C was extremely angry that the firm had sent confidential information to a third party. And he accused it of colluding with that third party in a fraudulent attempt to obtain the proceeds of his policy.

Dr C demanded compensation from the firm, totaling £670,000. This comprised:

- £500,000 for 'stress, severe emotional trauma and depression';
- £75,000 for loss of income;
- £20,000 for the cancellation of the holiday he had been planning to take as soon as the policy matured; *and*
- £75,000 for 'unwelcome intrusion into [his] life by criminals'.

When the firm said it would only offer him £500, Dr C brought his complaint to us.

complaint rejected

The firm's original letter to Dr C had been intercepted by someone at his former address, who had fraudulently completed the forms and returned them to the firm.

... the firm had spotted at once that the signature was not genuine.

The firm had spotted at once that the signature was not genuine and that there were inconsistencies in the way in which the form had been completed. The firm had not released the policy proceeds and had still been investigating the matter when Dr C got in touch, shortly after the policy matured.

There was no evidence to show that Dr C had suffered the stress, illness and loss of income for which he claimed compensation. And he had suffered no financial loss as a result of the firm's error. It had promptly paid him the proceeds of his policy, together with interest, as soon as it heard from him and obtained the correctly signed and completed forms.

The firm had already apologised for its error in sending the letter to the wrong address and had offered Dr C £500. We considered this reasonable in the circumstances. We therefore rejected his complaint.

... he had suffered no financial loss as a result of the firm's error.

■ 25/06

income-producing unit trust – inappropriate advice

When Mr L retired, he sold his home and bought a cheaper property in order to help fund his retirement. He had no other investments and only a very small pension. After buying his new house, he had approximately £317,000 and he sought the firm's advice on how best to invest some of this capital.

On the firm's recommendation, Mr L invested £244,000 in an income-producing unit trust. But when he received his first annual statement, Mr L was concerned to see how badly this investment had done. His capital was substantially reduced.

Mr L complained to the firm, stressing that its representative had not fully explained the risks in this type of investment. When the firm refused to uphold his complaint, he came to us.

complaint upheld

We noted that the documents Mr L was given at the time of the sale *did* explain that the investment involved some degree of risk. But there was no evidence that the firm had considered how Mr L could:

- fund his need for long-term income if the value of his investment fell substantially; *or*
- reduce the possibility of loss by investing in more than one kind of product.

We concluded that the firm should not have advised Mr L to put such a large proportion of his capital into this unit trust. The firm accepted our view and it agreed to return Mr L's initial investment with interest.

■ 25/07

single premium insurance investment – unsuitable advice causing unforeseen tax liability

In 1992, acting on the firm's advice, Mr H invested a lump sum of £9,500 in a single premium insurance investment. He said that he told the firm the policy was to be taken out on his wife's life, with a term of eight years.

In 2000, the policy matured with a value of approximately £19,000. But Mr H was most concerned to find he had a tax liability of approximately £1,900. He complained to the firm, saying that his intention had been to avoid paying tax by setting up the investment in his wife's name, and eventually transferring the capital to her.

The firm denied that Mr H had instructed it to set up the investment in his wife's name. It said that if Mr H thought the firm had made a mistake, he should have mentioned it earlier. It said that his name, not his wife's, was given on the policy document and on the bonus statements it had sent out each year.

complaint upheld

Mr H told us that he had never received a policy document, but he sent us copies of the annual bonus statements. These had been addressed to his wife and showed her name, not his, as the policyholder. Mr H also submitted a financial planning report, prepared for him by a different firm around the same time he had made the investment in question. This showed that he had made a number of other investments in his wife's name.

We felt that Mr H's intentions were clear and that it was most unlikely he would have failed to explain his requirements to the firm.

We concluded that if the firm had dealt with this appropriately, he would not have incurred this tax liability. So we said that the firm should put Mr H in the position he would have been in, but for the firm's negligence. We required it to pay an amount to cover the tax liability, plus interest.

... if the firm had advised him appropriately, he would not have incurred this tax liability.

2 banking – disputed cash withdrawals

In last month's issue, we outlined our approach to disputes about cash paid in to bankaccounts. This month, we look at complaints about cash withdrawals. Normally in these complaints, the customer has queried a cash withdrawal from their account, made either over the counter or via a cash machine.

Feelings can run high in these disputes. Customers are often angry that someone appears to have access to their account and – if we fail to uphold their complaint – they can feel very aggrieved. They may assume we have concluded that they acted dishonestly. This is not normally what happens.

We will often have to reach a decision on the balance of probabilities – in other words, on the basis of what we think is most likely to have happened, given the evidence. Sometimes we may conclude, on the balance of probabilities, that the customer *did* withdraw the money, but then forgot all about it. Memory can play tricks, and the customer may have forgotten the withdrawal – especially if it was made at a time when the customer was particularly busy, or if there was a lengthy period of time before the customer queried the withdrawal.

... feelings can run high in these disputes.

Factors we will lookat when dealing with disputes about cash withdrawals will differ slightly depending how the withdrawal was made.

over-the-counter withdrawals

In general terms, it is up to the firm to satisfy us that it had the customer's authority for the withdrawal. But where the customer queries the withdrawal a long time after it was made, the firm may well no longer have the withdrawal slip. That does not mean we will automatically find in the customer's favour. In such cases we decide, in the light of the information and evidence that we have, the likelihood of the customer having made or authorised the withdrawal. In some cases, although there is a signed withdrawal slip, the customer does not accept that the signature is genuine. Where this happens, we are likely to have to decide whether the signature is a forgery.

When we look into disputed cash withdrawals, we may need to askthe customer details of everything they were doing around the time of the withdrawal, in order to build up a picture of all the circumstances. We may also ask for details of the customer's wider financial position. Some customers resent this, feeling that their honesty is in question. But in order to consider a case properly, we do have to establish the facts; we cannot simply take the word of either the customer or the firm.

We need, too, to consider the possibility of dishonesty by the firm's staff and we may make enquiries about the history of individuals or of a particular branch.

Customers who are certain that they did not make the disputed withdrawal often hope that video footage from the branch security cameras will settle matters. Such footage is not always available, particularly if some time has elapsed since the disputed withdrawal took place. And its main purpose is not to provide a record of customer transactions. However, where it is available, video footage can sometimes be helpful.

Disputed withdrawals from the accounts of elderly – or otherwise vulnerable – customers can be especially complex to deal with, and may involve decisions about what the branch staff knew of the customer's circumstances. Where a carer or helper is alleged to have made unauthorised withdrawals, we may have to consider whether the money was used for the customer's benefit (for example, to pay the customer's bills).

Occasionally, we may decide that the complaint is more suitable for consideration by a court if, perhaps, the disputed withdrawal is part of a wider dispute between joint account holders or involves third parties, and cannot fairly be decided on its own.

... memory can play tricks, and the customer may have forgotten the withdrawal ...

cash-machine withdrawals

When a customer withdraws money from a cash machine, the machine produces an electronic audit trail. This shows the card and personal identification number (PIN) used to make the withdrawal. But the bank has no signed cheque or slip authorising the withdrawal, as it would have if the transaction was carried out over the counter.

The audit trail will also record other information which helps us build up a picture of the circumstances in which the withdrawal was made.

Customers who dispute cash-machine withdrawals often say that thieves must have used information from discarded mini-statements or withdrawal receipts to construct a 'duplicate' card and use it in the cash machine. However, in our experience, thieves can only get into an account through a cash machine if they have had access to the genuine card and they know the associated PIN.

When we look into disputed withdrawals from cash machines, we will question the customer about his or her movements around the time of the disputed withdrawal. We will also ask how and when the customer usually withdraws money. Where relevant, we will check if the firm has any record of the card having been reported lost or stolen.

In some circumstances, the customer claims never to have received the card used for the withdrawal. Where this happens, we make enquiries of both the customer and the firm to help us establish the facts.

… it is for the firm to prove gross negligence, not for the customer to disprove it.

Having built up a picture of the circumstances in which the disputed withdrawal was made, we then need to decide the extent to which the customer is liable for the amount withdrawn, if at all. We do this by considering:

- the terms and conditions of issue of the card;
- the relevant provisions of the Banking Code;
- the relevant parts of the Consumer Credit Act 1974 (where the withdrawal was made from a credit or overdraft facility); *and*
- whether the firm correctly applied any internal safeguards that existed within the firm's system to identify and limit fraud.

In looking at these matters, we may have to decide whether the customer was 'grossly negligent'. We consider each case individually, in the light of its particular facts and circumstances. But we view gross negligence as being more than carelessness – and bordering on recklessness. The Banking Code says that it is for the firm to prove gross negligence, not for the customer to disprove it.

banking case studies – disputed withdrawals

- 25/08

disputed cash withdrawal at branch counter – signed withdrawal slip disputed by customer

£1,500 was withdrawn in cash from Mr B's savings account. He said that he did not make or authorise the withdrawal, and that he had not been into the firm's branch for over a year.

The firm had a signed withdrawal slip authorising the transaction. It said that the signature was genuine and that a staff member who knew Mr B had seen him sign the slip. The firm also said that Mr B had carried out other transactions at the branch during that year.

complaint rejected

The signature on the withdrawal slip looked like Mr B's, and the member of staff who witnessed it gave a clear statement. Significantly, Mr B had written to the firm complaining about other events he said had taken place in the branch during the year in question. So he was clearly mistaken in saying he had not visited the branch for a year. We therefore rejected his complaint.

… he was clearly mistaken in saying he had not visited the branch for a year.

... there were significant discrepancies between what he said to the firm and what he said to us.

■ 25/09

disputed cash withdrawal at branch counter – customer claimed he had deposited money despite signing withdrawal slip

Mr T said that he paid £2,000 into his passbook account. The firm pointed out that his passbook showed he had *withdrawn* £2,000, not paid it in, and it produced the withdrawal slip he had signed.

Mr T accepted that he had signed the withdrawal slip. But he said the cashier had covered up the heading on the slip that showed the word 'withdrawal', so he had not realised it was not a paying-in slip. Mr T said thatbecause the entry in his passbook had been misaligned, he had not realised for some while that the transaction was entered as a withdrawal.

complaint rejected

It was not only the heading on the signed form that identified it as a withdrawal form. The text, which Mr T signed, confirmed that he wanted to withdraw the money and acknowledged receipt of it. And, though the passbook entry was misaligned, the resulting balance was clearly £2,000 less than it had been before the transaction. There were also significant discrepancies between what Mr T said in writing to the firm and what he said to us.

We therefore rejected his complaint.

■ 25/10

disputed cash-machine and counter withdrawals from bank abroad

Mr K, who frequently visits Greece to see family members, disputed three cash withdrawals made in Greece with his card, issued by the firm in the UK. Two of the withdrawals were from cash machines. The other was made over the counter in a bank.

Mr K said that he was in the UK at the time of the withdrawals and that his card never left his possession. The firm insisted that the cash-machine withdrawals had been made using Mr K's card and PIN. And it said that before the over-the-counter withdrawal was made, the Greek bank had inspected and noted the number of Mr K's passport.

complaint rejected

We checked the cash-machine records and the branch withdrawal slip. All of these appeared to be in order, and the signature on the withdrawal slip appeared to be authentic. Mr K was unable to produce the passport that he had at the time of the disputed withdrawals; he said he had lost it and had subsequently obtained a duplicate.

We rejected the complaint and considered that the firm was entitled to debit Mr K's account with the withdrawals.

■ 25/11

disputed cash-machine withdrawals with correct PIN – firm considered customer to have been 'grossly negligent'

Mr N disputed various cash-machine withdrawals from his account. He said that he did not make or authorise the withdrawals and had been at home at the time they were made.

The firm said the withdrawals had been made with the correct PIN and it considered Mr N to have been 'grossly negligent' in allowing someone to discover his number. However, Mr N insisted that no one else could have known the number and that he had not written it down.

complaint upheld

The Banking Code says that it is for the firm to prove 'gross negligence', not for the customer to disprove it. We did not consider that the firm had proved gross negligence in this case. The circumstances and the nature of the withdrawals led us to believe that the withdrawals had been made without Mr N's authority by a family member – who would have been able to observe him entering his PIN for previous cash-machine withdrawals.

■ 25/12

disputed cash-machine withdrawal – use of firm's security camera

Mrs E complained to the firm about a £200 cash withdrawal that she insisted she had never made. She said she had withdrawn £100 from the same cash machine the day before the disputed withdrawal. However, she said that her husband could confirm that they had been out of town on the day the £200 was withdrawn, so she could not have visited the cash machine.

complaint rejected

The film from the firm's security camera clearly showed Mrs E visiting the cash machine on two consecutive days, including a visit at the time of the disputed withdrawal. We did not accept Mrs E's contention that the film was 'falsified' and we rejected her complaint.

■ 25/13

disputed cash-machine withdrawals – allegation of 'gross negligence' – consumer credit act

Mr S, who has homes in London and Edinburgh, disputed three cash-machine withdrawals made in Scotland on successive days. These withdrawals increased by £600 the amount he owed the firm.

... he said he had been at home at the time the withdrawals were made.

Mr S said he could not have made these withdrawals since he had been based in London on the days in question and had left the card in his flat in Edinburgh.

The firm said that since the correct PIN had been used for each withdrawal, Mr S must have either made the withdrawals himself, or been grossly negligent by leaving a note of his PIN with the card. Mr S angrily denied this, saying he had destroyed the notification of his PIN some months earlier, as soon as he had received it.

complaint upheld

Mr S produced sufficient evidence to prove that he was in London at the time of the withdrawals and that he did not make or authorise them. We did not need to consider whether or not he had been 'grossly negligent'. The withdrawals increased the amount he owed the firm, so under the Consumer Credit Act, his liability was limited to £50, regardless of any gross negligence.

3 disclosure of spent motoring convictions

Some of the insurance complaints we deal with involve the customer's failure to disclose 'spent' motoring convictions to their insurer. These cases often reveal customers' confusion about whether they must disclose previous convictions. For example, someone applying for motor insurance six years after they were convicted of a drink-driving offence may consider that, since the endorsement remains on their licence for 11 years, they are obliged to disclose the conviction to the insurer. However, under the Rehabilitation of Offenders Act 1974, the conviction is 'spent' after five years.

Nevertheless, some firms ask customers applying for insurance: '*Have you or anyone who is to drive the vehicle been convicted of any offence within the last five years or had his licence endorsed within the last 11 years?*'

A recent High Court decision (in the case, *R v DVLA & Another, ex parte Pearson* [2002]) indicates that it is an unlawful breach of statutory duty for firms to rely on endorsements relating to spent convictions in order to disadvantage a driver.

The driver in the case, a Mr Pearson, had a spent conviction for drink-driving, but the endorsement was still on his licence. Some time after his offence and conviction, Mr Pearson trained and qualified as a driver of heavy goods vehicles. Inevitably, however, prospective employers asked to see his licence and they declined to take his job application further after seeing the endorsement.

Mr Pearson's action against the DVLA (Driver and Vehicle Licensing Agency) and the Secretary of State was brought under Article 8 of the Human Rights Act 1998, as he claimed '*breach of his right to respect forhis private life*'. He sought to establish thatbecause the endorsement remained on his licence beyond the rehabilitation period, it interfered with his private life (by preventing him from obtaining employment).

The judge dismissed the claim on the basis that Mr Pearson's human rights had not been infringed. However, the judge commented on the purpose of endorsements and, arguably, his comments have implications for insurers. The judge pointed out that the endorsement of a drink-driving conviction remains on a driver's licence for 11 years, for the purpose of any future sentencing, and he stated '*I see no reason why, if he had any evidence, a rehabilitated drink driver who is refused a driving job simply by reason of his spent conviction should not be able to maintain an action for breach of statutory duty*'.

By way of analogy, there seems no reason why a rehabilitated drink-driver, if he had evidence, would not have an equally strong case if he was refused insurance or was given less favourable terms and conditions than other policyholders, simply because of his spent conviction. If firms insist on asking questions about spent convictions, then they must effectively ignore the answers they receive. Otherwise, we are likely to consider they have breached their statutory duty.

Similarly, if a firm cancels the policy of a customer who has a spent conviction (but whose licence is still endorsed), simply because the customer did not disclose the endorsement, then we will uphold the customer's complaint.

4 insurance case studies – non-disclosure

The following cases illustrate other non-disclosure complaints we have considered recently.

■ 25/14

motor – non-disclosure – negligence – whether negligent non-disclosure justified cancellation of policy – whether proportional settlement fair

Mrs A insured her car through an insurance broker in August 1999. When her car was stolen in June 2001, she contacted the firm to make a claim. The firm discovered that she had a total of four convictions for speeding. In September 1994, September 1995 and April 1996 she had been convicted for driving at over 30 mph in a 30 mph area. In March 2000 she was convicted for exceeding a 60 mph limit.

The firm refused to meet Mrs A's claim because she had not mentioned the convictions. It said that both when she first applied for the insurance, and again when she renewed the policy in August 2000, it had specifically asked whether she had received any convictions in the previous five years.

...her failure to disclose her convictions meant that she had paid less than she should have done.

Mrs A said that the broker had completed the proposal form for her and she had simply signed it. She said she had not intentionally concealed any information from the firm. However, since her offences were relatively minor, she considered that even if she had told the firm about them, it would still have insured her.

complaint upheld in part

The question on the proposal form about convictions was clearly worded. And even though it was the broker, not Mrs A, who had completed the form, Mrs A should have checked the answers carefully before she signed it. However, we considered that her failure to do so was an oversight, rather than a deliberate attempt to conceal the convictions from the firm.

The firm agreed that the convictions were relatively minor. It also agreed that it would still have insured her if it had known about them. But it said that it would, initially, have charged her 12% more for her premiums. It would then have charged a further 5% when she renewed the policy in 2000. So her failure to disclose her convictions meant that she had paid less than she should have done.

In the circumstances, we felt that a fair and reasonable settlement would be for the firm to meet the claim on a proportional basis. The firm agreed and paid Mrs A 85% of the value of her claim.

■ 25/15

household contents – non-disclosure – clear question – no evidence question asked – whether incorrect answer entitled firm to cancel policy

In September 2001, Mr C arranged household contents insurance through an insurance broker. Several months later, Mr C was burgled and made a claim under his policy.

In the course of the firm's enquiries, it discovered that, following a domestic dispute in January 2001, Mr C had been convicted of three offences of causing actual bodily harm to police officers.

The firm said it would not have issued the policy if it had been aware of these convictions and it cancelled the policy. Mr C complained unsuccessfully to the firm and eventually he came to us.

complaint upheld

After Mr C had visited the broker, the broker sent him a printed statement. This incorporated the questions the broker had asked and Mr C's replies. The statement included a heading '*Non-motoring convictions (relating to you or any other permanent resident)*'. The space under this was left blank.

When we asked Mr C why he had not disclosed the convictions when he applied for the policy, he said he had told the broker about them. The broker denied this.

We accepted that the existence of the convictions constituted material information that the firm needed in order to assess whether it would insure Mr C. We also accepted that the firm would not have insured him if it had been aware of his convictions. However, there was no evidence that he had deliberately withheld information when he applied for the insurance.

There was a space for details of non-motoring convictions on the printed statement that the broker sent Mr C. But there was no evidence that the broker had asked about convictions during their meeting.

Mr C had not been asked to check the statement, or even to sign and return it. And neither the broker nor the firm had asked Mr C to sign a proposal form. We therefore considered the sale to have fallen short of good industry practice.

Mr C had not attempted to conceal his convictions from the firm's investigator when the firm was looking into his claim. We concluded that his failure to tell the firm about the convictions when he applied for the insurance was innocent. So we required the firm to meet the claim and to pay him £200 for maladministration, since it had cancelled his insurance without having any proof that he had failed to answer its questions.

■ 25/16

income protection – non-disclosure – duties of a 'company director' – whether firm entitled to cancel insurance for non-disclosure of manual duties

When Mr F applied for income protection insurance, he said he was a '*company director*' and described his work as '*inspecting construction sites and training workers in health and safety awareness*'. Asked whether his job involved '*manual or outdoor duties*', he answered '*no*'.

A year later, poor health forced him to stop work and he made a claim on the policy. In answer to a question on the claim form about the physical requirements of his work, Mr F said that 30% of his normal working day consisted of driving, 30% climbing ladders, 5% carrying heavy items, 5% lifting heavy items, 10% crawling or kneeling and 20% other physical activity. The firm cancelled the policy. It already knew that Mr F had a heart valve disorder and it said it would never have issued the policy if Mr F had disclosed the true extent of his physical activities at work.

complaint rejected

Mr F admitted that he *did* carry out all of the physical activities he mentioned on the claim form. But he said that – on reflection – when he had completed the form, he had overestimated the amount of time he spent on these activities.

In our view, the way in which Mr F answered the firm's questions when he first applied for the policy gave the clear impression that he was not involved in any outdoor or manual work. Mr F had given minimal information about his work, even though the form included a space for applicants to describe their duties fully.

Because of Mr F's medical history, if the firm had known that he was involved in heavy manual duties on construction sites, it would not have provided insurance. We concluded that his answers had misled the firm and that it was justified in cancelling the policy from its start date.

■ 25/17

critical illness – non-disclosure – continuing duty of disclosure until policy in force – whether failure to advise firm of medical referral innocent – whether firm took sufficient steps to make customer aware of continuing duty

In March 2000, Mr M applied to the firm, through a financial adviser, for life assurance to protect his mortgage. He rang the firm on 9 May, as he still had not heard whether his application had been successful. He was told there had been a delay as the firm was still waiting for his medical records from his GP.

The firm finally wrote to Mr M's adviser on 23 May, saying it had accepted the application and enclosing a letter of acceptance. This letter reminded Mr M that he had a duty to notify the firm if there had been any change in his details since he applied for the policy.

... he had a duty to notify the firm if there had been any change in his details ...

The policy took effect on 12 June 2000. Some nine months later, Mr M contacted the firm to say that he had been diagnosed with prostate cancer and that he wished to claim under the policy for the full critical illness benefit of £30,000.

When the firm obtained a report from Mr M's GP, in connection with the claim, it saw that Mr M had consulted his doctor on 3 May 2000 with symptoms for which he was referred to a cancer specialist. The firm cancelled Mr M's policy. It said that when he received the acceptance letter, he should have disclosed the fact that his GP had referred him to a specialist.

Mr M said that he had never received an acceptance letter. He also argued that, since the firm had not received his GP's notes until after the consultation had taken place, he had assumed it was aware of the situation.

complaint upheld

We were satisfied that Mr M had not received the acceptance letter. The adviser had failed to forward it to him and it was later found in the adviser's files.

The firm insisted that it was irrelevant whether or not the adviser had sent Mr M the letter. It said its application form made it clear that anyone applying for insurance had to tell the firm of any changes of circumstances that arose after they had completed the form. We did not agree that the application form made this sufficiently clear.

We also noted that although the firm had told Mr M on 9 May 2000 that it was still waiting to receive his records from his GP, it had actually received them in early April, some weeks before the consultation in question took place.

We considered that the firm's practice of sending the acceptance letter to the customer's adviser, without requiring the adviser to post it on, was likely to cause confusion and was not consistent with good industry practice.

We concluded that Mr M had not deliberately failed to disclose details of his referral to a specialist. We required the firm to meet the claim and to pay Mr M £200 compensation for distress and inconvenience.

■ 25/18

household buildings – non-disclosure – subsidence – whether policyholder's answers were to 'the best of his knowledge'

When Mr W took out a new household insurance policy in March 2001, he stated, in response to a question from the firm, that his house had never been affected by movement of any kind, such as subsidence, heave, landslip or settlement. In August that year, Mr W notified the firm that cracks had developed in the walls of his house. The firm's loss adjuster concluded that the damage was due to subsidence. The firm asked Mr W for a copy of the structural survey he had obtained before he bought the house in 1997. The surveyor's report concluded '*The property is affected by structural movement evident in severe cracking to the gable elevation. This appears significant and likely to be progressive.*'

During the firm's enquiries, it also became aware of a report on the house that had been prepared in 1996, shortly before Mr W bought the property. Although this recommended repairs to the drains, they had never been carried out.

The firm cancelled the policy, saying it would never have been issued if the firm had known about the existing problems.

Mr W said the firm should not have done this, as he had answered the questions on the application form correctly, to the best of his knowledge.

complaint rejected

When we inspected the application form, we noted that the firm had asked a very clear question about any incidence of subsidence or other kinds of movement. However, Mr W's reply had not fairly represented the true picture and had made no reference to the findings of the surveyor he consulted before he bought the house.

We concluded that the firm had acted correctly in cancelling the insurance.

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This year we will again be running a series of conferences in various centres around the UK. For more information, look on our website or complete this form, ticking the event(s) you are interested in, and return it to us.

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Reference number 178

ask ombudsman news

your questions answered

must I 'exhaust' the firm's procedures before coming to the ombudsman?

Q I have a complaint about my savings account. But the firm's complaints procedure seems very long and complex. There are four separate stages, starting with my local branch and ending up at the head office and the firm's chief executive. The firm says I have to 'exhaust' this procedure and get a 'deadlock letter' before I come to the ombudsman. Is this true?

A Before we can look at your complaint, you must have given the firm the chance to resolve the matter. Under the complaints-handling rules of the Financial Services Authority (FSA), a firm has a maximum of eight weeks to try and resolve a complaint unless, for special reasons, the FSA has given it a special waiver to extend the time limit.

This time limit applies no matter how many stages a firm has in its own complaints-handling process. After eight weeks, consumers have the automatic right to bring the complaint to us if they do not want to allow the firm any more time. They do not have to wait for a 'deadlock letter' from the firm before doing this.

Under the FSA rules, a firm must tell its customers of their right to take their complaint to the ombudsman. It must do this *either* when

- it sends its 'final response' (a formal letter setting out the outcome of the complaint) or eight weeks after it received the complaint, if it has not yet been able to send a 'final response' (and has therefore 'run out of time').

Exceptionally, if in our view there was a good reason why the firm could not deal with the complaint straight away, we might decide to allow the firm more time before we become involved.

can I get a copy of the rules that the ombudsman service follows?

Q Where I can obtain a copy of the Terms of Reference under which the ombudsman service operates?

A The Financial Ombudsman Service doesn't have Terms of Reference, as such. We operate under rules set down by the Financial Services Authority (FSA). You will find details of our jurisdiction and procedures in the 'Complaints Sourcebook' which forms a part of the FSA's Handbook of rules and guidance. Chapter 2 sets out our jurisdiction and Chapter 3 sets out our complaints-handling procedures.

You can access the 'Complaints Sourcebook' via the FSA's website at www.fsa.gov.uk