ombudsman news

April 2003 issue 27

essential reading for financial firms and consumer advisers

in this issue

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

first impressions

Sue Slipman (pictured left), newly-appointed chair of the Financial Ombudsman Service, shares her first impressions of the ombudsman service.

I have been chair of the Financial Ombudsman Service for less than two months. So it would be absurd to suggest that I have yet learnt everything I need to know. The first period in any new job brings its challenges – and one of them is climbing a steep learning curve. But newcomers often have initial insights that are too easily lost as over time they get more immersed in the organisation. So, perhaps I have been here long enough to share my first impressions with you.

Actually, my very first impressions of the ombudsman service were formed months ago when I was looking through its website and reading copies of its annual reports and ombudsman news. I was impressed with the openness and accessibility of these materials and the even-handed nature of the ombudsman service approach. An organisation that speaks in the plain language of the non-expert rather than in acronyms and jargon is a joy. My second impressions were formed by talking to stakeholders – such as those working in consumer advice agencies – who see the ombudsman service as genuinely listening to them and trying hard to respond to their needs.

When I arrived in post I found a well-managed, professional and cost-effective organisation where a great deal has been achieved in a short space of time. Bringing together the different organisational cultures of the six previous schemes into a coherent whole was no mean feat in itself. But I consider it truly admirable to have done this at the same time as undergoing a significant amount of internal change. This change was needed to create sufficient flexibility to cope with the wide-ranging and unpredictable levels of external demand. And on top of this, the ombudsman service has successfully managed a 44% increase in its caseload over this past year.

The Financial Ombudsman Service is now at the end of its initial – set-up – phase. In my view, it has met all these challenges and established its independence in a positive way. But the retail financial services industry is likely to go through some significant changes over the next few years. In turn, these changes will bring tough new challenges for the ombudsman service as it strives to settle disputes between the industry and its customers.

At present I am still in listening and learning mode. I am sitting in with different teams of staff to learn more about their work. I am also getting out and about meeting representatives of the industry, as well as consumer and other interest groups, listening to the issues they want to raise and finding out what they expect of the ombudsman service.

Looking ahead, the job for the board and me is to give strategic support to the management team who run the organisation so that – building on the very sound foundations already established – the ombudsman service can continue to anticipate and respond to external changes and meet the many demands that I'm sure lie ahead of us.

Sue Slipman
Chair – Financial Ombudsman Service

The chair and members of the ombudsman service board have no involvement in considering individual complaints. Their job is to ensure that the ombudsman service is properly resourced and is able to carry out its functions effectively, impartially and independently – free from any control or influence by those whose disputes we resolve.

how to contact us

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1 new powers for the ombudsman service

1 April 2003 saw the voluntary jurisdiction of the Financial Ombudsman Service opened up to mortgage brokers, insurance brokers and others.

background

Since we gained our own powers on 1 December 2001, we have had:

- a compulsory jurisdiction, which some firms must join; and
- a voluntary jurisdiction, which some firms can choose to join.

The compulsory jurisdiction covers:

- firms that were covered by one of the predecessor ombudsman schemes, for complaints about events before 1 December 2001; *and*
- firms that are regulated by the Financial Services Authority (FSA), for complaints about events from 1 December 2001.

As now extended, the voluntary jurisdiction is open to:

- firms that were covered by one of the predecessor ombudsman schemes but are not regulated by the FSA, for complaints about events from 1 December 2001;
- firms that are now regulated by the FSA but were not covered by one of the predecessor ombudsman schemes, for complaints about events before 1 December 2001;
- insurance and banking firms directing services at the UK from the European Economic Area, whenever the events occurred;
- mortgage lenders that are not regulated by the FSA, mortgage brokers and insurance brokers, whenever the events occurred.

The voluntary jurisdiction has been open since 1 December 2001 to mortgage lenders that are not regulated by the FSA. As the FSA is to regulate mortgage brokers from October 2004, and insurance brokers from January 2005, we opened the voluntary jurisdiction to them from 1 April 2003.

what has changed?

The extension of our voluntary jurisdiction means firms that carry out mortgage and/or general insurance broking activities can now apply to join the voluntary jurisdiction, to have unresolved complaints about those activities dealt with at the Financial Ombudsman Service.

And all FSA-regulated firms that were not covered by one of the predecessor ombudsman schemes can also join the voluntary jurisdiction to cover complaints about events:

- before 1 December 2001; or
- before the activity became regulated, if later.

how much will it cost?

Most firms pay an annual levy, based on their market share, plus a fee of £360 for each case we need to consider. But there are different arrangements for mortgage broking and insurance broking. These do not attract any levy, but the case fee is £600.

For further information about the voluntary jurisdiction, costs and how to join, please look on our website at www.financial-ombudsman.org.uk/vj.htm. If you do not have internet access, contact David Southgate at the Financial Ombudsman Service on 020 7964 0572 for further information.

2 banking – direct debit guarantee

Direct debits are now a major part of daily life, with many people using them each month to pay their household bills. The direct debit guarantee is a powerful safeguard for customers. So it's important that firms make sure their staff understand its provisions.

Unfortunately, many do not. Here are some of the things firms have told customers (incorrectly) when problems have arisen:

> *'We don't operate the direct debit guarantee.'*
>
> *'You'll have to contact the originating company for a refund.'*
>
> *'We need a month's notice to cancel a direct debit.'*
>
> *'The guarantee doesn't apply – because you haven't suffered a loss.'*

If you pay by standing order, it is up to your bank to send the payment. If you pay by direct debit, it is up to the payee's bank to call for the payment, but you will rightly look to your own bank/building society to ensure the smooth running of any direct debits. Mistakes and errors are covered by the direct debit guarantee.

The direct debit guarantee applies to *all* banks and building societies taking part in the direct debit scheme. It says that:

- If there is a change in the amount to be paid or the payment date, the person receiving the payment (the originator) must notify the customer in advance.
- If the originator or the bank/building society makes an error, the customer is guaranteed a full and immediate refund of the amount paid.
- Customers can cancel a direct debit *at any time* by writing to their bank or building society.

banking case studies – direct debit guarantee

■ 27/1

bank pays out under direct debit that customer had cancelled

Mrs B enrolled her son at a fee-paying school and signed a direct debit form, authorising the school to claim the school fees direct from her current account. But Mrs B removed her son from the school only a few weeks after he had started there.

She cancelled the direct debit and made separate arrangements to pay the school what she considered to be due. However, this was less than the school thought it was owed. A couple of months later, the school claimed an extra term's fees under the direct debit, because it said that Mrs B had been required to give a term's notice. When Mrs B's bank paid the sum requested, even though she had cancelled the direct debit, Mrs B complained and asked the bank to pay the money back.

The bank argued that she was not entitled to have her money back. It said she had not suffered a loss as a result of its making the payment because she owed the school the money in any event.

complaint upheld

It was irrelevant whether Mrs B owed money to the school. What *was* relevant was that her bank had paid out under a direct debit that she had cancelled. So, under the direct debit guarantee, once Mrs B notified the bank of its error, it should have refunded the money straight away. It wasn't for the bank to decide whether or not Mrs B owed the money to the school.

■ 27/2

bank pays out after direct debit cancelled – direct debit guarantee not applicable

Mr F set up a variable direct debit for payments to his stockbroker. He generally placed an order for shares around the middle of each month and the stockbroker collected the payment through the directdebit at the end of the month.

Eventually he decided to end this arrangement and cancelled the direct debit mandate. But the very next day, the stockbroker requested £50,000 via the direct debit and the bank paid. Several months after this, Mr F complained to the bank and claimed a refund of the money under the direct debit guarantee.

The bank refused, saying that to repay Mr F would result in his 'unjust enrichment'. This was because he already had the shares to which the payment related, even though their value had since gone down.

complaint rejected

In assessing this case, we looked at the terms of the direct debit guarantee. Customers can cancel a direct debit *at any time* by writing to their bank. Mr F had written to his bank and cancelled the direct debit the day before the payment was made.

So if the bank had paid the stockbroker under the direct debit, it must have been in error because he had cancelled the direct debit. And if the bank makes a payment in error the customer is entitled to a *full and immediate* refund.

But in this case we found that the stockbroker had Mr F's authority to debit his account independently of the direct debit. It was in the terms and conditions of his contract with the stockbroker that the costs of each deal would be taken from his nominated account. So that gave the bank authority to release money from his account to the stockbroker, whether or not this was done via a direct debit, and we did not uphold the complaint.

■ 27/3

bank's failure to transfer direct debits correctly to new accounts – customer does not notice for ten years – complaint outside time limits

For some years, Mr and Mrs C had a joint bank account, out of which they paid a number of direct debits. But eventually they decided to set up their own separate accounts and they divided their direct debits between these two accounts.

Mrs C frequently shopped at a large department store for which she had a store card. The direct debit for this card should have been transferred to her new account but, in error, the bank transferred it to her husband's account.

Mr C remained unaware of this for ten years until, after falling out with the bank over another matter, he took a close look at the direct debits on his account. He then found that he had unwittingly been funding all his wife's spending at the store for the past ten years.

Mr and Mrs C both blamed the bank for the error and Mr C complained to the firm, saying that under the terms of the direct debit guarantee it was responsible. When the firm rejected the complaint, Mr C came to us.

complaint rejected

We were unable to deal with the complaint because it was outside our time limits. For us to consider a complaint, the event complained about must have happened within six years, or within three years from when the customer ought reasonably to have been aware that there was cause for complaint. In this instance, the bank's failure to transfer the direct debit correctly had happened more than six years ago.

But even if this had not been the case, we would not have upheld the complaint. The payments had been coming out of Mr C's account for many years and he received statements every month, so he had ample opportunity to spot the mistake and notify the bank. In the circumstances, we did not think it reasonable to require the firm to refund the payments as he had requested.

■ 27/4

bank pays out after fradulent direct debits set up – customer claims refund plus payment for consequential losses

When withdrawing money from his account via a cash machine, Mr M was very surprised to find he had become overdrawn. He checked his bank statement and found that two directdebits had been set up on his account without his knowledge.

The banklooked into this and found that a fraudster had somehow obtained Mr M's bankdetails and set up direct debits to repay a car loan and take out car insurance. The firms that were taking the payments for the loan and the insurance were both members of AUDDIS(Automated Direct Debit Instruction Service). This meant they could establish direct debit instructions without needing to send paper instructions to Mr M's bank.

In the past, a bank would always have received instructions to set up a direct debit in the form of a document signed by the customer. But increasingly, firms are carrying out these transactions electronically. This saves time and helps reduce costs but makes it less easy to spot a fraudulent instruction.

... he had ample opportunity to spot the mistake and notify the bank..

Although Mr M's account number and the bank's sort code were correct, the fraudster had given an incorrect account name. This should have alerted the firm that something was not quite right and it should have made further enquiries before proceeding.

The bank readily accepted that, in accordance with the direct debit guarantee, it should refund the direct debits incorrectly paid. But it refused to compensate Mr M for the additional losses he claimed to have suffered. He had a savings account with the firm, which fed his current account. He wanted to claim for loss of interest on the money that would have remained in his savings account if the firm had not paid out via the fraudulent direct debits.

He also said that since his earnings came from abroad, the firm's error meant he had to make extra transfers from his foreign bank account to keep his account with the firm in credit. The unfavourable exchange rate and the foreign bank's charges meant that these transfers were costly.

When the firm to refused to compensate Mr M for these additional losses, he came to us.

complaint settled

Mr M argued that the bank should cover these losses under the direct debit guarantee. He said its purpose was to protect account holders who had set up direct debits from mistakes in the way they were operated.

In this case, as Mr M had not authorised a direct debit, the direct debit guarantee was not strictly relevant. However, after we discussed the position with the firm, it offered Mr M a goodwill payment to cover his consequential losses.

3 insurance complaints involving non-disclosure

Following on from the insurance case studies involving non-disclosure featured in the February 2003 edition of *ombudsman news*, this article summarises our approach when dealing with such cases.

It is widely recognised that applying the strict legal position in non-disclosure cases can result in unduly harsh outcomes. The Association of British Insurers (ABI) has sought to address this in its statements of practice, which provide important safeguards for policyholders. The ABI's 'General' and 'Long-Term' statements of practice give us a helpful starting point when we consider what is fair and reasonable in individual non-disclosure cases.

In our experience, these disputes span a wide spectrum of circumstances, from deliberate attempts to mislead through to genuine misunderstandings. The position at either end of this spectrum is clear.

fraudulent or deliberate non-disclosure

If we consider that a policyholder's non-disclosure (or misrepresentation) involved a material fact, induced the firm to offer the policy (on the relevant terms), and was fraudulent or clearly deliberate, then the firm can decline to meet the claim, as well as 'voiding' the policy 'from inception' (cancelling it from its starting point). It can also decline to return the premiums and seek to recover money it has paid out to the policyholder in relation to previous claims under that policy.

innocent non-disclosure

Conversely, if the policyholder's non-disclosure is innocent, then the firm should meet the claim in full, regardless of whether, if it had known of the matter that was not disclosed, it would have increased the premium or refused to offer cover.

We are likely to conclude that non-disclosure is innocent if the questions posed by the firm were not clear (or did not clearly apply to the fact(s) in question). We are also likely to conclude this if we consider it was reasonable for the policyholder to have overlooked the fact(s) that he or she failed to disclose. This could be the case, for example, with minor childhood ailments or minor motoring offences that occurred more than four years earlier.

Of course, policyholders have no duty to disclose information that they are not, in fact, aware of.

... applying the strict legal position in non-disclosure cases can result in unduly harsh outcomes.

Inevitably, most of the disputes we see lie somewhere between these two extremes. In dealing with them we try to distinguish between those cases where the policyholder seems to have been reckless, and those where the non-disclosure seems more the result of a genuine oversight or inadvertent error.

inadvertent non-disclosure

We are likely to conclude that non-disclosure was 'inadvertent' if it seems to have resulted from an understandable oversight or moment of carelessness, rather than from any deliberate act. In such cases, the matters that the policyholder failed to disclose are likely to be minor, distant in time or otherwise easy to have been overlooked.

We try to take a reasonable approach to the degree of care that policyholders should exercise, taking account the nature of the product and the circumstances of the transaction.

... much depends on the details of each individual case.

In making this assessment, much depends on the details of each individual case. We look, for example, at the circumstances surrounding the giving of information (including the stage at which the information was provided and whether an adviser transcribed the information).

The fact that an adviser or other intermediary completed a form incorrectly is not, in itself, reason for upholding a case against an insurer (although it may give rise to a justified complaint against the intermediary) but it *is* a factor we can take into account here.

We will look, too, at how clear and concise the firm's questions were (bearing in mind the issue that is the subject of the alleged non-disclosure). We are unlikely to give much weight to 'catch-all' questions or to questions that require significant and wide-ranging disclosure of minor matters that the firm knows will not, in practice, be relevant to its assessment. If, for example, it asks medical questions requiring details of *all* the policyholder's visits to a doctor over the past five years, then it is probably impractical to expect the policyholder to provide a fully accurate response.

We may consider whether the firm gave any warning about the consequences of giving false or incomplete information, and how clear such a warning was.

We may also look at the degree to which the policyholder should have been aware of the information he or she was asked to provide, and whether the policyholder was likely to have recognised the significance of this information to the firm. For health-related insurance, for example, we would expect policyholders to be aware of the firm's likely interest in recent major illnesses, while for car insurance, we would expect the policyholder to be aware of the need to disclose significant convictions like dangerous driving or drink-driving.

So, the more recent and significant an event is, the less likely we are to conclude that any non-disclosure or misrepresentation was simply an oversight. Even here, however, we would expect the firm to ask clear questions designed to obtain the information it requires.

If we conclude that the policyholder's non-disclosure was inadvertent, then we will lookat whether a decision by the firm to cancel the policy, decline the claim and return the premiums would produce an outcome that is manifestly unfair.

The outcome is likely to be unfair if:

- the firm would have offered cover (albeit on somewhat different terms) if it had known of the matter that the policyholder failed to disclose; *and*
- the loss/claim is not associated with that matter.

... we expect the firm to ask clear questions, designed to obtain the information it requires.

In such cases we may adopt a 'proportional' approach, where we calculate the proportion of the premium that was paid and base the settlement on that proportion. If the firm would have added an exclusion or amended a term, then we calculate the settlement as if that exclusion or term was in place. Normally, we would not require the firm to reinstate the policy, and we would permit it to deduct any refund of premiums from the settlement.

'clearly reckless' non-disclosure

We are likely to conclude that non-disclosure is 'clearly reckless' if a policyholder appears not to have had any regard for accuracy when completing the proposal form. Typically, in such cases, the matters the policyholder failed to disclose will be of significance, and will have been well-known by the policyholder. We will probably have found it difficult to believe that the policyholder could simply have overlooked these matters. But we will not have found sufficient grounds to conclude that the non-disclosure was deliberate.

In such cases, we consider that the firm can decline to meet the claim and can cancel the policy from its start date. The firm should normally return the premiums paid. It can also seek to recover whatever it may have paid the policyholder in relation to previous claims made under the policy.

insurance case studies – non-disclosure

■ 27/5

critical Illness – non-disclosure – inadvertent – whether proportional settlement appropriate

Mr C's wife had suffered from a series of ear infections that resulted in some loss of hearing. She wore a hearing aid and had seen a consultant. Both she and the consultant viewed her condition as a minor disability.

When Mr C applied, through an intermediary, for a critical illness policy for himself and his wife, the form included the following questions.

> *'Have you, within the last five years, seen a doctor or been recommended to see a doctor for any of the following: a medical or surgical investigation or operation, treatment, test or advice?'*
>
> *'Are you aware of any condition for which you may need to see a doctor?'*
>
> *'Have you ever suffered from or had investigations for: eye disease, loss of speech, loss of hearing or eartrouble, disorder of the brain (including benign brain tumour), disease of the nervous system, anxiety, depression, back orspinal trouble, joint problems, arthritis or any form of paralysis?'*

The intermediary completed the form on behalf of the couple, answering 'no' to all of these questions, and the firm issued the policy.

Just over a year later, Mrs C was diagnosed with leukaemia and she died shortly afterwards. The firm rejected the substantial claim that Mr C made under the policy. Its reason was that when Mr C applied for the policy, he had not disclosed his wife's ear condition. The firm said that if it had known about this it would have imposed an exclusion relating to her hearing.

complaint upheld

We concluded that Mr C's failure to disclose the ear condition probably resulted from an inadvertent oversight. We thought it would be unreasonable and disproportionate for the firm to reject the claim. The exclusion would not, in any event, have affected Mrs C's ability to claim following the discovery of her leukaemia. In the circumstances we required the firm to meet the claim in full.

■ 27/6

farm buildings/machinery/produce – fire damage claim – non-disclosure of previous losses/claims – whether firm justified in voiding the policy and not accepting the claim

In July 2002, Mr and Mrs J arranged farm insurance cover through an intermediary.
In answer to a question on the proposal form about previous losses or claims, they disclosed one claim (for losses following a straw fire in 2000). The firm issued the policy.

Only a month later, Mr and Mrs J made a claim when a fire resulted in extensive damage to their farm buildings, machinery and produce.

The firm's investigations revealed that Mr and Mrs J had a history of losses and claims in recent years. They had made a number of claims during the period from October 1993 to February 2001. And they had a total of four substantial losses and claims within the previous five years (one being the straw fire in 2000 that they had disclosed). The firm viewed the couple's failure to provide full disclosure of their losses and claims history as a misrepresentation, entitling it to cancel the policy.

4 investment case round-up

complaint rejected

Mr and Mrs J were in dispute with the intermediary about the circumstances in which the proposal form was completed, signed and submitted. It was beyond our role to determine that dispute. However, we did conclude that, in completing part of the proposal form and sending it to the firm, the intermediary was acting for Mr and Mrs J, and not as the firm's agent.

We saw no evidence that, at the time of proposal, the firm was made aware of the couple's history of losses and claims, other than the one incident Mr and Mrs J disclosed.

It was Mr and Mrs J's responsibility to ensure that they gave complete and accurate information in response to the questions in the proposal form. We concluded that their failure to provide the full history of their substantial losses and claims within the previous five years had induced the firm to provide cover. So the firm was justified in cancelling the policy from its start date and rejecting the claim.

... it would be unreasonable and disproportionate for the firm to reject the claim.

a selection of some of the complaints we have dealt with recently on a range of investment matters.

■ 27/7

firm fails to act on customer instruction to cancel monthly payments – customer's claim for cost of calls from abroad to put things right

In early May 2002, Mr S instructed the firm to cancel his regular monthly payments into his Individual Savings Account (ISA). He would shortly cease to be a UK taxpayer and, before this happened, he wanted to use up his tax-free savings allowance by paying a lump sum into the ISA.

The firm wrote to Mr S to confirm it had cancelled his monthly payments. But the following month, while he was on holiday in the Caribbean, he attempted to make his lump sum investment online. An online message told him to contact the firm as it was unable to accept his payment.

Mr S had to make a number of telephone calls to the firm (from his hotel) before he discovered that it had not cancelled the monthly payments. This was why he had been unable to arrange the lump-sum investment. The firm accepted its error and attempted to put things right. But in doing so it collected too large a sum from his bank account. Mr S then had to telephone his bank several times (again from his hotel) in order to establish exactly what had gone wrong.

When Mr S returned to the UK, he contacted the firm to complain. He asked it to reimburse him for the cost of the calls – approximately £285. The firm refused so Mr S brought his complaint to us.

complaint upheld

Mr S said that each time he had telephoned the firm, he had made it clear that he was calling from the Caribbean. At no stage had it offered to call him back, even though he had needed to make a number of calls before being put through to the correct member of staff. And he said that on several occasions he had been kept 'on hold' for some minutes.

In the circumstances, we thought it was right for the firm to compensate Mr S for the cost of his calls and we asked it to pay him £300. Mr S accepted this offer.

■ 27/8

investments fall in value – customer claims advice was inappropriate

After Mr and Mrs G's son died suddenly in February 2000, they inherited £38,000 from his estate. They put this money in their current account with the firm. Shortly afterwards, the firm contacted them several times, by telephone and by letter. It asked if they wanted financial advice so that this money could 'do better' for them.

Mrs G claimed that she told the firm she was unable to think about such matters so soon after her son's death, and she said that for a time the firm's calls and letters stopped. However, it was not long before the firm contacted the couple again. In April 2001, Mr and Mrs G finally agreed to meet an adviser at the firm's premises. However, after Mrs F became upset, the meeting was abandoned.

A second meeting was arranged two months later, this time with a different adviser, but again at the firm's premises. The adviser noted on the 'fact find' that the couple's attitude to risk was rated '3' on a scale rising from 1 to 5. He recommended investing £24,000 in the firm's unit trusts and the remaining £14,000 in two of its maxi-ISAs.

After the adviser had explained how the policies worked and what the risks were, Mr and Mrs G completed and signed the application forms. They also completed and signed a separate statement, confirming that they understood they were '*underno obligation to buy or take up any of the recommendations made*'.

The following day, the adviser wrote to the couple urging them to re-read the product literature he had given them and to make sure they were happy with his recommendations. The letter also stated the couple's cancellation rights.

Mr and Mrs G went ahead with the recommended investments. The following year, the firm automatically transferred £14,000 from the couple's unit trust holding into two further maxi-ISAs, to take advantage of the ISAs' tax-free status. However, after the ISA investments fell in value, Mrs G complained that she had been wrongly advised. When the firm did not uphold her complaint, she referred the matter to us.

complaint rejected

Mrs G held the firm fully responsible for the ISAs' fall in value. She said that if the firm had not been so persistent in urging her to take financial advice, then the money would still be safe in her current account. She told us that her husband did not understand financial matters and left decisions about money entirely to her. And she said she had already decided, before meeting the adviser, that she would agree to whatever he suggested, simply so she could get the firm 'off her back'.

Mrs G did not deny that the adviser had explained everything in detail. But she claimed that, because of the emotional state she was in at the time, she had not been capable of making a decision. She said she had not known what she was doing when she signed the forms.

We noted that the investments had been taken out some 16 months after the death of the couple's son. And although we felt it would have been reasonable for the adviser to have been aware of the couple's bereavement, there was no evidence to suggest that Mrs G had been in such a state at the second meeting that she 'did not know what she was doing', as she had claimed. The meetings had taken place at the firm's premises and not at the couple's home. And while we accepted Mrs G's assertion that her husband was not financially astute, he had been present at the meetings and would have provided moral support.

The firm had been quite persistent in its initial approaches to the couple, but there was no evidence that it had exerted undue pressure on them, either to meet an adviser or to take up any of his recommendations. The firm had followed all the correct procedures and there had been nothing unsuitable about its recommendations, in view of the information recorded on the 'fact find' about the couple's circumstances and requirements. We did not uphold the complaint.

■ 27/9

savings policy – early withdrawal incurs penalty – firm's right to impose a market value adjustment – whether policy suitable for customer's needs at time of sale

Acting on the firm's advice, Mrs D took out a savings policy. But eight years later, when she withdrew some of her savings, she was very surprised to be told by the firm that she would have to pay a penalty. When the firm rejected her complaint, she came to us.

complaint upheld

We looked at the 'fact find' that the firm completed at the time of the sale. This noted that Mrs D said she would need access to her savings before the policy had been in existence for ten years.

The policy that the firm recommended was one where savers could withdraw their money without penalty after ten years, but might have to pay a penalty if they needed access to their savings before then. This was because the firm reserved the right to charge a market value adjustment. And although, at the time of the sale, the firm had not imposed such a charge for some years, it had since begun to do this.

There was no doubt that the firm had the right to impose the market value adjustment. And the literature it had given Mrs D at the time of the sale made it clear that it might do this. However, we thought that this particular policy had been mis-sold as it had clearly been unsuitable for Mrs D's needs at the time of the sale. The firm agreed to give Mrs D a full refund of her premiums, together with interest.

■ 27/10

share portfolio managed by firm – whether firm ignored customers' instructions

Mr and Mrs T had a 'discretionary management' agreement with the firm that was managing their share portfolio. The firm had recorded their investment objective as 'balanced' (defined as requiring 'reasonable long-term overall return') and it noted that the couple were prepared to take a 'moderate' level of risk.

... she said she had not known what she was doing when she signed the forms...

Early in the year 2000, the firm greatly increased the proportion of the couple's portfolio that was invested in telecommunications, media and technology-related companies.

In December of that year, Mr and Mrs T complained to the firm. They said the firm had been negligent, had ignored their specific instructions and raised the level of riskin the portfolio beyond what was acceptable to them. When the firm rejected their complaint, they came to us.

complaint rejected

It is always important not to view complaints about investment performance with the benefit of hindsight, but to consider what was known in the marketplace at the time.

When the firm made the investment concerned, telecommunications, media and technology shares were widely considered an importantarea for investment. Any fund managers not having a significant weighting in this area would have been subject to criticism. We noted that, in this case, the proportion of funds that the firm allocated to these shares was very much in line with that allocated by managers of similar funds atthat time.

Seen with the benefit of hindsight, the firm's decision to move into these shares could be regarded as ill-timed (because of their subsequent decline). However, that did not constitute negligence on the firm's part. The firm had acted in line with Mr and Mrs T's stated attitude to risk, and we rejected the complaint.

■ 27/11

share portfolio managed by firm – whether firm's investment in line with customer's requirements

In the autumn of 2000, Mr M set up a 'discretionary management' agreement with the firm to manage his portfolio. Mr M's investment objective was to obtain capital growth and his attitude to risk was 'medium'.

Mr M became concerned when he discovered that 80% of the initial portfolio was invested in technology, media and telecommunications shares. He drew the firm's attention to this apparent imbalance and complained that his portfolio had not been managed in line with his agreed risk profile or investment strategy. The firm dismissed his complaint, so he came to us.

complaint upheld

As in all cases of this type, it is important to look at market circumstances at the time the investment was made. We noted that at the height of the stock market in 2000, telecommunications, media and technology shares made up approximately 35% of the FTSE 100 index. In view of this, we thought the firm had invested an extremely high proportion of Mr M's portfolio in these shares. Given Mr M's objective and his risk profile, we thought a proportion of 35% would have been more reasonable.

We discussed the matter with the firm. We explained that we have no set criteria to define a 'medium risk' portfolio as containing any set proportion of investments and that we look at each case individually, on its own merits. In this particular instance, we felt it appropriate to look at the FTSE index weighting. Initially, the firm refused to accept our view but we were eventually able to negotiate an amount in full and final settlement of the complaint, without the need to refer the matter for an ombudsman'sfinal decision.

working **together**

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.

Please send information about the *working* **together** conferences to:

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3 April	London	British Library	investment
☐ 2 July	London	British Library	insurance
☐ 17 September	Belfast	Europa Hotel	insurance, investment and banking
☐ 8 October	Leeds	Royal Armouries	banking
☐ 12 November	London	British Library	banking
☐ 4 December	Manchester	Manchester Conference Centre	insurance
☐ 10 December	Manchester	Manchester Conference Centre	investment

Please send this form (or a photocopy) to:
Graham Cox, Liaison Manager
Financial Ombudsman Service
South Quay Plaza
183 Marsh Wall
London E14 9SR

or email the details to: conferences@financial-ombudsman.org.uk

ask ombudsman news

your questions answered

Q ***Can you give me any tips and advice on saving and investing?***

A No. Our job is to settle disputes between individual consumers and financial firms, where consumers thinkthey have lost out.

The industry regulator, the Financial Services Authority (FSA), can help with general information about financial products and services. Look at the consumer help pages on FSA's website (www.fsa.gov.uk). The FSA also has a consumer helpline (0845 606 1234) for enquiries from consumers about personal finance and financial services in general, although it cannot give individual financial advice.

We list the websites of other organisations that give general information about consumer finance on the 'useful links' page of our own website (www.financial-ombudsman.org.uk).

mortgage mis-selling – when does firm's liability end?

Q One of my advice centre clients has a problem with a mis-sold mortgage endowment policy. He complained to the firm that sold the policy and it has agreed to pay him redress. However, this only runs up to the point where he switched his mortgage to another lender. The firm says its liability stops at that point. Is this right?

A The firm that sold the policy is responsible for the consequences of that sale, including that part of the mortgage to which the policy relates, even if the customer subsequently moves the mortgage to another lender. The firm should therefore have calculated redress up to the current date.

In addition, in accordance with the FSA's guidance on mortgage endowment complaints, the firm must calculate the amount of capital that the customer would have repaid after switching the mortgage, using the new lender's interest rates and method of interest calculation, not its own.

what's the latest on the voluntary jurisdiction?

Q I'm a mortgage broker and I think I remember the ombudsman service consulting on opening up its voluntary jurisdiction to cover mortgage advice. What's happened about this?

A Yes, we consulted last year on extending the scope of our voluntary jurisdiction. This included proposals to invite mortgage brokers (and insurance intermediaries) to join the ombudsman service before they are covered by us automatically (when statutory regulation by the FSA begins – in late 2004 for mortgage brokers and early 2005 for insurance intermediaries).

See page 3 of this edition for more information about our voluntary jurisdiction and how to join.