ombudsman
news

Financial Ombudsman Service

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essential reading for financial firms and consumer advisers

in this issue

about this issue

We begin this issue with a round-up of recent insurance cases involving alleged non-disclosure (the situation where a customer fails to reveal relevant facts when applying for – or renewing – an insurance policy). Our cases include that of a policyholder who was told – when he developed lung cancer – that the firm would not pay out under his critical illness policy because he had understated the extent of his alcohol consumption when he applied for the policy.

We look, too, at what banks should and should not do if they decide to tell a customer to close their account and make alternative banking arrangements. Among our case studies is that of a woman who asked for a £500 increase in her overdraft limit and was told by the firm that she should, instead, repay all her borrowing and close her account within seven days.

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

Finally, in our article – *what makes an investor 'experienced'?* we examine how some investment firms try to defend their inappropriate sale of an investment product by saying that the customer was *'experienced'*. Our wide range of case studies show firms citing – for example – a client's possession of windfall shares, or an inherited portfolio as *'proof'* that the client required a high-risk or sophisticated product.

services for firms and consumer advisers

our **external liaison team** can

- provide training for complaints handlers
- organise and speak at seminars, workshops and conferences
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phone **020 7964 1400**

email **liaison.team@financial-ombudsman.org.uk**

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- information on how the ombudsman service works
- help with technical queries
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insurance case studies – non-disclosure

In issue 46 of *ombudsman news* (May/June 2005) we outlined our position on *non-disclosure* in insurance complaints (the situation where a customer fails to reveal a relevant fact when applying for – or renewing – an insurance contract).

In this issue we set out some of the cases we have recently seen involving alleged non-disclosure of information by those applying for insurance.

48/1

life assurance – inadvertent non-disclosure

In December 2002 Mrs D applied to the firm for life assurance cover of £100,000 and for £35,000 critical illness cover. Two years later she was diagnosed with breast cancer. The firm refused to meet her claim. It said this was because she had not disclosed that for most of the early 1990s she had been suffering from, and received treatment for, back pain following childbirth. It considered the fact that she had not revealed this information to be *reckless* non-disclosure.

Mrs D told the firm that she had not thought she needed to disclose this information. She had thought the question on the firm's application form referred only to illnesses that had resulted in her taking time off work during the previous five years. It was more than five years since she had suffered from the back pain and she had never needed to take time off work because of it.

In response, the firm pointed out that it had asked whether she had '***ever** suffered*' from '*back or spinal trouble*'. Mrs D said she did not believe that back pain due to childbirth was '*back or spinal trouble*'. Unable to reach agreement with the firm, Mrs D came to us.

complaint upheld

After studying the questions that the firm put to Mrs D when she applied for insurance, we noted that – in answer to most of the questions – Mrs D needed to give information only about any medical consultations that had occurred during the previous five years.

However, the firm's question about '*back or spinal trouble*' was not limited to that five-year period. We felt that the wording of this question was potentially misleading. We accepted that Mrs D had genuinely misunderstood the question and that any non-disclosure was inadvertent.

However, we thought that that a careful reading should have made it clear that the firm wanted to know about *all* back and spinal trouble, regardless of how it occurred or when she had sought treatment for it. We took the view that Mrs D had been *slightly careless* in completing the application.

... the wording of the question was potentially misleading.

... the questions the firm had asked were clear and unlikely to be misunderstood.

Slightly careless or *inadvertent* non-disclosure entitles an insurer to rewrite the insurance policy. It should do this on the terms that it would have offered originally, if it had been fully aware of the applicant's medical history. In this case, the firm would have offered full cover except for back and spinal problems.

We required the firm to reinstate Mrs D's policy – adding the exclusion for back and spinal problems – and to deal with the claim on those terms. There was no connection between Mrs D's breast cancer and the exclusion clause so the firm had to meet her claim in full, together with interest.

■ 48/2

motor insurance – deliberate non-disclosure

Mrs G took out motor insurance by telephone. In answer to one of the firm's questions she said that she was the owner and keeper of the car. Mrs G asked for her son, A, to be added to the policy as a *named driver*.

The firm sent Mrs G details of all the information she had given and that it had relied on when deciding the terms of her insurance policy, asking her to let it know if anything was incorrect. Mrs G did not make any changes.

A few months later, after A was involved in a road traffic accident, the firm discovered that the car was registered in his name, not his mother's. The firm also found that the receipt for the car named A as the purchaser.

When the firm declined to meet the claim, Mrs G insisted that she was indeed the real purchaser and owner of the car. She said that the registration documents had been issued in her son's name by mistake. The firm told her it would not have insured the car at all if it had known that A was the owner. Unable to reach an agreement, Mrs G came to us.

complaint rejected

In our view, the questions that the firm had asked Mrs G when she applied for insurance were clear and unlikely to be misunderstood. And the firm had specifically drawn Mrs G's attention to the importance of accurate information and records.

Her failure to reveal that the car was registered in A's name had *induced* the firm to offer insurance. As it would not have insured the vehicle if it had been aware of the true position, the firm was entitled to *avoid* the policy (treat it as though it had never existed). We rejected the complaint.

... she had failed to disclose information about her health.

48/3

life and critical illness insurance – innocent non-disclosure

In January 2005, Mr E was diagnosed with lung cancer and put in a claim to the firm. Over six years earlier, in November 1998, he had taken out life and critical illness insurance cover worth £150,000.

After carrying out enquiries, the firm found that in September 1997 Mr E's GP had recorded that Mr E was consuming approximately 80 units of alcohol a week (21 units is the recommended maximum weekly amount for men). In February 1998 Mr E's alcohol consumption was up to 84 units a week but by July of the next year it had gone down to a more moderate 40+ units a week.

The firm said this differed greatly from the declaration Mr E made when applying for insurance. He had said then that his average alcohol consumption was five units a day (35 per week). The firm told him that if it had been aware of his drinking habits, it would have increased his premium by 200-300%. It refused to pay the claim and it returned his premium, *avoiding* the policy from its start date.

Mr E was extremely angry with the firm's response. He said that when he applied for the insurance he had answered all the firm's questions accurately. He pointed out that he had, at that time, been the sole carer for his newly-born daughter and could not have handled his responsibilities if he had been drinking as heavily as before. The firm still maintained that he was likely to have been drinking more than he had claimed.

complaint upheld

When the complaint was referred to us we found no evidence concerning Mr E's drinking habits at the time he applied for the insurance. The amount he had said he was drinking (five units a day or 35 units a week) was close to the 40+ units a week that his GP had recorded eight months later. Mr E had given a plausible explanation for his answer and the firm had no justification for disregarding it.

As there was no evidence of non-disclosure or misrepresentation, we required the firm to reinstate the policy and meet the claim. The firm agreed to pay the full sum of £150,000, plus interest.

48/4

household insurance – deliberate non-disclosure

Mr A applied for household insurance. After receiving his completed questionnaire, the firm agreed to put the policy into effect from 28 June 2002. They also sent him a statement of facts, setting out the information he had given. In response to a question asking whether he had any '*non-motoring convictions*' he had replied '*none*'.

The following day, Mr A contacted the firm to say that his house had been burgled. However, the firm was unable to get any response when it tried to arrange for its investigator to visit him at home. It heard nothing more until January 2003, when it was informed that Mr A was in jail.

In the course of the firm's subsequent investigations, it discovered that – at the time Mr A took out his policy – he had a criminal record for possession of drugs and resisting arrest. After making the burglary claim, Mr A had again been found in possession of drugs and was fined for resisting arrest. Finally, three months after the burglary, he was remanded in custody on a murder charge.

The firm told Mr A that it would not have insured him if it had been aware of his criminal record. It said it would *avoid* his policy and refund the premium. Mr A complained to the firm, saying he had not been asked about his criminal record. When the firm rejected his complaint he came to us.

complaint rejected

Unfortunately the firm was unable to produce the questionnaire that Mr A had completed when he applied for the insurance. It had only kept a copy of the *statement of facts*. This established that the firm was likely to have asked Mr A whether he had any non-motoring convictions.

Mr A admitted that he had kept a copy of the application form. However, he would not let us see it.

We concluded that although the firm was remiss in not keeping all the original paperwork, it had still been entitled to decide that Mr A had not answered its questions accurately, and to *avoid* his policy for *deliberate* non-disclosure.

48/5

household insurance – deliberate non-disclosure

Mr M's home was broken into in October 2002. The burglars had kicked in a panel in his back door and stolen many of his possessions. After accepting his claim for the stolen contents, the firm arranged for one of its approved contractors to replace the back door, even though the council owned the property and was responsible for repairing the damage.

Early the following year, shortly before Mr M's policy was due to expire, the firm sent him a renewal questionnaire. This asked for details of his current security arrangements. Mr M completed the form, confirming that his external doors had '*a mortise deadlock and security bolts or a key-operated locking system*'.

The firm renewed the policy, but within a month Mr M's property was broken into a second time. Again, the thieves had kicked in the rear door panel. When the firm discovered that the back door did not, in fact, have security bolts or a key-operated locking system, it refused to meet Mr M's claim. After complaining unsuccessfully to the firm, Mr M came to us.

... the firm would not have insured him if it had been aware of his criminal record.

complaint upheld

We accepted Mr M's explanation that he had assumed the firm's contractors had installed a door that met the firm's own security requirements. It was *careless* of him not to have double-checked this.

However, given that his other answers were accurate, we were satisfied that he had not *deliberately* or *recklessly* supplied an incorrect answer.

We also took two further factors into account. First, even if Mr M had realised that he needed to fit bolts, we did not believe they would have impeded the burglary. This was because the burglars had entered the house by kicking in the door panel. Second, even if Mr M had answered the question correctly, the firm would still have allowed him a reasonable period of time in which to change the locks. The burglary occurred within this timescale.

We upheld the claim. We did not think Mr M's failure to comply with the security condition was connected with the loss and we pointed out to the firm that it was good insurance practice to meet claims in such circumstances.

48/6
term life assurance and critical illness insurance – reckless non-disclosure

In December 2001, Mr and Mrs W applied for term life assurance and critical illness insurance. This included *own occupation* cover, which paid benefits if either of them was unable to continue with their *own occupation* because of permanent total disablement.

In response to the firm's questions they both stated that they were not '*currently receiving any medical treatment or attention or awaiting any medical or surgical consultation, test or investigation*' and had '*never had any medical or surgical treatment, including investigations, tests, scan or X-rays for any … mental or nervous illness (including depression) lasting for more than 3 months and/or requiring more than 10 consecutive days off work*'.

The firm accepted the application on the condition that, since signing the application, Mr and Mrs W had not '*suffered any illness or required any medical attention or changed occupation*'.

Two years later, Mrs W submitted a claim for rheumatoid arthritis but the firm refused to meet it. It said her medical records showed that she had been consulting a doctor for carpal tunnel syndrome and depression for about eight years before the date when she applied for the policy. She had not disclosed this.

In addition, she had never disclosed that – after she had submitted her application but a few days before it was accepted – she had seen her doctor for pain and swelling in her ankle. And she had failed to tell the firm that, before she received the firm's offer of acceptance, she had changed her occupation.

The firm said that although it was entitled to treat the whole policy as *void* from the start, it would not do this. However, it would exclude claims for Mrs W's previous health problems and would no longer provide the *own occupation* cover. Unhappy with this, Mr and Mrs W referred the complaint to us.

... the dispute was not suitable for our informal procedures.

complaint rejected

We did not consider there to be any basis for requiring the firm to pay the *sum insured* for Mrs W's rheumatoid arthritis. We accepted that there was no link between her carpal tunnel syndrome and depression and the onset of her rheumatoid arthritis. However, this did not change the fact that, in response to clear questions, she had failed to disclose information about her health.

In our opinion it was fair and reasonable of the firm to offer to rewrite the policy on the terms it would have offered originally – if it had been given the correct information. Mr and Mrs W appeared to have given very little thought to the accuracy of their answers, and their non-disclosure appeared to be at least *reckless*, which would have entitled the firm to void the policy.

48/7

commercial insurance – non-disclosure

In January 2001, there was a serious fire at Mrs Y's shop, which was insured with the firm under a commercial policy. The fire brigade thought the fire might have been caused by an electrical fault.

The firm made an interim payment to Mrs Y of £10,000 and appointed loss adjusters. In the course of their investigations the loss adjusters discovered that Mrs Y's business owed its suppliers £70,000. Mrs Y had borrowed almost £100,000 from her bank over the previous two years and had made incorrect statements when applying for the bank loans. The loss adjusters also discovered that, in her original insurance application, Mrs Y had failed to disclose that the ground floor of her shop unit was unoccupied and was not properly secured.

The firm told Mrs Y that it was treating her policy as *void*. This was because she had failed to disclose that the building was not secure and that her business was in difficulty, even though it had questioned her directly about these matters. The firm also believed that Mrs Y had committed a criminal offence in misrepresenting the purpose of the loans. Unhappy with the firm's actions, Mrs Y referred her complaint to us.

complaint dismissed

Mrs Y denied that her business was in difficulty. She said the money she had borrowed from the bank had originally been intended for home improvements, but she had later changed her mind.

We noted that Mrs Y had run her business for several years and claimed to have run a previous business overseas. So the firm was entitled to treat her as a *commercial customer* and not a *consumer*. This meant that the firm was entitled to rely on the strict legal position. In the circumstances of this case and because of the fraud allegations, we concluded that the dispute was not suitable for our informal procedures and would better be dealt with in a court.

banking: when a firm decides to close a customer's account

From time to time, banks and building societies ask customers to close their accounts and make alternative banking arrangements. This happens most often if the firm is unhappy with the way in which the customer is using the account, or feels that its relationship with the customer has broken down irretrievably.

Sometimes, customers who are in this situation complain to us. They feel that the firm has no right to close their accounts, particularly if they believe they have done nothing wrong.

This article explains what firms should and should not do in such circumstances, and outlines some cases we have considered recently.

... the firm should allow the customer a reasonable amount of time to make alternative banking arrangements.

is a firm entitled to close a customer's account – even without the customer's agreement?

The general answer is – yes, the firm is entitled to do this. Like most other commercial organisations, banks and building societies are under no obligation to continue doing business with someone if they do not consider it appropriate to do so. But they should not decide to close an account for an improper reason – for instance, because of unfair bias or unlawful discrimination. And it is an implied term of the contract between the firm and its customer that the firm will not normally close the customer's account without giving reasonable notice.

what is '*reasonable notice*'?

This is likely to vary, depending on the customer's circumstances and the type of account. But the general rule is that the firm should allow the customer a reasonable amount of time to make alternative banking arrangements.

The *Banking Code* and the *Business Banking Code* both say that, in normal circumstances, firms should give customers at least 30 calendar days' notice before closing their accounts. Examples of circumstances which are not '*normal*' include suspected fraud, or cases where the customer was threatening or abusive to the firm's staff.

For personal customers, we generally take the view that 30 calendar days is enough time. But a longer period might be more appropriate for business customers. This is because a business is likely to need more time than a personal customer to make the necessary arrangements, particularly if there is an agreed overdraft on the account. Technically, an overdraft is repayable *on demand*. However, it is quite likely that we would consider a firm had not given a business enough notice if – for example – two months into a 12-month facility it changed its mind for no apparent good reason, and gave the business 30 days' notice to make alternative arrangements.

Some firms say in their account terms and conditions that they will not close a customer's account without giving a certain amount of notice. But if that is less than the *Banking Code*'s 30 days, then – as in all cases of potential conflict between account terms and conditions and the *Code* – the provisions of the *Code* take precedence.

notice accounts

Some accounts, usually savings accounts, allow customers to withdraw their money only after giving the firm a period of notice. We usually expect a firm to take any such notice period into account if it decides to close the customer's account. For example, if the firm wanted to close a customer's 90-day notice account, it should arguably give that customer an equivalent amount of notice – that is, 90 days, rather than just the 30 days specified by the *Banking Code*.

... it is important that firms make their intentions clear and unambiguous.

is the firm's *closure notice* conditional or unconditional?

Sometimes, firms say they will close a customer's account at the end of a set period unless certain conditions are met. For example, they might say they will close the account at the end of the notice period unless the customer brings the account balance back to within an agreed overdraft level. But this can give rise to confusion. What if the customer brings the account up to date but then, by the end of the notice period, the account balance has crept back over the agreed overdraft? Has the customer met the firm's condition or not?

Here, it is important that firms make their intentions clear and unambiguous. Otherwise, we might consider that the customer had met the firm's condition and it was unfair of the firm to impose the original notice period.

potential loss to the customer

If a firm closes a customer's account without giving adequate notice, the customer could suffer losses if the firm – wrongly – fails to honour cheque, standing order and direct debit payments. Such losses could be in the form of interest, charges, or late payment fees levied by the intended recipient of the money, or they could flow from the actual failure to honour the payments.

If we decide the firm was wrong to close the customer's account when it did, we are likely to require it to reimburse the customer with any such direct costs. And if we decide that further adverse financial consequences flowed from the failure to honour payments, and those consequences were reasonably foreseeable by the firm when it decided to close the account, we would generally expect the firm to compensate the customer. For business customers in particular, the firm's failure to honour a payment could have extensive – and potentially disastrous – financial consequences.

potential distress and inconvenience to the customer

If the customer has suddenly – without adequate warning – been left without access to banking facilities, it is possible that significant distress and inconvenience might result, not least when trying to set up a new bank account. In such circumstances, we are likely to require the firm to pay compensation. The actual amount of the compensation will be individually assessed, to take account of the particular facts and circumstances of the case.

... the firm's failure to honour a payment could have extensive financial consequences.

case studies – banking: when a firm decides to close a customer's account

48/8

firm declines customer's request for increased overdraft limit and says it will close her account in seven days

Mrs G had an overdraft of £1,000 on her account with the firm. When it came up for review, she wanted to increase it to £1,500. She had exceeded the existing limit every so often in the past and now wanted to put arrangements on a better footing. But the firm wasn't happy to do that; in fact, it wanted her to repay *all* the borrowing.

Mrs G discussed her overdraft on the phone with Mr A, the firm's lending officer, but things did not go well. Mrs G felt that Mr A was aggressive, while Mr A felt that Mrs G had been rude and unpleasant. The upshot was that Mr A wrote to Mrs G telling her that the firm would not renew the overdraft and that she should repay all her borrowing and close her account within seven days.

When Mrs G complained to the firm's head office, it said the firm's action was justified because she had gone over her agreed overdraft limit. That was when Mrs G came to us.

complaint upheld

We accepted that Mrs G had exceeded her agreed overdraft facility from time to time. But she had done so only by small amounts. And the firm had not questioned those excesses before – it had simply let the overdrawn balance increase. We also noted

Mrs G's concern that the firm might register adverse credit information against her name. This was particularly important to her as she worked in the finance industry herself and her employer expected her to have an unblemished credit history.

Mrs G was able to make alternative banking arrangements within a few days. But she experienced some inconvenience in having to do so. We felt that the firm had been wrong to give her only seven days to close her account. We did not accept that her conduct of her account had been such that, under the *Banking Code*, the notice period should have been less than 30 days. When we told the firm this it offered Mrs G its apologies, together with £250 compensation, which she accepted.

48/9

firm gives company notice to close its accounts after the arrest of company directors

Mr and Mrs J were directors of a company, E Services Ltd. The company's bank accounts were always in credit – often to a very significant extent – and had never caused the firm any difficulties or concern.

But in mid-November 2004, a photograph of Mr and Mrs J appeared on the front page of the local paper. They had been arrested because it was alleged that their earnings from E Services Ltd had been acquired illegally.

... the firm said the customer's conduct was unacceptable.

The branch where E Services Ltd had its accounts was in a small town and it was fairly common knowledge that the company banked there. The branch manager was worried about the publicity and, after phoning the firm's head office for guidance, he wrote to Mr and Mrs J. He said that if they did not close the company's bank accounts by the end of December 2004, the firm would close them and send the couple a cheque for whatever amount was then left.

In early December 2004, Mrs J complained to the firm. By then, she had been released on bail but her husband was still in police custody. She asked the firm to explain its proposed action, particularly since E Services Ltd had so much money on deposit. And she added that if the firm's decision was connected with the press reports of her and her husband's alleged wrongdoing (which she denied), then she thought this was wholly improper and inappropriate.

The firm did not confirm or deny the reasons for its actions, and that led the couple to refer the matter to us. But in the meantime, because the couple had not closed their accounts voluntarily, the firm closed them in early January 2005 and sent Mr and Mrs J a cheque for the balance.

complaint rejected

In its representations to us, the firm did not hide its reasons for wanting to close the accounts. It clearly felt it would run a reputational risk in the local community if, in the light of the publicity, it continued to maintain them. Without needing to comment on that, however, we were satisfied that the firm had given E Services Ltd adequate notice to close its accounts. The six weeks' notice was rather more than the period required by the *Business Banking Code*. Moreover, E Services Ltd had not faced the difficulty in finding another bank that it might have done if it had a large overdraft. We did not uphold the complaint.

48/10

because of customer's unacceptable behaviour, firm says it will write off his overdraft to speed up closure of his account – but it then forgets to take any action

One afternoon, after drinking heavily, Mr F turned up at the bank branch where he had his account. According to the firm, he spoke offensively to several members of its staff before being escorted from the premises.

The following day, Mr F returned to the branch in a similar condition. The manager told him his conduct was unacceptable and that he would be asked to close his account. The manager added that, in order to speed up the process, the firm would write off the £400 by which the account was overdrawn.

Mr F continued to use his account and the firm forgot to close it and write off the overdraft. Some weeks later, Mr F asked for the £400 that – in his view – he had been promised. By that time he had given up his heavy drinking. The firm refused to write off the £400 – on the basis that as Mr F was now behaving in an acceptable fashion, there was no need to close it. That was when Mr F came to us.

... the firm had been wrong to give her only seven days to close her account.

complaint settled

Mr F had always managed his money well. His income was paid in to the account and although he used his overdraft facility from time to time, he never exceeded the £500 limit.

We took the view that the bank had been remiss in failing to close the account, as it had said it would. However, given that things appeared to have returned to normal, there now seemed no particular reason for it to do so. And if the account remained open, we saw no reason for the firm to credit Mr F's account with the £400. But we did think the firm should make some payment to him to reflect its administrative failings. It offered £100, which we recommended Mr F to accept.

48/11

firm closes business customer's account ahead of the agreed date – causing financial losses

Mr and Mrs L ran a small business. Cash was always tight and they often overdrew their bank account by small amounts, although they did not have a formal overdraft facility. In fact, the firm had refused to grant them one, although it did tolerate (and charge fees for) any borrowing that arose.

Shortly after a new bank manager took over, the couple found that the leeway they had previously been allowed stopped without any warning. They went to see the new bank manager, but she refused to budge. The meeting was far from cordial and a few days later she wrote to Mr and Mrs L telling them to close their account by the end of the month. That was just under four weeks away.

The couple set about finding a new bank. Meanwhile, the firm closed the account a few days earlier than it had said it would. That meant that a number of cheques and other payments were left unpaid when, had the account remained open just a few days longer, there would have been enough money available to pay them.

The firm's actions caused Mr and Mrs L a number of problems. Not only did they incur extra interest and late payment charges on their credit cards (which should have been paid by direct debit), but one of the dishonoured cheques had been payable to their main supplier. He immediately shortened the credit terms he offered them – from 30 days to one week. And for several months he would only accept payment from them in cash.

Mr and Mrs L complained to the firm, claiming direct financial losses of around £5,000, plus a further £2,500 for their '*distress, anxiety, frustration and sleepless nights over many weeks, along with the need to re-build our relationship with our supplier*'.

In response, the firm accepted that it had closed the account a little too soon. But it refused to accept that the couple had suffered anything like the loss or inconvenience they claimed. It offered them £300 in compensation.

complaint upheld

We were satisfied that Mr and Mrs L had genuinely expected the firm to make several payments before the account was closed. And if that had happened, some of the charges would not have been incurred. These amounted to about £150. We also accepted that the dishonour of the supplier's cheque had a significant effect on the couple's trading and their cash flow. We valued this at £4,000. On top of that, we felt the firm's actions had caused the couple unnecessary distress and inconvenience – but we felt that they were claiming rather too much for this. Overall, we recommended the firm to pay Mr and Mrs L £4,750.

The firm continued to argue – very strongly. It sought to persuade us that the way in which the couple had run their account had always been unacceptable. But we explained that, even if the earlier overdrafts had not been formally sanctioned, the firm had allowed them to arise over quite some time, and it had charged its usual 'penalty' fees and interest for their overdrawing without its consent.

Ultimately, we had to decide the complaint formally, rather than through mediation and conciliation. This was primarily because we felt the firm's later arguments were demonstrably misplaced – leading to the matter remaining outstanding for rather longer than it should have been.
We eventually required the firm to pay Mr and Mrs L £5,000 in final settlement of their complaint.

what makes an investor *'experienced'*?

Firms often try to defend complaints that their sale of an investment product was inappropriate by saying that the customer was '*experienced*'. Sometimes, a firm may suggest that a customer's ownership of shares demonstrates a knowledge of equities. Or a firm may say that a customer's previous investment in a mortgage endowment policy *'proves'* they were comfortable with risk-based products.

We also sometimes find firms claiming that a customer is *'experienced'* because of their occupation. While it is true that a customer's occupation may affect the likelihood that they will understand a particular investment, care should be taken not to make assumptions; there are always exceptions.

Having some former experience of investment does not necessarily mean that a customer is an expert in the subject, or that they understand the products they have taken out in the past. And it does not automatically mean that – in the customer's present circumstances – a sophisticated approach or high-risk product is required or appropriate.

A customer's investment experience is certainly one of the areas we look at when considering the complaints referred to us, and it can be relevant to our assessment of the customer's overall circumstances. But we may sometimes decide that any experience is overridden by what was recorded at the time of the sale in the *factfind* or client questionnaire about the customer's desired approach or their attitude to investment risk. For example, if a customer expresses the wish to adopt a cautious approach, then any recommendation the firm makes should be in line with this approach, regardless of the customer's previous investment experience.

People have different needs at different times of their life. Financial firms have a duty to ensure that any product they recommend is suitable for the customer and that they have given the customer enough information to make an informed decision about that investment.

... having some former experience of investment does not necessarily mean the customer is an expert in the subject.

case studies – what makes an investor '*experienced*'?

■ **48/12**

firm says its customers' ownership of windfall shares and mortgage endowment policies '*proved*' they were not averse to risk

Mr and Mrs J wanted a greater return from their money than they were getting from their savings account, so they contacted an adviser recommended by a friend. On the adviser's recommendation, the couple invested in a high-income stock market bond. When the bond matured, Mr and Mrs J were very disappointed to find that, although they had received a high income, their capital had been reduced. They said the firm had not warned them of the risk to their capital and they complained that the bond had not been suitable, as they were '*cautious*' investors.

The firm argued that Mr and Mrs J had not been averse to risk, since they held a number of mortgage endowment policies and a few shares. And it defended its sale of the bond by pointing out that the couple '*had the ability and opportunity*' to read the product documents which set out the potential risk to capital.

complaint upheld

The adviser had not completed a *factfind* at the time of the sale. However, in the letter he sent to Mr and Mrs J outlining his recommendation, he described the couple as '*cautious investors*'. The bond was not suitable for them on that basis.

... she had inherited a portfolio of shares but this did not make her an '*experienced*' investor.

The fact that the adviser had sent the couple some documents about the bond did not make his recommendation any more suitable, or relieve the firm of the responsibility to give appropriate advice.

In our view, the couple's mortgage endowment policies and shares did not indicate that they had investment experience or required a product carrying a high level of risk. The couple's shares had come to them as a *windfall* following the demutualisation of their building society and they had received compensation from another financial firm for the mis-selling of one of their endowment policies.
We upheld the complaint.

■ **48/13**

firm says customer was an '*experienced*' investor because she had inherited a portfolio of shares

Mrs B was widowed and in her late fifties. Some years earlier she had inherited a reasonably large portfolio of shares from her father. However, she had not done anything with the portfolio, which continued to be managed by her late father's stockbroker.

Realising that she would need to supplement her income when she retired, as her occupational pension would be very small, Mrs B sought investment advice. She acted on the adviser's recommendation that she should sell the share portfolio and invest in a portfolio of '*less risky*' bonds.

Some time later, when one of the bonds suffered a severe capital loss, she complained to the firm that its advice had been inappropriate, given that she was a '*cautious*' investor.

The firm rejected Mrs B's complaint, arguing that she had not been disadvantaged since – overall – the recommended investments had met her requirements. It also said that her ownership of a portfolio of shares confirmed that she was not a '*cautious investor*' but an experienced one, who had a '*higher tolerance of risk*'. Unhappy with the firm's response, Mrs B came to us.

complaint upheld

The fact that Mrs B had inherited a portfolio of shares did not make her an experienced or knowledgeable investor. Nor did it make the firm's advice appropriate. Mrs B had wanted to reduce the level of risk presented by her existing investments. The bonds did not meet that requirement. We upheld the complaint.

... care should be taken not to make assumptions.

48/14

firm says customer was '*experienced*' investor because she was a trustee of a fund set up by her late husband

Mrs K, who had been a widow for many years, was one of the trustees of a family trust. This had been set up after her husband's death to benefit their children. The firm advised the trustees and Mrs K later consulted it in her own right when she needed some personal investment advice.

However, Mrs K was very disappointed when the investments recommended to her by the firm failed to perform. She said that if the firm had explained the level of risk involved, she would never have put her money in these investments.

The firm rejected Mrs K's complaint. It said that the fact that she had dealt with the trust's assets showed that she was an '*experienced*' investor who was '*prepared to accept the same level of risk personally*'.

complaint upheld

When Mrs K referred her complaint to us we noted that the firm had not completed a *factfind* at the time of the sale, so had no record of Mrs K's attitude to risk. The brief letter it had sent her to confirm its recommendation merely described the products – it did not explain why it considered them suitable for Mrs K.

We found no evidence that Mrs K had been an active trustee. And on looking at her situation at the time of sale, we were satisfied that she was *not* an experienced investor and that the products recommended by the firm were not suitable for her. We therefore upheld her complaint.

48/15

when investments decline in value, investors complain that advice has been unsuitable as they were '*inexperienced*' investors

After Mr and Mrs D won £1m on the lottery, they were introduced to an adviser who arranged a portfolio of investments for them. Unfortunately the stock market fell and the portfolio declined in value.

The couple complained, saying that as they were '*inexperienced*' investors, the adviser should not have recommended any risk-based products. They thought that he should instead have arranged for their money to be left in savings accounts.

complaint rejected

Mr and Mrs D had not had money to invest in the past and were inexperienced investors. However, we were satisfied that the adviser had carried out a proper review of their circumstances and had explained the investment risks. We agreed with his assessment that Mr and Mrs D had been prepared to tolerate a low to medium level of risk when investing the money they had won. We therefore rejected the complaint.

... he was well able to understand the nature of the investment he made.

48/16

customer with considerable investment experience complains that firm's mailing misled him into making unsuitable investment

Mr T made an investment on a *direct offer* basis (in other words, he did not receive personal investment advice but invested after receiving a detailed mailing from the firm). Some while later he complained to the firm, saying that the investment product had turned out to be too risky for him. He also said that the firm's letter that had accompanied the product literature had contained a factual error, which had misled him into investing.

The firm argued that the error in the covering letter was not material. It said that it had sent Mr T detailed – and correct – product information and that Mr T was an extremely experienced investor, well able to understand the nature of the investment he made.

complaint rejected

We concluded that the error in the firm's letter did not mask the level of risk associated with the investment and that the letter had not influenced Mr T's decision to invest. We also noted that Mr T had invested for many years on a *direct offer* basis. He had demonstrated a good understanding of risk-based products and his earlier investments had included a number of more adventurous products. We rejected his complaint.

our 2005 series of conferences for firms

Aimed primarily at financial services practictioners and focusing on current complaint topics, the handling of complaints, and the ombudsman process, the conferences feature:

- presentations by our ombudsmen and senior adjudicators
- discussion groups and case studies
- first-class conference venues
- refreshments, including buffet lunch
- value for money – we run these conferences on a not-for-profit basis, charging just £125 + VAT per delegate, to cover our costs.

For more information and a booking form, see our website www.financial-ombudsman.org.uk or complete this form, ticking the conferences(s) you are interested in, and send it (or a photocopy) to:

Kerrie Coughlin, communications team
Financial Ombudsman Service
South Quay Plaza
183 Marsh Wall
London E14 9SR

name(s)

office address

firm

phone

email

please tick

☐	12 May	IFAs, mortgage and insurance intermediaries	The Brewery, Chiswell Street, London EC1
☐	30 June	IFAs, mortgage and insurance intermediaries	Weetwood Hall, Leeds
☐	6 October	life, investment, banking and insurance firms	Hilton Hotel, 1 William Street, Glasgow
☐	25 October	life, investment, banking and insurance firms	Culloden Hotel, Holywood, near Belfast
☐	27 October	banking firms	Barbican Conference Centre, London
☐	10 November	insurance firms	Barbican Conference Centre, London
☐	1 December	life and investment firms	Barbican Conference Centre, London

ask ombudsman news

training events for consumer advisers

the manager of a citizens advice bureau writes...

Q My staff occasionally see clients who have complaints about the way they have been treated by financial firms. We want to ensure that we give these clients accurate advice and that we don't waste anyone's time by referring cases to you that properly belong elsewhere. Could you tell me about any training events that you are planning for consumer advisers?

A This year we are running a series of special events all around the UK for professional consumer advisers (for example, trading standards officers, money advisers and citizens advice workers). These free events, focusing on how the ombudsman service works, also provide ample opportunity for informal debate and discussion. Currently we have events planned in the North West (29 September), Northern Ireland (30 September), the South East (9 November 2005), North East (18 November 2005) and Yorkshire/Humberside (9 February 2006).

You will find full details on our website (www.financial-ombudsman.org.uk) on the *working*together 2005 pages.

wider implications

a legal firm asks ...

Q How do the ombudsman service and the FSA liaise on cases that have wider implications?

A Together with the Financial Services Authority (FSA), we have specific arrangements in place for dealing with cases with wider implications.

A joint website (www.ombudsmanandfsa.info) sets out the procedures for invoking the wider implications process. The website also:

- clarifies the different roles and responsibilities of the two organisations when wider implications issues arise; *and*
- sets out the practical arrangements for co-operation between us and the FSA on these types of cases.

treating customers fairly?

the manager of a legal advice centre emails ...

Q How are ombudsman service decisions affected by the FSA's *'treating customers fairly'* programme?

A The ombudsman service decides, in the circumstances of a particular complaint, whether an individual customer has been treated fairly – taking into account the law, the FSA's rules and good industry practice.

The FSA's *'treating customers fairly'* programme encourages a firm's senior management to create systems that support fair treatment of all customers, but it does not impose any new rules. So *'treating customers fairly'* should improve the way that financial firms treat their customers, but does not affect how we decide individual complaints.