ombudsman news
essential reading for people in the financial services and consumer advice sectors

Financial Ombudsman Service

settling financial disputes, without taking sides

issue 56

challenging times

Walter Merricks
chief ombudsman

Judicial review appears, suddenly, to be flavour of the month. Not a week seems to go by at present without someone announcing a legal challenge to our decisions or procedures.

Often, the press releases issued to announce and describe the challenges promise rather more dramatic consequences than are seen in the actual proceedings themselves. And much of what is claimed seems contradictory.

We are regularly accused of – at one and the same time – being above the law and unchallengeable; being engaged in a disgraceful denial of human rights that a landmark test case will bring to a halt; suffering a stunning blow in the courts that will save the financial services industry millions of pounds; *and* outrageously allowing firms to wrongly escape paying millions to consumers with financial complaints.

However, these kinds of dramatic yet rather confusing claims are – hardly surprisingly – unlikely in reality to rock the foundations of the ombudsman service. No public organisation involved in the contentious business of handling disputes is immune from people wanting to test the limits of its remit, particularly as there are always commercial interests at stake.

in this issue

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

September/October 2006

(continued from page 1)

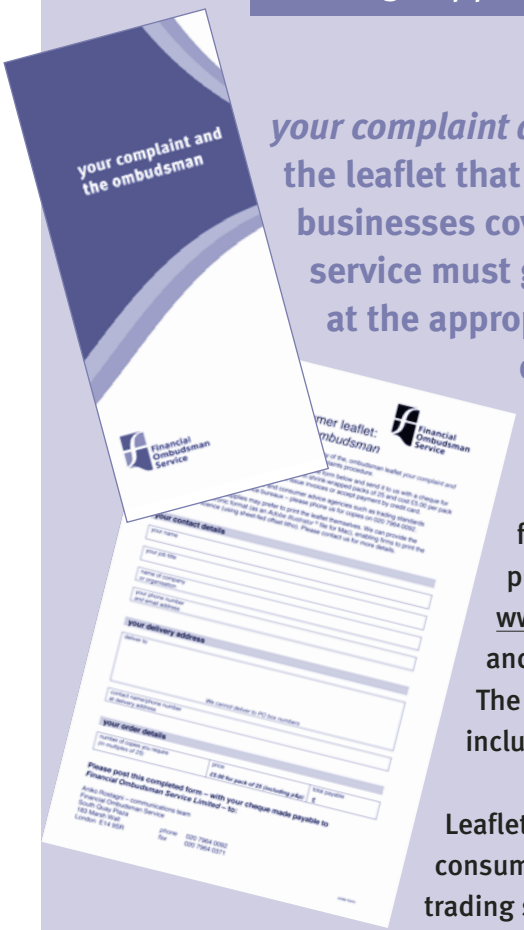
Claims-handling companies have a business interest in maintaining the flow of endowment complaints. Lawyers seeking to attract business from financial firms will put an optimistic spin on what they might achieve. And if financial advisers' indemnity insurers belive they can avoid liability for meeting awards they think are unjustified, they are entitled (and indeed obliged) to try to do so.

So if all this provides the courts with opportunities to clarify definitively some aspects of our scheme, we will all be the wiser. And once that's done we might look forward to spending less time, and less of the industry's money, on lawyers.

Walter Merricks chief ombudsman

your complaint and the ombudsman

ordering supplies of our consumer leaflet



your complaint and the ombudsman **is the leaflet that (under the FSA rules) businesses covered by the ombudsman service must give consumers at the appropriate stage in the complaints procedure.**

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Financial Ombudsman Service
South Quay Plaza
183 Marsh Wall
London E14 9SR

switchboard **020 7964 1000**
website **www.financial-ombudsman.org.uk**
consumer enquiries **0845 080 1800**
technical advice desk **020 7964 1400** (this number is for businesses and professional consumer advisers only – consumers should ring us on 0845 080 1800)

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complaints about travel insurance

As the summer holidays come to an end, we can usually expect to see a slight rise in the number of travel insurance disputes referred to us. In this article we outline some of the main causes of these disputes, and provide case studies illustrating our approach.

Travel insurance is generally bought as a standard package to cover (subject to specified limits and exclusions) a wide range of risks. Commonly, these include events such as:

- the cancellation or curtailment of a trip
- expenses due to a delayed departure or loss of baggage
- medical emergencies
- loss or theft of money, a passport or personal possessions
- personal accidents *and*
- personal liability.

Sold either as a single-trip policy, an annual multi-trip policy, or an 'ongoing' policy (often linked to a bank account or credit card), travel insurance can cover business or leisure travel. It may be effective worldwide or limited solely to travel within the UK or another specific geographic area.

Complaints about travel insurance represent about 12% of all the insurance complaints we receive. In most of these disputes:

- the trip was cancelled or curtailed because of the illness, injury or death of one of the travellers or of a close relative
- one of the travellers was hospitalised during the trip and incurred medical expenses *or*
- money, a passport or baggage belonging to one of the travellers was stolen or lost during the trip.

The disputes often centre on:

- whether or not a particular event was covered by the policy *and*
- the impact of exclusion clauses for pre-existing health conditions.

When dealing with travel insurance disputes, we will examine the relevant policy wordings, as the law and the *Insurance Conduct of Business Rules* require. We will also review all other available evidence, such as medical reports, police reports, claim forms *etc*, to determine whether the insurer's decision was fair and reasonable, in all the circumstances of the case.

Exclusions, for example those relating to pre-existing medical conditions, play an important role in defining the cover provided. Our general approach is that exclusions are not inherently unfair or unreasonable, provided the customer is made aware of their existence and scope at the time the policy is sold.

In disputes involving policy exclusions, we will take into account any advice that the seller of the policy may have provided. We will also consider whether or not any unusual and significant exclusions or limitations in the policy were drawn to the customer's attention.

The following case studies illustrate some of the more common types of travel insurance disputes referred to us.

... exclusions play an important role in defining the cover provided.

case studies
complaints about travel insurance

56/1
travel insurance – whether cancellation caused by events outside the policyholder's control

In mid-April Mr G, an investment banker, visited his local travel agent and booked a week's holiday to Moscow, departing three months later, on 16 July. At the same time, the travel agent sold him travel insurance to cover the trip.

Five days before the holiday, Mr G realised that he had not yet obtained a visa. He knew this shouldn't be a problem because, for an additional fee, the Russian consulate offered a 'fast track' service with a 24-hour turn-around.

As he was very busy at work, Mr G gave the completed visa application to his mother and asked her to send it off for him. Unfortunately, Mrs G enclosed the fee for the 3-5 working day turn-around, not for the 'fast track' service her son needed.

Becoming extremely anxious when – the day before his holiday was due to start – the visa had still not arrived, Mr G phoned the Russian consulate and Royal Mail. Neither could help him, so he called round to see the travel agent.

The travel agent told Mr G he would be able to claim a 50% refund from the insurer if he cancelled the holiday immediately – but would get nothing if he left it any later. Mr G cancelled.

Half an hour later he got home to find the visa had arrived. It was too late to reinstate his booking. And in due course the travel insurer told him he was not entitled to claim back any of the money he had paid for the holiday. The insurer pointed out that Mr G was only covered if he was forced to cancel for reasons beyond his control. It did not consider his failure to obtain a visa in time to be a matter outside his own control.

Mr G disputed this – saying that the cancellation had been caused by '*an unforeseeable mix-up*' between him and his mother – and that this 'mix-up' had been outside his control. When the insurer rejected Mr G's complaint, he came to us.

complaint rejected

We looked at the wording of Mr G's policy. Under the heading, '*cancellation cover – what you are covered for*', it said:

'If you have to cancel or curtail your trip through your inability to travel for reasons beyond your control following an event that happened after the commencement date of this Certificate we will pay up to the amount shown above in respect of ... travel costs which you have paid or are contracted to pay and which you cannot recover from any other source ...'.

It was clear that Mr G's reason for cancelling the holiday was not outside his control. He had left it until the week before his departure before applying for his visa. And he had then chosen to delegate to his mother the task of arranging payment and sending off his application. In our view, it was his responsibility to ensure the correct fee was enclosed with his application.
We rejected the complaint.

56/2

travel insurance – whether insurer should pay curtailment claim when policyholder was taken ill but did not return home before scheduled end of the holiday

In April 2003, while on a cruise with his wife to celebrate their silver wedding, Mr B tripped on some steps and broke his leg. After his leg had been put in plaster, Mr B was prescribed strong painkillers and spent the remainder of the cruise – a total of 11 days – in his cabin.

When the couple returned home, Mr B submitted a claim under his travel insurance policy for medical expenses and for the curtailment of his and his wife's holiday. The insurer settled the medical expenses claim. However, it rejected the curtailment claim in its entirety, on the grounds that Mr and Mrs B had not left the ship and returned home before the scheduled end of their holiday.

After Mr B disputed this decision, the insurer agreed to meet half of the curtailment claim. It paid the cost of the final 11 days of the cruise (less the policy excess) – but only for Mr B, not for his wife.

Mr B said the insurer should pay for his wife as well, because after his accident she had remained in the cabin to look after him. However, the insurer disagreed, so Mr B came to us.

complaint rejected

The travel policy provided cancellation cover '*... if you are forced to curtail your trip and return home after departure as a direct and necessary result of any cause outside your control...*'.

There had been no medical reason for Mr B to leave the ship and return home before the end of the cruise. He and his wife would have preferred to return home, but this was not the same as being forced to do so. We were satisfied that the insurer's payment of half of Mr B's curtailment claim was fair and reasonable, and we rejected the complaint.

... the insurer's payment of half of the claim was fair and reasonable

56/3

travel insurance – whether an insurer correctly relied on policy exclusion to refuse cancellation claim resulting from policyholder's ill-health

Mr K occasionally suffered from migraines but was otherwise in excellent health. So he was somewhat concerned when, for no apparent reason, he collapsed and briefly lost consciousness.

He soon recovered but '*just to be on the safe side*', as he later told us, he made an appointment with his GP. Mr K saw the doctor four days later – on 30 August 2005 – and told her he had felt perfectly well until immediately before he passed out. At that point he had started to feel dizzy and had then found himself unable to stand.

The doctor told Mr K that his collapse had in all probability been related to a migraine. However, the doctor thought it would be a sensible precaution to have a brain scan, just to rule out any possibility that Mr K might have had a minor stroke.

In her referral letter to the hospital, which we later asked to see as part of our investigation, the doctor stressed that she did not think Mr K had suffered a stroke. But she said she wanted Mr K to have the scan in order to '*completely rule out this possibility*'.

Mr K's appointment for the scan was on 27 September 2005. A couple of weeks before this – on 14 September – he booked and paid for a holiday and bought a travel insurance policy. The holiday was to start on 30 September, a few days after he was due to have the scan.

... we told the insurer that it had not acted in accordance with the law.

The result of the scan came back on 28 September and revealed that Mr K *had* suffered a minor stroke. His doctor told him he should not fly for at least three months, so Mr K cancelled his holiday.

The insurer rejected the claim Mr K made under his travel insurance policy. It pointed out that the policy contained an exclusion from cover for:

... any condition of which the policyholder was aware at commencement of the policy or for which he received advice, treatment or counselling from any registered medical practitioner during the 12 months preceding the commencement date, whether diagnosed or not'.

complaint upheld

There was clear evidence that – at the time Mr K had taken out the policy – both he and his doctor had thought that the dizziness and resultant collapse had been caused by a fairly minor ailment – not by a stroke.

So we told the insurer that it its reliance on the policy exclusion in order to reject the claim was neither fair nor reasonable. And citing the legal case, *Cook v Financial Insurance Co Ltd* [1998] 1 WLR 1765, we told the insurer that it had not acted in accordance with the law.

We said the insurer should meet Mr K's claim, less any excess, and pay him interest from the date of the cancellation. We also said it should compensate him for the distress and inconvenience he had been caused.

56/4

travel insurance – whether insurer correct in refusing to pay repatriation expenses for policyholder taken seriously ill on holiday

Mr C, a 45-year old landscape gardener, was taken seriously ill while on holiday in West Africa. It was clear that he would require major surgery. And it seemed probable that he would need a blood transfusion during or after the operation.

The treating doctor thought Mr C should be flown home to the UK for the operation, despite the risk that he might suffer further problems while waiting for this to be arranged – or during the flight itself.

Mr C contacted his insurer to explain his predicament. He asked for assistance in arranging his flight home but the insurer said it could not help. It insisted that flying was too risky for him.

The doctor treating Mr C had provided an oral assurance that Mr C was fit to fly, and had explained why repatriation was in his best interests. But the insurer said it would need a written report to this effect before it could reconsider the matter.

Mr C argued, unsuccessfully, that the insurer's insistence on a written report was unreasonable, bearing in mind the urgency of the situation and the doctor's view that it was in his best interests to be repatriated. Anxious not to delay matters any longer, Mr C arranged and paid for the flight home himself.

Once Mr C had recovered from his operation, he complained to the insurer about its handling of the matter. The insurer rejected his complaint, arguing that its representative had acted in Mr C's best interests because she genuinely believed he had not been fit to fly home.

complaint upheld

In medical cases, the evidence of the treating doctor is normally very persuasive. The doctor is generally best placed to assess their patient's situation at the time the problem arises. This was such a case, and we agreed with the treating doctor's assessment of the risks in flying Mr C home, when set against the risks associated with carrying out the operation in West Africa.

The doctor who subsequently operated on Mr C in the UK confirmed that, in the circumstances, it had been the best course of action for Mr C to return home for surgery. Most medical facilities in West Africa are still fairly basic. And the risk of contracting HIV as a result of a blood transfusion is much higher there than in countries where there is an effective donor-screening programme.

We felt that in this particular case the insurer's insistence on a written report had been unreasonable. The *Insurance Conduct of Business Rules* state that an insurer should not reject a claim on the basis that a policy condition (such as having to provide a written report) has been breached, unless the circumstances of the breach are connected to the loss. In other words, the insurer's position must have been prejudiced as a result of the breach. Since the treating doctor in Africa had given an assurance that repatriation was in Mr C's best interests (even though he had not put this in writing), we did not think it a material factor that Mr C had not provided the insurer with a written report.

We upheld the complaint and required the insurer to reimburse Mr C for the expenses he had incurred in returning to the UK. We also said it should pay him a significant amount for the distress and inconvenience he had experienced because of its refusal to assist with his repatriation.

56/5

travel insurance – whether insurer right to reject policyholder's cancellation claim after her father became ill

In October 2004, Miss J visited a travel agent and booked to go on holiday to Greece in June the following year. The travel agent also sold her an insurance policy to cover the holiday.

In January 2005, Miss J's father was diagnosed with a heart problem. He responded well to treatment and soon appeared to be back to normal. However, in May – just a few weeks before the start of Miss J's holiday – his condition suddenly deteriorated. Miss J found she needed to look after him almost full-time.

She tried to arrange some respite care, so that she could get away for her holiday as planned. However, it proved impossible to find a suitable carer at such short notice. Miss J cancelled the holiday and submitted a claim under her travel insurance policy for the full cost of cancellation.

The insurer rejected her claim. It referred to the following provisions:

'Cancellation:

Cover applies if You have booked a Trip to take place within the Period of Insurance, but You are forced to cancel Your travel plans because of one of the following changes in circumstances, which is beyond Your control, and of which You were unaware at the time you booked the Trip ...

- *Unforeseen illness, injury or death of a Close Relative as confirmed to Our medical staff by the treating doctor, who will deem whether it is necessary for You to cancel or curtail Your Trip ...*

To declare a Pre-existing Medical condition or a change in Your state of health or prescribed medication, You should contact the Medical Screening Helpline ...'.

The insurer said that Miss J had been aware of her father's illness in January and could have cancelled the holiday at that stage for only 15% of the cost. It also said she should have contacted its helpline in January (to declare the change in her father's state of health), and again in May (when his condition worsened and she had attempted to obtain respite care for him).

complaint upheld

The medical evidence we obtained confirmed that:

- Mr J's condition had responded very well to treatment in January *and*
- there had been no reason at that time for Miss J to believe her father's state of health would force her to cancel her holiday.

It was the unexpected change in Mr J's health in May, and Miss J's inability to find respite care, that meant she had to cancel the holiday. We found that Miss J had acted reasonably and promptly in seeking respite care, and in notifying the insurer and cancelling the holiday when this proved impossible.

We did not believe the policy imposed a duty on the policyholder to call the insurer's medical screening helpline if there was a change in the health of anyone on whom the holiday might depend. Any such duty would constitute an '*onerous*' term, and would have to be made very clear to the customer before the policy was sold. The insurer had made no effort to do this through its own policy summary or sales documentation, or through the efforts of the travel agent.

We upheld the complaint and required the insurer to reimburse Miss J for the full cost of cancelling her holiday.

taking the chair

Chris Kelly Chairman of the Financial Ombudsman Service

Although he self-deprecatingly describes himself as '*just a man in a suit who's been a civil servant for 30 years*', when Chris Kelly – the chairman of the Financial Ombudsman Service – talks about the importance of identifying with customers, it is clear he understands the very real impact that a dispute can have on the life of both sides concerned.

We spoke to him to find out more about his views on the theory and practice of life on the board at the ombudsman service.

what attracted you to the ombudsman service?

I joined the Financial Ombudsman Service as a member of the board in 2002. I have to confess that at that stage I didn't know a great deal about it. But once I had done my 'due diligence' I thought it would be a very interesting organisation to join.

In a sense it has some similarities to the children's charity – the NSPCC – of which I am also the chairman.

People think I'm mad when I say that – as obviously the ombudsman isn't a charity and doesn't deal with children.

But both are well-run organisations working in difficult and challenging areas. Both are in the public eye and dealing with groups of people with very different interests.

And both organisations strive to be better. To have the opportunity to play a part in that and to help guide things is really rewarding.

you have a strong financial background – is there any reason that you ended up going down that particular path?

My background has given me some understanding of financial policy – the way the financial system works. I started off at university as a medical student. But I decided it was a mistake in the first week and changed to economics. My second degree was in social anthropology. And since then my career has been a mixture of economics *and* social policy.

I thought my interests would best be developed in the Civil Service. When I joined, you didn't apply direct to a particular department – you were only able to express a *preference* for where you'd like to go.

I said I'd like the Treasury, not really expecting to get placed there. But I was and I had a wonderful time! I eventually became director of monetary policy, and subsequently director of the budget & public finances.

I particularly enjoyed the Treasury because of the mix of economics and social policy. Social policy is essentially what much public expenditure discussion is about. I also spent

Sir Christopher Kelly KCB

- chairman of NSPCC
- a board member of the National Consumer Council

formerly:

- permanent secretary at the Department of Health
- head of policy at the Department of Social Security
- director of monetary & fiscal policy and director of the budget & public finances at HM Treasury

two years at the Department of Social Security. The importance of the benefit structure to things like work incentives means that this was a mixture of economic and social policy as well.

does the strength of the board lie in the different backgrounds of its members?

The board is not 'representative' in the sense that no board member is appointed specifically to represent any particular group of people or sector. But the board can draw on the wide range of experience, knowledge and skills that the different members bring.

It makes a big difference to the quality of discussion to have people who can look at things from a different perspective.

This is also my experience as chairman of the NSPCC board. I'm essentially a man in a suit who's been a civil servant for 30 years, so it's refreshing for me to be working not just on a conceptual level, but with people who have direct professional experience of dealing with children day-to-day.

you talk about the board being able to 'challenge' the executive management team – does that work?

The board takes a strategic overview of the service and ensures it is properly resourced and able to operate effectively and independently. In order to do that we need to be able to challenge the executive team – and they are commendably open and willing to be challenged.

In fact board members have said they enjoy working with the ombudsman service precisely *because* it's so open to discussion. That means we have a particular responsibility to resist the temptation to go further down the 'hands-on' management road. It would be easy to overstep the mark and get too involved!

is it hard to step back and not get too involved?

Yes, it is very hard. Particularly when there are people on the board with directly relevant experience – it's inevitable they would like to get more involved!

I imagine some people believe the board's work entails looking at decisions on complaints. But that's not so. That's the work of the ombudsmen. Our focus as a board is to give a strategic steer, not to intervene directly with the day-to-day management and with decision-making by our ombudsmen.

Having said that, there *are* strategic management issues we look at in some detail – the board needs to know there is an effective HR policy, for example.

Looking at those issues is one way of doing a quick health check of the organisation. That's not interfering in individual personnel issues; it's about satisfying ourselves there are effective policies in place to support this organisation.

are there any particular challenges for the ombudsman service at the moment?

I think the big challenge facing the organisation is the uncertainty about the future workload in relation to mortgage endowment complaints. We're starting to see the volume level off – but can't predict exactly how time-barring will affect numbers of complaints.

The economies of scale involved in dealing with the three- and four-fold increases in mortgage endowment complaints in recent years helped to put downward pressure on our unit costs – though that's not the only reason.

The measures introduced to cope with the volume of complaints have undoubtedly made the organisation more efficient. A declining workload would remove that influence. So we have to ensure that we have other drivers to keep costs down.

The mortgage endowment experience has also changed the way we are seen by some sectors of the financial industry. We have to continue demonstrating that when we make decisions, it is done in an even-handed and objective way.

to be able to listen to people's views but remain independent?

Absolutely. One of the problems with a lot of organisations is that they don't really hear what their customers say.

This is probably completely irrelevant but I spent four years as a pay negotiator in the civil service. The single most important thing I learnt then about negotiation of any kind isn't rocket science. It's about listening to what the other person says, making sure you understand it, and demonstrating that you've heard it.

You have to make sure you are responding to what's actually being said to you – not to what you think has been said, or what you wanted to hear!

we know that the board is keen on having external independent reviews – following the review by Professor Kempson in 2004. Why is that so important?

External reviews can be very helpful – although we also do a number of other things to assess how the organisation is doing. For example, we look at sample cases and decision letters, we get input from the independent assessor, and we get letters from MPs and complainants – which have given me quite a bit of an insight. They are normally questioning whether we are really as even-handed as we like to think!

Having an external review is a good way of getting reassurance that we are as good and as fair an organisation as we want to be. And it allows you to demonstrate it to everybody else!

It's one thing for you to assert your independence, but – particularly when you don't have competition and those who pay the costs have no choice about it – it's very important to demonstrate that you have robust processes in place.

what do you feel you've achieved so far as chair – both personally and professionally?

It's been enormous fun! This is partly because it's great working with Walter Merricks and his team, and partly because I have such a strong and constructive board. People naturally have different views and different personalities, but it feels as if we're all part of the same team.

As far as achievements are concerned – one example of something I'm particularly pleased with is the process we put in place for consulting and agreeing on the *corporate plan*.

We took advantage of the opportunity to stand back and consider our place in the world and where we might be going. Among other things, this led to the funding review and to improving our stakeholder dialogue.

was your move from board member to chairman a daunting one?

No, not at all. Of course it's hard work, but the board and I have what I hope is a justified confidence in the organisation. So I don't lose sleep over it.❖

did you know...

our website gives you free access to over 1,000 pages of up-to-date information?

This includes details about us and our process, plus practical guidance on a wide range of topics to help those involved with financial disputes.

What's more, all our publications are available online, allowing you – for example – to browse through case studies in earlier editions of *ombudsman news*, refer to technical briefing notes on a specific subject, or check out our expected workload for the year ahead.

www.financial-ombudsman.org.uk

calculating redress when a pension mortgage has been mis-sold

Although we receive relatively few complaints about the mis-selling of pension mortgages – the cases we see tend to be very complex and time-consuming.

This article outlines how we calculate redress in the complaints we uphold. Our case studies:

- **illustrate some of the different circumstances in which we have awarded redress for mis-sold pension mortgages *and***
- **outline the principles we have followed in setting out how that redress should be calculated.**

The idea behind a pension mortgage is fairly straightforward. Because of the tax concessions associated with pensions, paying into a pension is – for some people – a potentially attractive way to build up a lump sum that can be used to pay off an interest-only property loan.

But there are risks. Just as with endowment mortgages, the amount of money you will get at the end of the policy term depends on stock market performance. There's no guarantee you'll have enough to pay off all the capital on your mortgage. And pension mortgages carry an additional risk. This is because the more of your pension fund that has to go towards paying for your property, the less there will be for you to rely on in your retirement.

We deal with complaints about the inappropriate sale of pension mortgages in much the same way we consider other types of complaint about inappropriate investment advice. This involves looking at whether the advice was suitable, in view of the consumer's specific circumstances and needs at the time of the sale.

If we conclude there was a mis-sale, we then need to decide on redress. The aim is always to put the consumer back, as far as possible, in the position they would have been in – had they not been inappropriately advised.

... these cases tend to be very complex and time-consuming

In many ways there are parallels with the way in which we calculate redress for mortgage endowment mis-sales, and we take the same approach as our starting point. But the nature of pension mortgages makes determining an appropriate amount of redress particularly complex. Only the cash element of the pension – or sometimes just part of it – would have been intended for mortgage repayment. And pensions themselves cannot usually be surrendered.

So it would only be in the most exceptional circumstances – perhaps when both the pension and the mortgage elements are manifestly unsuitable – that redress might be made by cancelling an entire policy and refunding the premiums paid, plus interest.

Inevitably there will be many variations on the main themes highlighted in these cases – and the approach to redress may need to be adjusted, according to the circumstances of the individual case.

Firms wanting general advice on our approach should contact our **technical advice** desk on **020 7964 1400**.

case studies
calculating redress where a pension mortgage has been mis-sold

56/6
redress for pension mortgage mis-selling – a 'straightforward' case

After deciding to move to a bigger house, for which he would need a larger mortgage, Mr M visited a financial adviser. At that time Mr M, a painter and decorator, was 40 years of age and married with two children. He had a repayment mortgage but no savings. And although he planned to retire when he was 65, he had not yet made any pension provision.

The firm's representative suggested that Mr M should start a personal pension plan, and use it both to save for his retirement and to meet his mortgage needs. The representative told him that when the plan reached the end of its term, just before his 65th birthday, he could take a maximum of 25% of the fund as a tax-free cash sum. He could then use this to repay the capital on an interest-only mortgage. The balance of the fund would provide Mr M with an income, once he had retired.

Mr M went ahead and took out the pension plan. But several years later, dissatisfied with the firm's response after he had raised concerns about his mortgage arrangements, Mr M came to us.

We looked into the details of the sale, and of Mr M's circumstances at the time, and concluded that the pension plan was suitable for Mr M's *pension* needs. However, it should not have been recommended to him as a means of repaying his mortgage.

calculating the redress

We calculated redress on the basis that, had Mr M been given appropriate advice, he would have taken a repayment mortgage over a 25-year term, to coincide with his planned retirement at the age of 65.

There had been no changes to Mr M's pension plan since it was first set up. And he had not increased his mortgage since then. So we said redress should be calculated by taking:

A the amount of capital that would have been repaid to date if he had taken a 25-year repayment mortgage

and deducting

B 25% of the present transfer value of his personal pension plan.

Because pensions cannot usually be surrendered, Mr M could not have used 25% of the current transfer value to pay off the mortgage at the time we decided the case. He would have had to maintain that part of his borrowing until the cash sum came due, unless he had other funds with which he could pay off the capital.

But Mr M had been able to rearrange his finances and had not suffered ongoing financial hardship as a result of the firm's advice. So we took the view that no further compensation was necessary; Mr M would eventually get the benefit of continuing the whole pension. (If hardship had been an issue, we would probably have said he should be compensated with an extra sum, equal to the discounted value of future interest payments.)

25% of the policy value had been intended to repay Mr M's mortgage. So we compared:

A 25% of the pension plan's net cost (after tax relief) to date, plus interest payments on the interest-only mortgage – to date

with

B the capital and interest payments which Mr M would have made to date if he had taken a 25-year repayment mortgage.

In this case, as with many, the actual amount that Mr M spent was less than if he had taken a repayment mortgage. But we did not adjust the redress to take

these notional 'savings' into account. This was because Mr M would have arranged his day-to-day expenditure on the basis of his known outgoings, and would not have been conscious of the 'savings' he was making by not having a repayment mortgage.

We are only likely to deduct such 'savings' where we think it reasonable to do so, and where the 'savings' were:

- clearly identifiable as such at the time *and*
- in the form of readily realisable assets.

(If, unusually, the pension (on the net 25% basis) plus mortgage interest had cost Mr M more than he would have paid for a repayment mortgage over the same period, then we would have awarded compensation to cover the difference.)

The planned retirement date in complaints about pension mortgages is often further than 25 years away, as in the next example.

56/7

redress for pension mortgage mis-selling – where the mortgage would have been paid off earlier if the consumer had taken a repayment mortgage

Mr D, a first-time buyer, contacted the firm for advice on a mortgage. At the time he was 30 years old and single, with no dependants. He worked as a clerical assistant and had no savings or pension plan.

The firm recommended an interest-only mortgage. It said he should also take out a personal pension plan. This would not only provide a retirement income once Mr D reached the age of 65, it would also give him a tax-free cash sum. He could use that sum to pay off the capital on his mortgage.

Mr D's mortgage was originally due to be repaid after a term of 35 years, and he would have paid interest on the full amount of the mortgage over that period.

Ten years after acting on the firm's recommendations, Mr D complained to the firm, querying the suitability of its advice. The firm admitted that a pension mortgage was unsuitable for Mr D. It offered redress but Mr D was unhappy with the amount offered and he brought the case to us.

calculating the redress

The firm had based the amount of redress it offered on:

(A) the amount of capital that would have been repaid to date on a repayment mortgage for the 35-year term of the mortgage

less

(B) 25% of the transfer value of his personal pension plan.

We investigated the complaint and concluded that if he had been suitably advised, Mr D would have had a repayment mortgage. He would have been able to afford the repayments over a 25-year term.

So we told the firm that the correct calculation in this case should be based on:

A the amount of capital Mr D would have repaid to date on a repayment mortgage for a **25**-year term

less

B 25% of the transfer value of his personal pension plan.

Because the pension term was so much longer than the mortgage term would have been, the actual pension cost was smaller than it would otherwise have been.

However, we decided Mr D could have afforded the higher payments he would have had to pay for a 25-year mortgage. The notional 'savings' were treated in the same way as in case 56/6.

56/8

redress for pension mortgage mis-selling where the pension plan was already in existence

Mr A had sought advice on increasing his mortgage as he was planning to move to a larger house. At the time, he was 40 years of age and employed as a caretaker. He was married with two children and had a repayment mortgage.

Mr A had no savings. But for the past five years he had been paying £20 a month into a personal pension plan, with the intention of retiring when he was 65.

The firm advised Mr A to change to an interest-only mortgage and to increase the amount he paid into his personal pension plan. It said that when he reached the age of 65 he could use 25% of his pension fund to repay the capital on the mortgage.

Several years later the case was referred to us, after Mr A had complained unsuccessfully to the firm about its advice. We concluded that, had Mr A been given suitable advice, he would have kept his repayment mortgage for a 25-year term. We agreed with the firm's advice that Mr A should pay more into his pension plan. However, with the repayment mortgage it should have recommended – he would have made a smaller increase in his pension contributions.

calculating the redress

Where an existing pension is 'converted' into a pension mortgage, we usually decide that only the 'new' part of the pension should be taken into account when redress is calculated. Similarly, where the pension contributions are clearly intended to produce a higher cash sum than is needed to repay the mortgage, we disregard the 'extra' contributions.

We told the firm to exclude from its calculations the proportion of the transfer value relating to the premiums Mr A had paid before taking the firm's advice. We said it should use only the proportion that related to those contributions intended to produce sufficient cash to pay off the mortgage capital (based on projections made at the time of the advice).

Just as we would usually disregard an existing pension, we would not normally include in the calculation any later contribution increases – or the related proportion of the transfer value – as the next example shows.

56/9

redress for pension mortgage mis-selling – where the consumer has subsequently increased their contribution to the pension plan

A graphic designer, Mr Y, decided to buy his council flat under the '*right to buy*' scheme, so he contacted the firm for mortgage advice. At the time, Mr Y was a 45-year old single man with no dependants

Acting on the adviser's recommendation, Mr Y took out an interest-only mortgage with a 20-year term and a personal pension plan. The adviser had explained how, when he reached the age of 65, Mr Y could pay off the capital on his mortgage with the tax-free cash sum he would get from his pension plan.

Two years later, Mr Y started to increase his contributions to the pension plan, so that he could get a larger pension when he retired. And several years after that, when Mr Y queried the suitability of the advice he had been given, the firm offered him redress. Mr Y was unhappy with the amount offered and also with the firm's apparent inability to explain the reasoning behind its calculations, so he came to us.

calculating the redress

The firm had calculated redress as follows:

A The capital that would have been repaid to date on a 20-year repayment mortgage

less

B 25% of the transfer value of the personal pension plan, *including* the increased contributions that Mr Y started paying two years after he first set up the plan.

We agreed that the firm's advice had been unsuitable for Mr Y's circumstances and that it should pay redress. However, it should not have taken Mr Y's increased pension contributions into account when it calculated redress. These contributions were intended to provide additional retirement benefits and were not linked in any way to Mr Y's mortgage.

ask ombudsman news

the ombudsman and 'smaller' businesses

an independent financial adviser asks ...

Q Does the ombudsman service have a *small firms*' division like the FSA?

A Half of all the complaints we deal with relate to the 12 largest financial services groups in the UK – reflecting the size and profile of these organisations. At the other end of the scale, more than nine out of ten of the businesses we cover each have fewer than three complaints referred to us annually (and, incidentally, pay no case fees).

So while a very small number of firms have close and frequent contact with us, thousands of businesses have little or no direct experience of our service. Most of these 'occasional users' of the ombudsman service are smaller businesses. (But firms that have few consumer complaints and little contact with us also include major financial companies with few *retail* customers.)

We recognise that businesses that have only infrequent contact with us have different needs to those that deal with us on a daily basis. We do not have a unit specifically called our *small firms' division*. Instead, we have specialist teams focusing on particular types of casework that are relevant to a specific sector or kind of complaint – for example, cases involving smaller building societies, friendly societies and credit unions.

Stockbroking complaints may also involve our dealing with smaller firms that have little direct experience of the ombudsman. However, the issues for this group of firms are obviously very different from those relating to other groups of smaller businesses – say, hospital cash-plan providers. For IFA-related complaints, we have teams with particular knowledge and experience of key complaints-handling issues such as PI cover and network and/or product-provider relationships.

Our approach takes account of the fact that not all smaller businesses are the same – and we respond to their various needs and issues in different ways.

A high-level internal task force – working across all areas of the ombudsman service – has specific responsibility for focusing on smaller firms and encouraging initiatives to improve the service we offer this key stakeholder group. This currently includes, for example, running a pilot project to see whether IFAs who have several complaints with us at the same time prefer to have their cases co-ordinated by a single adjudicator.

For more details of our work with smaller businesses, see *ombudsman news* issue 52 – where principal ombudsman, Tony Boorman, was interviewed about our approach in this area.

ombudsman events for consumer advisers

the manager of a consumer advice centre writes...

Q I understand from a colleague that you organise events for consumer advisers. How can I find out more about this?

A Yes, we run a series of training days across the UK for people working in the consumer advice sector. You'll find details on our website (www.financial-ombudsman.org.uk). Go to the 'news' page and look under the heading 'events'.