



Financial  
Ombudsman  
Service

... settling financial  
disputes, not taking sides

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Walter Merricks  
chief ombudsman

## fair's fair

With 26 May 2008 now set as the date when the new *Consumer Protection from Unfair Trading Regulations* come into force, consumers and the financial services industry may wonder how many more definitions of fairness (or unfairness) they need to be familiar with – and whether this new definition is likely to affect the ombudsman service's handling of complaints.

The short answer, so far as we are concerned, is not much. The vast majority of the complaints we see are either about what we call 'maladministration' – or they turn essentially on the legal position between the two sides to the dispute.

The maladministration complaints range from errors in bank or pension statements to the serious mishandling of insurance claims. A surprisingly large number of disputes arise from the simple failure of a business to note people's change of address.

Analysing the legal position, as part of our consideration of a financial dispute, usually means looking at the terms and conditions of the contract – whether it's a bank account, a mortgage agreement or an insurance policy. ▶



Complaints about mis-selling are essentially about the legal obligations of advisers, under professional negligence law. Of course, the rules of the Financial Services Authority (FSA) – where they apply – embody these obligations. But in judging a dispute, we apply pretty much the same criteria as a court of law would do.

What about the FSA's principle of *Treating Customers Fairly*, the 'unfair relationships' test under consumer credit legislation, and the *Unfair Terms in Consumer Contracts* test? Well, in fact it's not often that we actually need to analyse or apply these in relation to the disputes we see at the ombudsman service.

So back to the imminent new regulations which, from May, will ban a commercial practice that contravenes requirements of '*professional diligence*' and that '*materially distorts the economic behaviour*' of a consumer. I'm sure financial services businesses will want to look at the regulations – but I'd be surprised if we wind up with many complaints that turn on them.

Walter Merricks, chief ombudsman

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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)

# a selection of recent banking case studies

## ■ 68/1

bank alters its record of customer's details to show a false name and occupation

Mr K, who had a current account and a credit card account with his bank, was very surprised to receive a credit card statement with the wrong name on it. The statement was clearly his, as the account number and all the transaction details were correct. However, the name on the statement appeared to have been made up and not a genuine name at all.

After making a number of phone calls to the bank, Mr K was eventually told that the name change had come about because of a '*systems error*'. The bank sent him a cheque for £25 for his out-of-pocket expenses in having to pursue the matter. Although the name on the cheque was closer to his own name than the name on the statement had been – it was still not right.

Given this further error, Mr K remained most concerned about what was happening on his account. When he pursued the matter further, he discovered that the bank's record of his occupation stated that he was a '*professional shoplifter*'. Mr K then brought his complaint to us.

complaint upheld

It soon became clear that the alterations to Mr K's details on his credit card account had not come about as a result of a systems error, as the bank had told him. The changes had been made deliberately, by a member of the bank's staff.

The bank had compounded the problem by failing to get Mr K's name right when it sent him a cheque. It had also taken several months to amend his name on his credit reference history. The overall effect of all this was that Mr K was caused a significant degree of distress and inconvenience. We said the bank should pay him £500 compensation for this.

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## ■ 68/2

consumer held liable for disputed debit card transactions

Acting as executor of his late wife's estate, Mr M contacted the bank about a number of disputed cash machine withdrawals that had been made from his late wife's savings account.

The withdrawals, totalling over £6,000, had been made with the card that had been issued on the account. And the transactions had all taken place during the two-month period when Mrs M had been seriously ill in hospital, following a stroke.

Mr and Mrs M's grandson, Mr J, had subsequently been convicted for the theft of the money. Mr J no longer had the money, so it was not possible to recover it from him. And the bank refused to refund Mrs M's account as it considered she must have been '*grossly negligent in her care of the card and PIN*'.

complaint upheld

Mr M did not dispute that his grandson had made the withdrawals. The circumstances in which Mr J had obtained the card and PIN were distressing and unusual. He had arrived at his grandparents' home shortly after Mrs M had a stroke. He had then stolen the card and PIN notification while Mr M was preoccupied with attending to

his wife and waiting for the ambulance to take her to hospital.

The bank said that, under the terms and conditions of the account, Mrs M was liable for the withdrawals if she had failed to act with reasonable care. In its view, by keeping her card together with the PIN notification she had failed to act with reasonable care.

However, under the *Banking Code* a customer's liability is limited unless they acted fraudulently or with gross negligence. Clearly, there was no suggestion that Mrs M had acted fraudulently. So the issue we had to decide was whether, in keeping a note of her PIN with the card, Mrs M had been grossly negligent.

Except when Mrs M took her card out of the house in order to withdraw cash, she had always kept it, together with the PIN notification, in a small box. This was hidden in a small cabinet in an upstairs room of the house. The card and PIN would not, therefore, have been accessible to any casual visitor.

... the bank considered she had been '*grossly negligent in her care of the card and PIN*'.

... the bank had not taken proper care of the safe deposit box.

It was reasonable to conclude that Mr J had only discovered the whereabouts of the card and PIN because, over time, he had been able to search through the house while visiting his grandparents.

In all the circumstances, we did not consider Mrs M could fairly be said to have acted with gross negligence. We upheld the complaint and said that Mrs M's estate should be compensated by the bank re-working her account (including interest) as though the disputed withdrawals had never been made.

- 68/3 consumer complains that bank failed to take proper care of a safe deposit box – from which jewellery went missing

As executor of her late mother's will, Miss J contacted the bank about the safe deposit box in which she said her mother had kept a large amount of jewellery.

At first, the bank was unable to locate the box at all. Eventually, the box turned up. But when Miss J examined the contents she said that 30 individual pieces of jewellery – with a combined value of over £48,000 – were missing.

Miss J then made a formal complaint to the bank, enclosing a hand-written list that she said was evidence of the jewellery's existence. She said her mother had drawn up the list and attached it to her will, as she had intended Miss J to inherit all the items on the list.

Miss J also sent the bank a statement from her friend, Mr M. He confirmed that he had seen at least 30 items of jewellery in the safe deposit box when he had accompanied Miss J and her mother on a visit to the bank some eighteen months earlier.

Dissatisfied with the bank's response to her complaint, Miss J came to us.

complaint upheld in part  
Miss J told us she was aware that a significant amount of building work had been taking place at the branch where the safe deposit box was stored. And unsupervised contractors had been working in the secure area where the box had been kept. She said she was also aware that several members of staff had left the branch, and she believed that at least one of them had been dismissed for mis-conduct.

It was clear from our investigations that the bank had not taken proper care of the safe deposit box. The box had been moved at some stage, probably during the building work, and the bank had ▶

been unable to locate it when Miss J first asked to have access to it. When the box was eventually found, it had been inside another box but not in the secure area.

However, we noted that when the box was located, the seals on it had been intact. Miss J said she was sure it would have been possible for someone to ease the seals slightly and create a very small opening. We agreed that was a possibility. But it seemed extremely unlikely that even the smallest item of jewellery could have been removed from such an opening.

A number of items were still in the box, including several very valuable rings. It was unclear why they would have been overlooked by any thief who had managed to gain access to the box.

The hand-written list was the only evidence that the items of jewellery – now allegedly stolen – had ever existed. None of the jewellery was mentioned in Mrs J's will, there was no inventory or valuation and the jewellery had never been insured.

... we were not satisfied that her recollections were as accurate as she believed.

We noted several inconsistencies in Miss J's account of events. In particular, she gave us contradictory information about the dates when she had last had access to the box – and whether she had signed for it. And Mr M's account of his visit to the bank differed in several essentials from Miss J's account of that same occasion. Mr M later wrote to us to say that, on reflection, he thought the visit might well have taken place some months later than the date he had given originally.

Overall, we were not satisfied that Miss J's recollections were as accurate as she believed. Because of the lack of evidence about what had actually been in the box, we could not fairly say that the bank should pay Miss J's claim for the items she said were missing. But we accepted that she had been caused considerable upset and inconvenience by the bank's failure to look after the box properly. We said it should pay her compensation of £500 for this.

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#### ■ 68/4

directors of a small business complain that they were wrongly advised by their bank to continue trading, despite serious financial difficulties

Mr and Mrs L were directors of V Ltd, a company that eventually went into liquidation. When the company was set up, the couple had given personal guarantees, limited to £100,000 plus interest, in respect of the company's debts to the bank.

After the liquidation, the company still owed the bank more than £100,000. When the bank sought to recover the money by calling on the guarantees, Mr and Mrs L argued that they should not be required to pay the bank anything. They said that if the bank had given them better advice, they would have ceased trading much earlier, when V Ltd still had sufficient assets to repay all its debts in full.

complaint not upheld

Mr and Mrs L brought their complaint to us in their capacity as guarantors. They said they had contacted the bank when V Ltd was experiencing significant



financial difficulties. They had expected the bank to put the company into liquidation. Instead, it had 'encouraged' them to continue trading by suggesting a debt-factoring arrangement.

After looking into the details of the dispute, and examining the records made at the time, we were unable to conclude that the bank *had* advised or encouraged Mr and Mrs L to continue trading. Rather, it had offered to provide cash flow assistance (by means of the debt-factoring arrangement) if Mr and Mrs L decided to try and keep trading. The couple had decided to go ahead with the arrangement, but unfortunately the company failed just over a year later.

We did not agree with Mr and Mrs L that the bank's offer of assistance was, of itself, encouragement or advice to keep trading. We were also unable to accept the couple's view that the bank had the primary responsibility for deciding whether or not the company should continue trading. We agreed that, in some circumstances, insolvency proceedings are initiated by a creditor. But we said that, as the directors of V Ltd, the couple themselves had a clear duty to take responsibility for such matters.

... the couple had a clear duty to take responsibility for such matters.

We noted that the company's accountant had told Mr and Mrs L to continue in business only if they were satisfied they had sufficient liquidity to trade out of the difficulties the company was experiencing. Having been offered assistance with liquidity by the bank, it was then up to the couple to decide whether they thought the offer was likely to prove effective, or whether they should cease trading at that point.

After examining the company's accounts, we thought it doubtful that the creditors could all have been repaid in full, as the couple maintained, if V Ltd had ceased trading rather than using the debt-factoring arrangement. And we were not satisfied that it would have been possible for Mr and Mrs L to avoid having a call on their guarantee, even if the decision to put the company into liquidation had been made much sooner. We did not uphold their complaint.

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■ 68/5

consumer held liable for disputed transactions made with her debit card

Mrs W contacted her bank to complain that, over a three-month period, £9,600 had been withdrawn from her account without her knowledge. The withdrawals had all been made from cash machines, using her debit card and PIN. She did not consider that she should be liable for the transactions and she thought that the bank should have done more to prevent them taking place.

According to Mrs W, her debit card had been taken from her by a Mr C, who had made the disputed withdrawals without her permission and had then refused to give the card back. She said she often suffered from periods of depression and that, during these periods, Mr C '*exercised control*' over her. She assumed that he must have obtained her PIN by watching her use the card.

... £9,600 had been withdrawn from her account without her knowledge.

complaint not upheld

We examined the audit trails for the cash withdrawals made from Mrs W's account during the period in question. These showed that all the withdrawals had been made with Mrs W's genuine card and associated PIN.

It was difficult, from what Mrs W was prepared to tell us, to get to the bottom of exactly how Mr C had obtained Mrs W's debit card in the first place – or why she had not reported this to the bank right away. We also noted that the disputed transactions were interspersed with *undisputed* transactions, made by Mrs W herself. This did not seem to tie in with her statement that Mr C had refused to give her back the card.

Mrs W had eventually reported her card to the bank as 'lost or stolen', but not until some time after all the disputed withdrawals had been made. Mr C had told the bank that Mrs W had allowed him to use the card and had given him the PIN. But because Mr C was not a party to the complaint, we had no power to question him about that.

After looking carefully at all the evidence, we accepted that Mrs W had not actually made the disputed withdrawals herself.

... the bank should have understood the significance of the request.

However, we were unable to conclude that she had not in any way authorised them. We could not fairly say that the bank should be liable for the transactions, and we did not uphold the complaint. However, we reminded Mrs W that our consideration of her complaint did not affect her right to take the matter to court – where witnesses such as Mr C could be compelled to give evidence.

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■ 68/6

consumer lost money because of the bank's mistake in the way it set up his savings account

After selling his house, Mr G transferred the proceeds from the current account he held in his sole name to a savings account that he asked the bank to open for him and his sister, Mrs Y.

Mr G had previously been bullied and intimidated by a Mr D, who had – over time – persuaded Mr G to pay him substantial amounts of money. It was to

try and prevent a recurrence of this situation that Mr G and his sister asked for the savings account to be set up so that both of them had to sign for all withdrawals.

Unfortunately, however, the bank ignored these instructions. Mr G and his sister were each able to withdraw money from the account using just their own signature. And in less than a year, Mr G had withdrawn and paid over to Mr D some £11,000. In Mrs Y's view, this had only been possible because of the bank's error. The bank disagreed so, together with her brother, she complained to us.

complaint upheld

It was not in dispute that the bank should have set up the account so that both Mrs Y and Mr G had to sign for any withdrawals. However, the bank said that the money in the account belonged to Mr G and he was entitled to pay it over if he wanted to – which is exactly what he had done.

We did not agree that the position was as simple as that. Mrs Y was adamant that they had told the bank, at the outset, exactly why it was so important that both of them had to sign for any withdrawals. We were satisfied, in the circumstances, that the bank should have understood the significance of the request.

A police crime report, spanning the relevant time period, confirmed that Mr G had again been bullied and intimidated by Mr D and had given him the money withdrawn from the savings account.

So although the bank had been correct in noting that Mr G had made the withdrawals himself, he had received no benefit from the money. He had felt obliged to take it out of the account because he was being preyed upon by Mr D – the very situation that he had hoped to avoid by opening the joint account with his sister.

We said the bank should re-work the savings account as though the disputed withdrawals had not been made (including making good the interest paid on the account). We also said the bank should pay Mrs Y and Mr G £500 as compensation for the distress and inconvenience caused by the error.

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## consumer credit complaints and the ombudsman service

It's now nearly a year since the Financial Ombudsman Service has been able to look at complaints involving the wide range of businesses that hold a standard consumer credit licence.

We ask lead ombudsman, Jane Hingston, to tell us about the types of consumer credit dispute that are now being referred to the ombudsman service – and how the businesses concerned can help ensure these disputes are settled as quickly and effectively as possible.

has the number of consumer credit complaints referred to the ombudsman service over the past year matched up with predictions?

The numbers reaching us have been pretty much as we expected – around 2,000 consumer credit complaints in the first year – although it was quite difficult at the start to predict just how many complaints we were likely to see. That's because there had not formerly been any requirement for consumer credit businesses to keep records of complaint numbers.

Our remit over businesses with a standard consumer credit licence only covers complaints about things that happened *after* 5 April 2007. Quite a large proportion of the enquiries we received at first concerned events

that took place *before* that date, so they were not matters that we could help with. That is less of a problem now, and we expect numbers to build steadily as we go forward.

Most of the initial complaints and enquiries we receive about businesses with a standard consumer credit licence do not go on to become 'full-blown' disputes. In part this is because the frontline staff in our customer contact division can resolve many of the more straightforward problems there and then.

But we get too many calls from customers who are unsure how to approach the business itself with their complaint. We can – and do – direct these customers to the right place. However, this suggests that some businesses should be doing more to highlight their own complaints process to their customers.

what are the most common areas of complaints involving consumer credit – and are you seeing any particular themes or trends coming through?

The three main categories of complaint we deal with involving businesses with a consumer credit licence are hire purchase, debt collection and store cards – and this has been the case pretty much since our consumer credit remit started.

It is difficult to identify any strong trends at this stage. As to themes, it is fair to say that many of the complaints seem to concern administrative muddles, service failures and poor communication.

has anything in particular surprised you in the first year of looking at these disputes?

No 'surprises', as such – but it has been encouraging to see how quickly many businesses with consumer credit licences have adapted to our role – and how willing they have been to participate in arriving at informal complaint settlements.

Unfortunately, though, there is a very wide gulf between the approach of these smarter businesses and that of some of the less constructive businesses we deal with.

are you seeing more complaints as a result of the recent 'credit crunch'?

It would be short-sighted not to expect that the wider economic climate, including the so-called 'credit crunch', will affect the number and types of consumer credit complaints we receive. Already, we have been seeing an increase in complaints about changes to credit card and overdraft facilities. I expect that to



Jane Hingston, lead ombudsman

continue. Consumers are also increasingly challenging the fairness of charges that are being added to their accounts.

Trade associations and consumer advisers are very well-placed to spot emerging issues in the credit area, so the ongoing work we do with them is particularly valuable in these interesting times.

are any particularly difficult or challenging issues emerging?

I know that many consumer credit businesses are worried about the new rules that come into force later this year, under the *Consumer Credit Act 2006*, relating to the provision of post-contractual information (including information sheets).

I have always felt, though, that the transparency gained through these measures can be made to work in *everyone's* favour. Consumers will be kept up-to-date on exactly what they owe, so there will be no nasty surprises. They will be given information about where they can get debt advice, and help with disputes, at the times they need it. ▶

In view of the number of disputes we see that appear to stem from lack of basic information – and that then became worse because the consumer did not know who to go to for free help – I am hopeful that the new rules will prove beneficial all round.

what help is available for consumer credit businesses who receive their first complaint? Many will have had no dealings with the ombudsman service before.

We provide a range of services to help businesses that have received a complaint and need some guidance through the complaints-handling and ombudsman process. Our technical advice desk (020 7964 1400) is on hand from Monday to Friday to provide informal guidance on our jurisdiction, the complaints process and our own procedures. This service is also available to consumer advisers.

There's a special online resource for consumer credit businesses ([www.financial-ombudsman.org.uk/publications/technical\\_notes/consumer\\_credit\\_resource.html](http://www.financial-ombudsman.org.uk/publications/technical_notes/consumer_credit_resource.html)), which includes the publication illustrated on this page, *consumer credit businesses and the ombudsman*, covering common issues.

We also go out and about to talk to the consumer credit sector. In the last year, I have spoken to delegates at the Credit Show 2007, the CCR-interactive Conference, events organised by the Consumer Credit Trade Association, the Money Advice Liaison Group, the Credit Services Association, the Civil Court Users Association – I could go on!



any thoughts on what the future holds for consumer credit businesses?

Well it's certainly not going to be boring! Alongside getting to grips with the *Consumer Credit Act* transparency requirements and the wider supervisory role of the Office of Fair Trading, consumer credit businesses will also, among other things, have to adapt to the changes coming on the heels of the *European Consumer Credit Directive*. And then there are the challenges of the wider credit climate and concerns regarding levels of personal debt.

But, in terms of dispute-resolution at least, I hope businesses will feel they are now on fairly familiar territory!

## helping you to help us – answering questions from the ombudsman service



and finally - are there any tips for dealing effectively with ombudsman complaints that you could share with consumer credit businesses?

I know that many consumer credit businesses are small or medium-sized firms with limited complaints-handling resources. This can create challenges. But taking advantage of our online resources and of the following tips should ensure that – whatever its size – a business gets it right. ★

- ▲ Above all, remember that the ombudsman service is impartial. We are on nobody's 'side'. There is no need to be defensive when you communicate with us, and an emotional response will not help. A professional response is the appropriate one, though there is no need to make formal representations, as you would need to do in court proceedings.
- ▲ Our questions are designed to find out what actually happened – not to trick you. You should answer them as best you can.
- ▲ If an adjudicator telephones you to discuss a case, this will usually be to check a small point quickly or to establish if it might be possible to resolve the dispute informally. Our adjudicator will probably have had a similar discussion with the consumer.
- ▲ Always provide the information that the adjudicator has asked for, rather than what you hoped they would ask for. Otherwise, we will have to contact you again – which delays matters as well as wasting your time and ours.
- ▲ If you have other relevant information or evidence that you believe the adjudicator needs to see, then provide that as well – and explain why you have done so. If you are unsure, you can always telephone the adjudicator to check first. But please don't just send us large bundles of unsorted paperwork – more is not always better!
- ▲ Never ignore a question that you cannot (or would rather not) answer – and don't be tempted to try an ambiguous reply. The adjudicator will notice and will follow it up.

# complaints involving buildings insurance

## ■ 68/7

whether insurer responsible for cost of remedying faults in building work carried out as part of a claim for flood damage

Mrs C lived in an old mill house which was badly damaged by winter floods, following prolonged rain and storms. She was insured by the same firm for both buildings and contents and she submitted claims under both policies.

The insurer accepted liability and appointed contractors to carry out repairs to the property. After a few weeks, however, Mrs C concluded that the contractors were making unreasonably slow progress. She discussed the situation with the insurer and said she would like to appoint a local surveyor to represent her and supervise the work. The insurer agreed to her proposal and confirmed that it would pay the surveyor's fee.

During the course of the subsequent works, Mrs C's surveyor replaced the existing contractors with a new firm of builders. And Mrs C asked for some additional work to be carried out, at her own expense.

As time went on, Mrs C became increasingly dissatisfied – both with the surveyor and with the standard of the building work. When all the work was eventually completed, she hired a different surveyor to prepare a report on what had been done. He identified a number of faults in the building work and estimated that it would cost just under £50,000 to remedy matters.

Mrs C sent the report to the insurer, together with a claim for the cost of putting things right. However, the insurer refused to meet the claim. It said that as Mrs C had appointed a surveyor to oversee the work, responsibility for any faults lay with him. Mrs C then brought her complaint to us.

complaint upheld in part

It was clear that there were a number of problems with the building work. Some of the faults listed in the report related to the additional work that Mrs C had asked the builders to carry out. We agreed with the insurer that it was not responsible for putting right any defects in this additional work.



However, we said that the repair work relating to the flood damage was a different matter. The insurer had authorised and paid for the work. And it remained responsible for ensuring that the work was completed satisfactorily, regardless of the fact that – with its agreement – Mrs C had appointed a surveyor to oversee the builders.

We said the insurer should pay Mrs C £20,000 to cover the cost of remedying the defects in the work carried out to repair the flood damage.

■ 68/8

whether uneven concrete flooring resulted from subsidence or poor construction

Mr and Mrs B contacted their insurer when they first suspected that their flat had been affected by subsidence. The insurer appointed a firm of surveyors to inspect and monitor the situation.

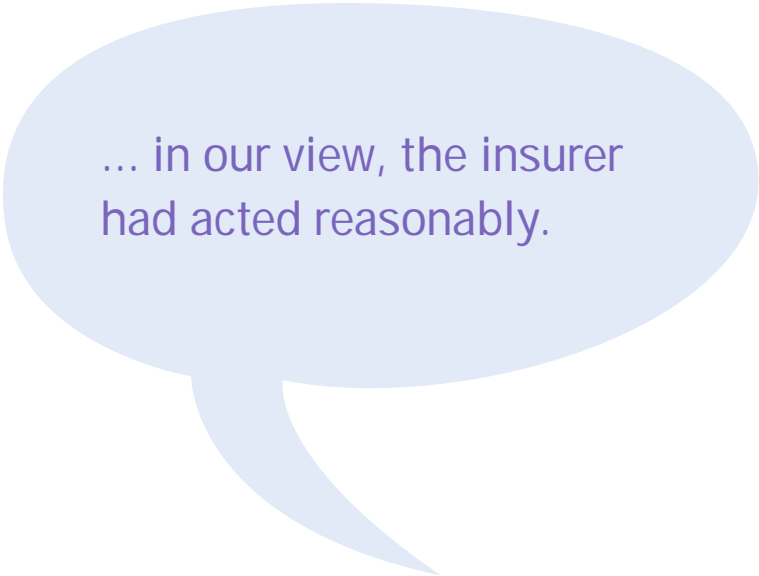
It became clear that subsidence was affecting the entire block of flats and that a significant amount of work would be needed to remedy matters. The insurer paid for Mr and Mrs B to move into alternative accommodation for eight months, while work was carried out on their flat. ▶



In the event, it was over nine months before the work was finished. And when Mr and Mrs B visited the flat, they concluded that it was still not in a fit state for them to return to. They told the insurer that the uneven state of the concrete floor was unacceptable. They also submitted a long list of 'snagging' items that they said needed to be fixed before they could move back home.

The surveyors said that the poor state of the floors was nothing to do with the subsidence or the repair works. It was attributable to the age of the property and the poor quality of its original construction. The surveyors did, however, agree that the 'snagging' items needed attention.

The insurer agreed to pay for Mr and Mrs B to continue living in alternative accommodation for a further three months. At the end of that time, the couple returned home. However, they remained unhappy about the state of the floors. Unable to get any further with the insurer on this matter, they referred the dispute to us.



... in our view, the insurer had acted reasonably.

complaint upheld in part

In our view, the insurer had acted reasonably in carrying out the repairs and then extending the period during which it paid for the couple to stay in alternative accommodation. We accepted the surveyors' evidence that the poor state of the floors did not result from subsidence, the repair works, or any other insured 'event'. So we agreed with the insurer that it was not responsible for any work that was needed to restore or improve the state of the floors.

We did, however, conclude that Mr and Mrs B had been caused additional and significant inconvenience and distress by the need to extend their stay in alternative accommodation. We therefore required the firm to pay them £1,000 for this.

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■ 68/9

claim for flooding and damp in basement after exceptional rainfall – whether policy also covered cost of repairing damaged damp-proofing in walls

After a period of exceptional rainfall, Mr and Mrs D discovered that the basement of their house had suffered flooding and damp. They put in a claim under their household insurance policy.

After sending an engineer to inspect the basement, the insurer agreed to pay the cost of repairing the flood damage.

However, it said it would not meet the cost of making the walls of the basement watertight. The engineer had reported that the damp-proof membrane protecting the walls was in a poor condition and that this had contributed to the problems in the basement.

... the insurer pointed out that the policy did not cover such matters.

The couple thought it unreasonable of the insurer not to pay for all the repairs. However, the insurer insisted that it was not liable for the cost of repairing the damp-proof membrane or providing an alternative solution to keep the basement water-proof and damp-proof. It said the damage to the membrane must have been caused by defective design or poor workmanship or by very gradual movement in the surrounding earth. The insurer pointed out that the policy did not cover such matters. Mr and Mrs D then brought their complaint to us.

complaint upheld in part

The evidence from the engineers suggested that the damage was likely to have been caused by ground movement rather than by any defect in workmanship or design. The insurer said that this type of ground movement constituted a '*gradually-operating process*' – something that was not covered by the policy.

After reviewing the evidence, we concluded that the ground movement that had, in all likelihood, caused the damage *was* covered by the policy. We therefore required the insurer to pay for the cost of installing a new system to replace the damaged membrane and protect the basement. ►

Mr and Mrs D had also asked to be compensated for the insurer's '*undue delay*' in dealing with the claim. We did not agree that it was appropriate in this case for the insurer to make such a payment. In view of the technically complex nature of the problem, the insurer had been entitled to appoint a firm of engineers to inspect and report on the damage. The insurer had acted promptly, both in appointing the engineers and then in completing its consideration of the claim, once the report was ready.

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■ 68/10

insurer refuses to pay claim for storm damage when it discovers that policyholder is serving a prison sentence

Mr and Mrs T put in a claim under their buildings insurance policy after their small, sea-front house was badly damaged in a storm involving wind speeds of up to 100mph and exceptionally high tides.

While it was looking into the claim, the insurer discovered that Mr T was serving a prison sentence. It told the couple it would not have offered them any cover at all if it had been aware of Mr T's conviction. It said that it would

not pay the claim and that it was 'avoiding' the policy (treating it as if it had never existed).

Mr and Mrs T insisted that they *had* told the insurer about the conviction. However, the insurer refused to reconsider the matter so the couple brought their complaint to us.

complaint upheld

Mr and Mrs T had been sold the policy by their bank and regarded the bank as their insurer. There was clear evidence that the bank had been fully aware of Mr T's circumstances. In fact it had written to him at his prison address. However, it had not passed on any information about his conviction to the insurer.

The bank admitted that it had received a letter from Mr T in which he had given details of his prison sentence and asked about some concerns regarding both his mortgage and his household insurance. However, it said that Mr T had addressed his letter to the bank's mortgage department – and the correspondence had all been dealt with within that department, not in the insurance part of its business. It said that it was not fair to imply that the one part of the business

would automatically be aware of what went on in other departments.

In our view, the staff in the mortgage department of the bank should have realised that they needed to pass on to the insurer the information that Mr T had provided about his conviction and imprisonment.

We noted that a few weeks after the bank's mortgage department had replied to Mr T, the bank had sent him the standard questionnaire it sent all policyholders when their insurance was due for renewal. When he completed the questionnaire, Mr T referred to his recent correspondence with the bank about his '*changed circumstances and conviction*'. However, it appeared that no one at the bank had passed on to the insurer what Mr T had written on the questionnaire.

We did not think it likely that Mr T, or his wife, would have been unable to obtain insurance cover – either from the same insurer or from a different one – if the details of his conviction had been known. However, the couple would probably have had to pay an additional premium because of the conviction. ►

We upheld the complaint. We said the bank should pay the couple the same amount that the insurer would have paid them in settlement of the claim. However, we agreed that it could deduct the cost of the additional premium that the insurer would have charged, if it had been aware of the conviction.



■ 68/11

whether problem with floorboards was caused by a relatively recent flood or by rot that had been spreading for some years

While Mr H was visiting his elderly mother he became aware of a problem with the flooring. After removing the carpet, he discovered that the wooden floorboards and joists were suffering from extensive rot. Acting on his mother's behalf, Mr H then put in a claim under her buildings insurance policy for the cost of replacing the wooden timbers and floorboards.

After investigating the claim, the insurer refused to pay out. It cited an exclusion in the policy that meant it did not cover *'loss or damage ... resulting in wet or dry rot'*.

Mr H complained to the insurer about its decision. He said that the damage must have been caused by a leak at the property four years earlier that had led to the installation of a new water meter and stopcock. As the policy had been in force since that time, and it covered liability for *'escape of water and flooding'*, he said the insurer should pay up.

complaint rejected

We examined all the evidence, including the independent reports that both the insurer and Mr H had commissioned.

We concluded, from the scale and extent of the rot, that it was unlikely to have been caused by a single leak, four years earlier. It appeared to have developed and spread over a number of years.

So we said that the insurer was justified in rejecting the claim.



# problem solved!



... our [technical advice desk](#) can help businesses and consumer advisers by:

- explaining how the ombudsman service works
- providing informal assistance on how the ombudsman might view a particular issue
- helping you find the information you need about the ombudsman service

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### FSA-approved industry guidance a policy adviser at a trade association emails ...

**Q** How does FSA-approved 'industry guidance' affect the way the ombudsman service decides complaints?

**A** The Financial Services Authority's framework for recognising 'industry guidance' came into effect in September 2007, as part of the regulator's move towards principles-based regulation. It allows trade associations, professional bodies and firms to seek formal confirmation for the guidance they produce, to help their members understand and meet the FSA's regulatory requirements.

A policy statement published by the FSA in September 2007 (*policy statement 07/16*) describes the role of 'industry guidance' and the process for seeking the FSA's confirmation of such guidance.

The policy statement also covers how 'industry guidance' relates to the Financial Ombudsman Service. It explains that the decisions made by the ombudsman service are not about enforcing the FSA's rules – but about protecting the rights of consumers. FSA-approved 'industry guidance' cannot affect the rights of third parties – such as consumers, when they seek to enforce their rights through the courts or the Financial Ombudsman Service.

There is no explicit requirement in the FSA's complaints-handling rules (the 'DISP' rules) for the ombudsman service to consider approved 'industry guidance' when it deals with individual disputes. However, relevant 'industry guidance' may help the ombudsman to establish what was thought to be good industry practice at a particular time – or to help explain to a consumer that a firm's approach is not unique.

### is a 'final decision' really final? an independent financial adviser emails ...

**Q** Is it true that an ombudsman's 'final decision' really is final, and that a business has to comply?

**A** Under the legislation that established the Financial Ombudsman Service and gave us our powers, an ombudsman decision is final and binding on the business, if it is accepted by the consumer.

An ombudsman decision gives finality and certainty. It means that a dispute that has probably already lasted for many months – absorbing increasing amounts of senior management time and business resource – can be brought to an end, once and for all.

No dispute can be allowed to continue for ever – either at the ombudsman service or in the courts, to which we are an alternative process. The side that loses would often like to continue arguing their case indefinitely. But a line has to be drawn – and a final decision made – once we are satisfied that both parties have had sufficient opportunity to tell us their version of events. The ombudsman decision marks the end of our involvement – and the end of our consideration of the dispute.

You can find out more about our process on our website ([www.financial-ombudsman.org.uk](http://www.financial-ombudsman.org.uk)) – in the FAQ section providing information for businesses covered by the ombudsman service.