ombudsman news

from the **banking** division

Financial Ombudsman Service

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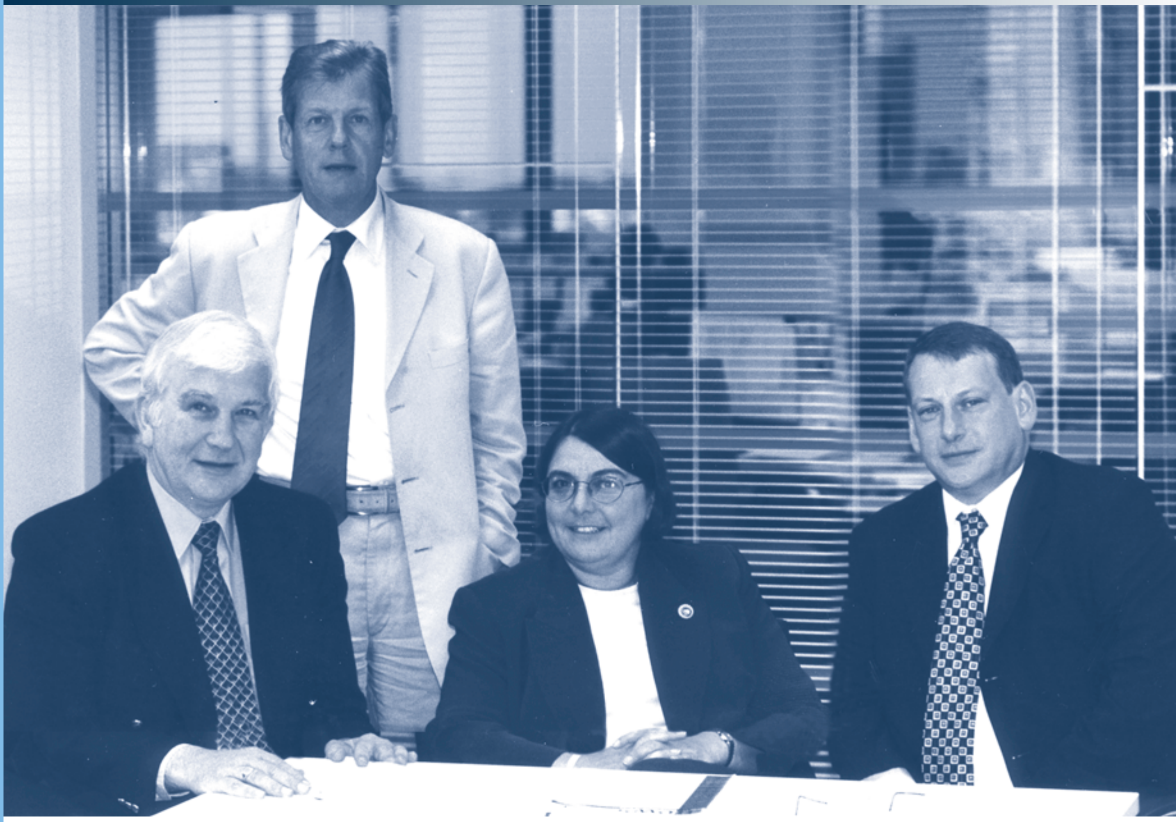
Aimed at financial firms and professional advisers – and at consumer advice agencies – we focus each month on news from one of our three case-handling divisions: insurance, investment – and this month – banking & loans



Walter Merricks (back), chief ombudsman, with the three principal ombudsmen. From left to right, **David Thomas**, banking and loans, **Jane Whittles**, investment, and **Tony Boorman**, insurance.

about this issue of *ombudsman news*

by **David Thomas**
principal ombudsman
banking & loans

The Financial Ombudsman Service is now dealing with banking and loans complaints in its own right, rather than on behalf of the Banking Ombudsman Scheme and Building Societies Ombudsman Scheme.

Those schemes used to publish commentaries on their decisions once a year, in their annual reports. *ombudsman news* is intended to fulfil the same role but quarterly – so the information is more regular and more topical.

This issue contains brief updates on two ‘hot topics’ – dual variable mortgage rates and TESSAs. It gives examples of other complaints that can arise on mortgage accounts and current accounts. And it looks at some plastic card transactions from opposite viewpoints – those of the retailer and those of the customer using a card abroad.

Our own contribution is rounded off by an explanation of some procedural issues – lead cases, final response letters and what our new rules mean for firms. Finally, a guest article from the BBA/BSA/CML deals with arrangements for ongoing liaison.

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1 mortgages

dual variable mortgage rates – an update

In the September 2001 edition of ***ombudsman news*** we gave a short 'interim report' on what was happening on this subject. Since then, the whole issue has gathered much more momentum – with column feet (rather than inches) being devoted to it by the press.

We cannot comment fully on our approach because cases are still being considered. But here, in general terms, is an update, with a summary of the position at 31 December 2001.

where we were three months ago

We had received a number of complaints about several different lenders. Some complaints were under investigation. In two cases, concerning lenders A and B, one of our adjudicators had already issued preliminary decisions recommending that the particular borrowers should have their mortgages linked to the new, lower, variable rate.

Both lenders had appealed, and the cases were being reviewed before an ombudsman issued a final decision.

what has happened since

We have issued an ombudsman's final decision in the case concerning lender A. In that case, the ombudsman decided that the particular borrowers were entitled to have their mortgages linked to the new, lower, variable rate.

The decision was based on the particular circumstances of the borrowers concerned, including the terms of their individual mortgage contracts. The decision did not deal with the general issue of lenders having more than one variable mortgage rate.

A preliminary decision has been issued in a case involving lender C, recommending that that lender should link the particular borrower's mortgage to the new, lower, variable rate. The lender appealed against that decision.

So the cases involving lenders B and C now await an ombudsman's final decision. It is likely that a preliminary decision will be issued at about the same time concerning lender D.

other mortgage problems

Mortgages are still our single largest area of complaint. The problems raised are not confined to such 'hot topics' as dual variable rates or early repayment charges, as the following three cases illustrate.

case studies – mortgages

■ 12/01

which valuation type – and who pays for a valuer's negligence?

In preparation for their retirement, Mr and Mrs G decided to move to the West Country. They applied for a small mortgage to help them buy their 'dream cottage'. On the mortgage application they ticked the box for a 'detailed' property valuation. That type of valuation was important to them because parts of the cottage dated back to 1800.

The firm arranged the valuation and Mr and Mrs G got the report the following month. It was generally satisfactory (it said the cottage only needed 'general maintenance') – so the couple went ahead with their purchase. But even on the day they moved in, they started to discover things that were wrong with the cottage – things they thought the valuer should have spotted. So they looked again at the valuation. That was when they realised they had been given a 'simple' valuation, not the 'detailed' one they asked for.

It cost Mr and Mrs G £60,000 to put everything right with the cottage. To pay for the work, they cashed in a life policy and also used some of their savings. Some of the problems were with things Mr and Mrs G did not expect the surveyor to have found. But as the firm accepted that it had given the valuer incorrect instructions, Mr and Mrs G asked it to pay £30,000 towards the repairs. It would only offer them £5,000.

When we looked at the complaint, we thought there was a chance that Mr and Mrs G should have realised sooner than they did that they had been given the 'wrong' type of valuation. But it was just a small chance – because there was only one small reference to the type of valuation on the whole form. However, by then it was clear that many of the problems – accounting for a significant part of the repairs – should have been spotted even with a simple valuation, not just a detailed one.

Another valuer, and an independent loss adjuster, both agreed that the first valuer had been negligent. And we decided that, given the overall circumstances, the firm should be held responsible for that negligence. The courts say that the starting point for working out compensation in this type of case is to calculate the difference between the price paid for the property, and the price that would have been paid had all the defects been 'out in the open'. However, if Mr and Mrs G had known of all the problems to begin with, it was very likely that they would have bought another property instead. There were plenty on the market at the time.

We were told by independent valuers that the price differential would only have been fairly small. But because we accepted that the couple might well have bought another property if they had known the cottage's true condition, we thought they should get more than that. So we told the firm to pay them £25,000.

12/02

duty to get a fair price when selling a property taken into possession

In 1990, Mr B bought a house for £250,000 with a mortgage from the firm of £150,000. But by 1994, he was having money problems and he fell into arrears with his mortgage. He put his house up for sale at £300,000 – but no offers came in even after he reduced the price, in stages, to £220,000.

In 1996, the firm obtained a court order authorising it to take possession of the house. Mr B was made bankrupt the same year. In January 1997, the firm took possession of the house and put it up for sale at £160,000. In March 1997, the firm accepted an offer of £155,000 from a Mr J.

12 months later, in March 1998, Mr B found out that Mr J had sold the house for £250,000. Mr B complained to the firm that it had sold the house too cheaply. The firm did not agree. It said that Mr J's initial offer for the house had only been £130,000 but it had managed to sell for £25,000 more than that. In any event, Mr J's offers were the only ones it received.

We were satisfied that the firm had done all the right things when it put Mr B's house on the market. It had consulted a number of local estate agents and had followed a recommended marketing strategy. There were good reasons why Mr J got much more for the house the following year. Prices generally had gone up, he had done a lot of work on the house and he got a premium price from the neighbouring hotel – which wanted the property as part of its expansion plans.

Mr B said the firm should have approached the hotel the year before. But we decided the firm had done enough and it had no reason to suppose the hotel would be interested in the house. The hotel had shown no interest when Mr B had been trying to sell it the year before, and if it had really wanted the house then, it would hardly have waited a year and then paid much more for it.

So we decided the firm had fulfilled its obligations towards Mr B and there was no evidence that – in accepting just £155,000 for the house – it had acted unfairly.

■ 12/03

repaid mortgage deed not properly dealt with

Back in 1991, Miss M bought an 80% interest in a house. The other 20% was kept by a housing association. The firm gave Miss M a mortgage to buy the 80% and the housing association took a second mortgage to secure its 20% interest.

In 1996, Miss M borrowed more money from the firm in order to buy out the housing association. The housing association's solicitors sent the second mortgage documents to the firm's branch, which sent them off to its centralised deeds department. That department should then have sent them to the land registry to get the second mortgage deleted from the register. But all that happened was that the documents were put with the main set of deeds.

Three years later, Miss M wanted to borrow some money from another lender and offered it a second mortgage over her house. Because she needed the money quickly and the housing association's mortgage was still on the register, she decided to borrow the money unsecured, which cost her more interest. Despite much to-ing and fro-ing between the housing association's solicitor and the firm, the problem had still not been sorted out by the time Miss M wanted to re-mortgage her house with her new employers (who were offering a cheap deal).

We considered that Miss M had been caused a lot of distress and inconvenience by the firm's failure to deal with the second mortgage documents when it received them from the housing association's solicitors. But we did not agree that she had suffered any financial loss. A secured loan would have been cheaper than the unsecured one, but Miss M had made no attempt to change the loan over – or to chase matters up. And her new mortgage with her employers was not delayed by much. So we told the firm just to compensate her for distress and inconvenience. As that had been considerable, we said that the firm should pay her £1,000.

2 savings accounts

tax exempt special savings accounts (TESSAs) update

To re-cap the story so far, in September 2000 we issued a briefing note, indicating the approach we were likely to take on complaints that reached us.

Banks took note of our likely approach. Some decided they would probably 'lose' and settled individual complaints with their customers. Others decided they were likely to 'win' and by and large they proved to be right.

Most building societies preferred us to investigate. Preliminary decisions have been issued in all but one of the 'lead cases' (we explain 'lead cases' on page 21). The societies 'lost' in about three-quarters of these. About half of those societies appealed against the decision. The outcomes of all the ombudsman final decisions issued so far have been the same as the preliminary decisions.

Two of the societies had threatened legal action if the ombudsman's final decisions went against them. The final decisions did go against those societies.

One of these societies, after studying the final decision in its case, decided to accept it after all. It continued to disagree with the ombudsman's view, but settled all its other cases in line with the ombudsman's decision. The other society asked for the ombudsman's decision to be referred to the High Court because, it said, the decision contained errors of law. That process is likely to take some months.

...in September 2000 we issued a briefing note, indicating the approach we were likely to take.

3 current accounts

Here are a few recent examples of complaints we have dealt with concerning problems with current accounts, affecting both private individuals and business customers.

■ 12/04

cheque lost in clearing – after five months

Mr D paid a cheque for £500 into his account. It had been given to him by one of his tenants. The cheque was actually a tax refund cheque, which was made out to the tenant, but which the tenant had endorsed over to Mr D in order to pay rent arrears.

The firm passed on the cheque to its clearing agents for collection – as it usually did – and credited Mr D's account. But five months and four days later, the clearing agents told the firm that the cheque had been lost 'in the system' and had therefore not been paid out of the account it was drawn on. So that same day the firm debited Mr D's account with the £500, and wrote to tell him what it had done.

Mr D was furious – even more so when he complained to the firm and it told him it had no responsibility whatsoever for the lost cheque, even though it did not dispute that he had paid it in. The firm said Mr D would have to get a replacement from the person who gave it to him. But Mr D couldn't do that – the tenant had died the month before. The firm insisted that Mr D had no comeback – and it quoted law to reinforce what it was saying. So Mr D came to us.

We decided that because the firm ***was*** responsible for dealing with the cheque after Mr D had paid it in, it should be held accountable for its loss. Not only was a delay of more than five months unacceptable, but the implication of the legal statement the firm was relying on was that if a banker ***is*** at fault in these circumstances, then the loss ***will*** fall on it. We thought it made no difference whether the firm or the clearing agent had lost the cheque. The agent was acting on behalf of the firm, which had chosen it, and not on behalf of Mr D. So the firm should accept responsibility for any failings of the clearing agent.

The firm fought the case all the way to an ombudsman's final decision, when we awarded Mr D the value of the cheque plus another £200 for inconvenience. Although the firm paid up, it wrote to the ombudsman afterwards saying that, in its opinion, the decision was 'fundamentally flawed' and that the matter would be taken up at the 'highest levels' at some future date.

■ 12/05

delayed/wrongly processed international transfer

While Mr and Mrs C were on holiday in Africa one Christmas, they were offered the chance to buy some land next to the holiday home they already owned. The people who owned the next-door holiday home were selling the land and wanted a quick sale. Mr and Mrs C were able to negotiate a very good price, on the basis that they paid £1,000 there and then and sent the rest of the money to the sellers immediately they got back home.

On the first working day after their return to the UK, Mr and Mrs C hand-delivered a letter to their branch of the firm, asking it to transfer £7,250 in sterling to the sellers' agent's bank account. They did not fill in the usual international transfer form – but they said they told the cashier what the transfer was for, and how urgent it was. They had used that type of transfer before and the money had usually arrived in three or four days.

The branch had filled in an international transfer form, attached Mr and Mrs C's letter to it, and sent it off to its international department for processing. But the branch had not marked the transfer as 'urgent'. It had ticked the 'standard transfer' rather than the 'urgent transfer' box. And it asked for the transfer to be made in local currency, not in sterling.

A week after their visit to the branch, Mr and Mrs C received a letter from the firm to say the money had been transferred. That was when they discovered it had been sent in the wrong currency – and had not been sent 'urgently'. They told the firm of its errors – and stressed that it had been essential that the money was sent in sterling because the agent's bank would not accept anything else. The firm then 're-called' the currency transfer and sent the money in sterling (from its own account – rather than from Mr and Mrs C's account) and this time marked 'urgent'.

In the meantime, the sellers got in touch with Mr and Mrs C to say someone else was interested in the land, at a higher price. If the money did not arrive within two days, they would sell to this other party. It did not arrive in time, so Mr and Mrs C lost the deal.

All the money eventually came back into Mr and Mrs C's account and the firm made good any exchange losses. However, Mr and Mrs C put in a substantial claim for 'loss of value and loss of profit' – saying that the loss of the land meant they could not now develop another property on the site and let it out to supplement their retirement income, as they had planned.

The firm rejected their claim as being too speculative, but it did offer the couple £5,000. They rejected this and brought their complaint to us. We decided that, although the firm's errors had meant that the money arrived in Africa too late, its offer was reasonable to compensate them for the 'loss of chance' they had experienced. So we told the firm to renew its offer.

■ 12/06

mail sent to the wrong address

Mrs A and Mrs G bought a hairdressing salon, which had not been doing too well, with the intention of re-launching it under new management. Mrs G was, at the time, still managing a competitor's salon in the town so they wanted to keep her involvement quiet until they were ready to re-launch the business. They were also keen to prevent the staff from learning of the salon's current financial problems. They therefore asked the firm to send all correspondence about the business to Mrs A, at her home address.

The firm knew all about Mrs A's and Mrs G's concerns. But, despite that, it sent a paying-in book to the salon with both their names on it. A few days later, three stylists handed in their notice – they felt their new employers had acted behind their backs and could not be trusted. So when Mrs A and Mrs G came to re-launch the business they did not have enough staff. This meant that, until they were able to recruit and train new staff, the takings were much less than they had forecast.

Mrs A and Mrs G estimated that the firm's error cost them over £35,000 – the difference between what they thought they would make in the first six months and what they ended up making. The firm accepted that it had made an error, but did not accept that a loss as big as £35,000 had come about as a result. It offered Mrs A and Mrs G £1,000 – which they rejected.

We decided that, given the sensitivity of the situation and the fact that Mrs A and Mrs G had made this extremely clear to the firm, it should have taken much more care than it did. But even so, it could not have been expected to foresee losses of the scale claimed. In any event, we were not convinced that Mrs A and Mrs G had actually lost as much as £35,000. We decided that, in the overall circumstances, the firm's offer of £1,000 had been fair.

■ 12/07

international transfer request – genuine or not?

H Ltd is a company incorporated in the Isle of Man but operating from Nigeria. It has its main bank account in England.

One morning, the firm received a letter:

- asking it to transfer over 50,000 US dollars from H Ltd's dollar account to an account at a bank in Chicago;
- asking it to transfer £16,000 from H Ltd's current account to its dollar account, to ensure there would be enough in the dollar account to cover the transfer; and
- telling the firm that H Ltd had moved.

Although the letter was apparently signed by H Ltd's authorised people, the firm was wary – partly because it knew there had been previous fraudulent attempts to withdraw money from H Ltd's accounts. So the firm phoned H Ltd in Nigeria and spoke to one of the authorised signatories, Mr J. Mr J confirmed that the letter was genuine, so the firm went ahead with the transfers.

It was only when H Ltd contacted the firm some while later, to ask why so much money had been transferred from its accounts, that it became clear that the letter had not been genuine and the firm had not spoken to the real Mr J at all – he had not been in the office that day. H Ltd asked for its money back. The firm refused, saying it had done all it could to verify that the letter and the transfer instructions were genuine.

When we looked into the matter we noted that, even at first glance, the letter looked suspicious. The letterhead was nothing like the one H Ltd normally used, and the signatures looked suspect too. The legal position is that a forged authority is of no effect. And we decided that, even though the firm had tried to get in touch with H Ltd, it had not gone far enough to make sure the letter was genuine. There were enough grounds for suspicion to suggest it was insufficient just to telephone the Nigerian office and take the word of the man they spoke to that he was who he said he was.

We told the firm to give back to H Ltd the 50,000 US dollars, and to add another 2,500 US dollars for lost interest and inconvenience.

■ 12/08
bankers' draft

Mr S saw a second-hand Mercedes and decided to buy it – even though the car's service record was incomplete. The seller said that he would give Mr S all the missing service information when he returned to collect the car.

When Mr S went to the firm to draw out £18,000 in cash to pay for the car, the firm recommended that he should pay by bankers' draft instead. That way, he was told, he'd have 24 to 48 hours to cancel the draft if there was any problem.

Mr S handed over the draft, was given an envelope apparently containing the missing service information, and drove the car home. He then discovered that the envelope did not contain any service information. The following day a local Mercedes dealer told him that the car appeared to have done many more miles than its clock showed – and was only worth £15,000 maximum.

Mr S asked the firm to stop the draft. However, it told him it could not do this as the draft had not been either lost or stolen. A draft could not be stopped just because of a customer's change of mind, however reasonable that change might be.

We sympathised with Mr S. It was obviously a big disappointment to him. But because there are only very limited circumstances when a draft can be stopped, we decided the firm had not misrepresented the position to him. Rather, he must have misunderstood what he had been told. We did not uphold his complaint.

■ 12/09

internet banking – whose fault is it when it stops working?

Because she is disabled and cannot get to a branch without help, the ability to run her accounts from home is very important to Mrs L. So she opened an account with the firm that could be run either via the internet or over the phone.

A few months later, Mrs L contacted the firm to say she was having problems downloading information from the firm on to her computer. The firm said the problems were probably with her machine, rather than with its own system. Mrs L did not believe that. She could get similar information from other companies, so she thought the problems had to be with the firm.

Many e-mails went back and forth between Mrs L and the firm, as it put forward a number of suggestions to try to resolve the problem – all of which involved Mrs L checking her own machine. Some of the suggestions were wrong, and would have caused her further problems if she had tried to implement them. But, overall, it turned out that the firm was not at fault. However, the e-mails continued to and fro. In the end, Mrs L told the firm that she expected compensation for her 'time and inconvenience' at £5.00 per e-mail. The firm was not prepared to offer her anything – mainly because it did not think it had done anything wrong.

We decided that, although not all the firm's answers to Mrs L's questions had been right, it had tried very hard to help by making a number of suggestions. The problem was down to her using an old version of the necessary software package. So we did not think the firm had any reason to pay Mrs L any compensation – even though she had clearly had a difficult time trying to run her account.

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■ 12/10

when it might be right to discuss a customer's account with someone else?

Mr K learning disabilities and is unable to manage money himself. Some of the time, he lives at home with his widowed mother. At other times, he 'lives rough'. Often his mother does not know where he is, or if he will ever be coming home.

One day, Mrs K found in the post an envelope from the firm addressed to her son. She opened it and, to her horror, discovered he had opened an account and applied for a loan of £1,500. She phoned the firm to tell it of her son's problems, and to ask it not to lend him the money. But it would not discuss the matter with her – even when she said that if the firm lent her son money, she would end up having to pay it back when she could ill afford to do so.

The firm went ahead and lent Mr K £1,500. He spent all the money and then defaulted on the first repayment. So the firm started writing to him to chase repayment. Mrs K saw the firm's letters and she phoned again but the firm would still not talk to her about the situation. She then came to us for help.

We told Mrs K that, strictly speaking, the firm was right not to discuss her son's financial affairs with her. But clearly these were special circumstances. We contacted the firm, pointed out the special circumstances, and explained that all Mrs K had tried to do was to save everyone unnecessary bother – and loss. The firm agreed to write off the money it had lent to Mr K.

and finally –

■ 12/11

In mid-1999, Ms N read a magazine article that said:

'If Kate pays £50 a month into a 'high interest' account with [the firm] for the next 2 years, she'll earn £700 in interest on top of the £1,100 nest-egg, as long as she doesn't take any money out. If she pays the same amount into another firm's account, she'll only earn £120 in interest.'

So Ms N opened a high interest account with the firm and paid in what the magazine suggested. But at the end of the two years, all she got back in interest was a few pence over £70. Understandably upset, Ms N complained to the firm on the basis that she had opened her account because of misleading information – which, she said, the firm must have supplied to the magazine.

The firm did not agree – and neither did we. The journalist may have misunderstood how the account worked, or perhaps there had just been a printing error. But either way, to get that sort of return would have required an improbable interest rate of just under 50% a year.

... to get that sort of return would have required an improbable interest rate of just under 50% a year.

4 plastic cards

when firms withdraw merchant acquiring facilities – leaving retailers unable to accept card payments

Many customers think – wrongly – that if they use a credit card to pay a retailer, the firm that issued their credit card then pays the retailer. Many customers also assume that the firm that issued their credit card authorised the retailer to accept its credit cards. This is how it actually works:

- The firm that provides the credit card is known as the ***card provider***. It belongs to a credit card network, such as MasterCard or Visa.
- The retailer is known as a ***merchant***. It has signed up with a ***merchant acquirer***, which belongs to the same credit card network as the bank.
- The retailer gets its money from the merchant acquirer. The merchant acquirer gets its money from the card provider.
- Effectively, each credit card network is an electronic form of clearing system – coupled with a delay before the cardholder has to settle up with the card provider.
- So the chain is actually: merchant (the retailer) l merchant acquirer l credit card network l card provider l customer.
- The card provider does not control where the cardholder can use the credit card, any more than a bank controls where a customer can use cheques.

... because of credit card fraud, this type of agreement can be a risky one.

Because of credit card fraud, this type of agreement can be a risky one – both for the retailer and for the firm that sets up the facility. The situation raises a number of issues. What is the deal for the retailer? And what happens if things go wrong? By the time the fraudulent transaction appears on the genuine customer's credit card statement, the fraudster will long since have disappeared – along with the goods. Who picks up the tab for those goods – the retailer, or the firm that allowed the retailer to accept credit cards in the first place?

Some unfortunate retailers can be the unwitting targets of fraud. But a few of them are in on the fraud themselves. They are what is known in the trade as 'collusive retailers' – retailers who know they are accepting 'dodgy' cards, and take a cut from each transaction.

Firms are, very properly, worried about all of this. Credit card fraud is running at too high a level. But what of the innocent retailer who is targeted by fraudsters? And what is the role of the National Merchant Alert Service – the organisation to which merchant acquirers report fraud? A couple of recent cases show up some of the problems.

case studies – withdrawal of merchant acquiring facilities

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who was the real fraudster and how should chargebacks be dealt with?

S Ltd sells ladies' fashions, mainly by credit card. On 15 January 2000, the firm that supplied S Ltd with merchant acquiring facilities wrote to it asking for signed transaction slips for 14 transactions made the month before (totalling over £3,000).

The firm said that S Ltd had 15 days in which to let it have the transaction slips, but on 22 January it wrote again – this time to say it was withdrawing merchant acquiring facilities immediately. This was because a number of high value transactions had been confirmed as fraudulent. The firm also took almost £6,000 from S Ltd's account, and held it in a separate 'frozen' account to meet expected chargebacks from other card issuers, if other customers found their accounts being wrongly debited.

On 27 January the firm reported S Ltd – and S Ltd's principal director – to the National Merchant Alert Service, saying it had withdrawn merchant acquiring facilities because they had both been 'involved in fraudulent or suspect activity'. A few months later, the firm used £4,000 of the 'frozen' money to meet chargebacks, and then gave S Ltd 30 days notice to transfer all its accounts to another firm.

S Ltd complained – vociferously. It said the firm had acted as 'judge, jury and hangman'; the report to the National Merchant Alert Service had been 'defamatory'; and the firm had no right to 'manipulate' its accounts in the way that it did. Taken together, the firm's actions had severely damaged S Ltd's business.

When we looked into the complaint, it was clear, first of all, that there had been a very significant increase in S Ltd's credit card transactions – so the firm was rightly alerted to the fact that something unusual might be going on. And the firm was entitled, under the terms of the merchant agreement, to terminate the facility without notice and to take the £6,000. But we did not accept that the firm had been right to register S Ltd – and its principal director – with the National Merchant Alert Service in the way that it did. Everyone concerned agreed that S Ltd had been the innocent victims of credit card fraud, but the way the registration had been made implied something very different. That registration had particularly affected S Ltd's director, rather than the company itself. So we told the firm to pay the director £2,000.

We also decided that, although the firm had been entitled to take the £6,000, it had not properly handled the chargeback requests it received. To begin with, we were not satisfied that it followed the strict time limits laid down for dealing with chargebacks. Added to that, it was clear that S Ltd had provided copies of almost all the transaction slips in good time. The firm had never given the £6,000 back to S Ltd, so we told it to do so – and to add another £1,750 for inconvenience, delays and lost interest.

■ 12/13

registering fraud with the National Merchant Alert Service

Mr A is a sole trader, who repairs and modifies car engines. It was Mr A's father who set up the business – called A Engineering. Mr A did not take over from his father until 1994, by which time the business had been accepting credit cards for quite a few years under a merchant acquiring agreement with the firm.

In 1997, the firm sent updated merchant acquiring terms and conditions to all its merchant customers – including Mr A. One of the new conditions allowed the firm to withdraw the merchant acquiring facility without notice if there was fraud or suspicion of fraud. If that happened, the new terms and conditions also allowed the firm to tell others, including other card schemes, about what it had done – to help prevent further fraud.

Later in 1997, it became clear that Mr A had been targeted by fraudsters. The firm identified that £19,000 worth of fraudulent transactions had been processed and another £74,000 of fraud had been attempted. So it terminated Mr A's acquiring facility without notice and reported him to the National Merchant Alert Service.

Mr A was very upset. He reckoned the firm had failed him in a number of ways. First of all, he did not think he should be held to the merchant acquiring agreement. This was because it was his father, not him, who had signed it. And he did not think the firm was entitled to register him with the National Merchant Alert Service. Even if it ***was*** entitled to do this, he thought it should just have registered the names of the fraudsters – not his own name.

It took more than three years before Mr A could get another firm to let him accept credit cards and he claimed that, because so much of his business was done by credit card, he had lost a huge amount over those three years – to say nothing of the stress and hassle he had to put up with.

We were satisfied that Mr A was bound by the original merchant acquiring agreement, since his father had signed it 'for and on behalf of' the business. In any event, Mr A had operated under the agreement ever since he took over the business and the 1997 terms and conditions did not require a signature.

We were also satisfied that the firm was entitled to withdraw the agreement in the way that it did. But we were concerned about the way in which the firm had registered Mr A/A Engineering with the National Merchant Alert Service. Part of the problem was the limited range of standard reasons it had to choose from when it made the registration. The option the firm chose made it look as if Mr A had been up to no good.

We wanted to award Mr A a fair amount to cover his lost trade but he never really came up with any clear figures. So in the end we told the firm to pay him £2,000 for the inconvenience he experienced because of the way in which it registered him and his business with the National Merchant Alert Service.

using a credit card abroad

More and more customers based in this country use their credit cards while abroad. But what happens if, after they get home, it becomes clear that things have not worked out as expected? And what rights, if any, do they have?

Under section 75 of the Consumer Credit Act, a UK credit card issuer is equally liable, with the supplier of the goods or services, for any misrepresentation or breach of contract by the supplier. But it is arguable whether section 75 applies to overseas transactions.

In 1995 the main credit card issuers adopted a voluntary policy, in order to give the government an opportunity of amending the Consumer Credit Act to clarify whether or not section 75 applied to overseas transactions. Under this voluntary policy, the credit card issuers agreed to accept liability for misrepresentation and breach of contract on overseas transactions, up to the value of the credit card payment.

The government never got around to clarifying the Consumer Credit Act and, strictly speaking, the voluntary policy has now lapsed, but many card issuers still treat it as being in force. That makes it good banking practice.

A review of the Act has recently been announced. We hope it will include a review of the applicability of section 75 to overseas transactions and we have suggested to the Department of Trade and Industry that it should. Here are a couple of cases that illustrate the present position.

... what happens if, after they get home, it becomes clear that things have not worked out as expected?

case studies – using a credit card abroad

■ 12/14

importing carpets

While in India, Miss P used a credit card to buy a couple of silk carpets costing a little over £2,000. The carpets were to be air-freighted to the UK and, soon after she arrived home, Miss P got a note from Heathrow airport to tell her they had arrived. But the airport would not let her take the carpets away unless she paid it another £600 – to cover freight charges, import duty and VAT.

Miss P protested, to no avail, that when she had done the deal in India, the seller told her that he would pay the freight and that there would be no import duty or VAT to pay. Because she really wanted the carpets, she paid up. But she then asked the firm that issued the card to reimburse her with the £600 – under Section 75 of the Consumer Credit Act 1974.

The firm refused, saying that if Miss P wanted to use Section 75, she'd have to sue it and the carpet retailer jointly – and it pointed her in the direction of the British Embassy if she wanted help. It added that Section 75 probably wouldn't apply anyway, since there wasn't anything wrong with the carpets and the sale was governed by Indian law.

We pointed out to the firm, firstly, that under Section 75 there was no need for Miss P to sue the retailer – and neither did there have to be anything wrong with the goods before she could make a claim: Section 75 covers 'any claim in respect of a misrepresentation or breach of contract'.

We also reminded the firm of the voluntary policy that the main credit card issuers entered into in 1995 to deal with overseas transactions. Many card issuers treat the policy as still being in force, even though – strictly speaking – it has now lapsed. We told the firm it should still apply the voluntary policy as a matter of good banking policy.

We looked at whether Miss P had a valid claim against the supplier. We decided that the supplier:

– ***had*** paid the freight costs to Heathrow – but not Heathrow's own charges (of about £30);
– had ***not*** told her there would be no VAT to pay – so she had to pay it; but
– ***had*** said that she would ***not*** have to pay import duty – which she ended up having to pay.

So we decided the firm should pay Miss P the £260 import duty.

■ 12/15

broken down camper-van

Mr R and his family booked a touring holiday in America. Their transport – and accommodation – was to be a large camper-van. But the holiday was a disaster – mainly because of the van. Not only was it very uncomfortable – much smaller than Mr R and his family had expected, or needed – but it kept on breaking down.

Mr R had paid a 'non-refundable' deposit for the van before he left the UK. He made a further payment when he arrived in the USA, before picking up the van. Both payments were made on his credit card. He paid the rest of the hire charges by travellers' cheque. At the end of the holiday, the hire company agreed to refund 1,400 dollars to Mr R, but this refund never appeared on his credit card statement.

Mr R complained to the firm and showed it the refund voucher. It re-credited him with almost £900. However, some while later, it took the money back again because it claimed Mr R had not properly answered some of its further questions. The questions arose because the US bank disputed the chargeback.

Mr R said that he ***had*** answered the firm's questions – albeit by phone. We decided that he had not really answered all the questions properly, so the firm was not being unreasonable in re-debiting his credit card account with the £900. Nevertheless, it was clear that the van had been far below standard, so we felt he could make a claim against the firm under the 1995 voluntary policy (mentioned in case 12/14 above).

Mr R had paid some, but not all, of the original hire charges by credit card (750 dollars – about £500). We told the firm that it should give him that money back – plus interest, because by then more than a year had passed.

5 procedure

lead cases

When we receive large numbers of cases about exactly the same financial product, we may decide to identify one or more apparently typical cases as 'lead cases'.

By focusing initially on these lead cases, we can save a lot a duplicated effort for all concerned – and so help to expedite our conclusions. The other cases are 'parked' temporarily, pending the outcome of the lead cases.

But some firms have misunderstood this procedure, and the terminology we have used. So we thought we would take this opportunity to clarify some points.

lead case or test case?

We have sometimes described lead cases we are considering as 'test cases'. But this term can mean a case that is referred to court for a ruling. So, from now on, we will stick to the term 'lead cases'.

... by focusing initially on these lead cases, we can save a lot a duplicated effort for all concerned

different types of lead case

Lead cases usually arise in one of two ways:

- We receive an apparently one-off case and start our investigation. But we then receive other, similar cases, which we keep at the pre-investigation stage pending the outcome of the first case.
- We receive a significant number of cases, more or less simultaneously. So we select one for investigation and keep the rest at the pre-investigation stage, pending the outcome of the selected case.

more than one lead case?

It ***causes*** delay, rather than saving it, if our investigation of the lead case shows that it does not cover the main features of all the 'parked' cases – so that we then have to select and investigate further lead cases.

So before we decide which case or cases to choose as lead cases, we may need to discuss the features of the cases with firms in order to ensure our selection is properly representative. But we – not the firm – will actually select the cases.

This should mean that firms will understand more clearly at the outset what is going on. And that, in turn, should lead to earlier resolution for the customer.

… firms should stop sending us details of authorised signatories.

communicating our decisions

Once we have reached a decision on a lead case, we can turn our attention to all the other cases in the same group. We contact whichever party (firm or customer) would lose if we followed the lead case decision in their particular case. We summarise the lead case to them, and ask them to tell us how the circumstances of their case differ from the lead case (if at all).

In the light of what they say, we can decide whether the outcome of their own case should follow the lead case – or whether there are special circumstances that require separate investigation. So, each individual case still ends up being decided on the basis of its own circumstances.

no comment

Sometimes the media speculates. Sometimes one of the parties may comment publicly, perhaps putting their own 'spin' on the case. But we do not comment publicly about individual cases – even to set the record straight – as that might draw us into commenting on the details, including sensitive personal and commercial information.

firms' final response letters

who signs them?

The FSA rules define the contents of a firm's 'final response' letter. So these letters are identified by what they say, not by who signs them. It is up to firms to ensure their final response letters are properly issued by the right people.

This marks a change from the practice of the former Banking Ombudsman Scheme and Building Societies Ombudsman Scheme, in that we no longer keep lists of those who are authorised to sign such letters. So firms should stop sending us details of authorised signatories.

what should the letters look like?

While on the subject of final response letters, it seems a good idea to remind everyone of what we prefer to see in them:

- an apology or expression of regret. Whether the complaint is justified or not – the firm has an unhappy customer;
- a summary of the complaint;
- a summary of the outcome of the firm's investigation;
- whether the firm acknowledges that it has been at fault in some way;

- any offer the firm has made to settle the complaint;
- how long that offer will remain open;
- if appropriate, why the firm considers the complaint is outside our rules – but explaining that it is for us, not the firm, to decide this;
- a clear statement that the letter is a final response and that customers who are dissatisfied with the final response may refer the complaint to us within six months.

Remember – the final response letter should be written in clear, plain language. If possible, it should stand alone. Firms should avoid referring to previous correspondence that may not be readily available to the customer or to us. If firms have to refer to previous correspondence, they should attach a copy.

the new rules: what do they mean for firms?

The main provisions of the Financial Services and Markets Act 2000 came into force from 1 December 2001. So the Financial Ombudsman Service is now resolving complaints against banks and building societies in its own name, rather than in the names of the Banking Ombudsman Scheme and the Building Societies Ombudsman Scheme.

Everyone had been preparing for these changes for a long time and there was much discussion about how things would operate in theory. Now we can see what happens in practice. So how will the new rules actually work, and how do they really differ from what has gone before?

This article summarises the basic framework of the new rules, and identifies some of the most significant changes.

where did the rules come from?

The Financial Services and Markets Act 2000 gave power to:

- the Financial Services Authority (FSA), to make rules about the Financial Ombudsman Service's compulsory jurisdiction;
- the Financial Ombudsman Service (with FSA consent), to make rules about our voluntary jurisdiction, and our procedures in both compulsory and voluntary jurisdictions;
- HM Treasury, to make transitional provisions, by statutory instrument, about complaints concerning events before 1 December 2001.

where are the rules?

The rules are set out in the dispute-resolution (DISP) section of the FSA Handbook. There are five chapters:

- 1: in-house complaint-handling by firms
- 2: the scope of our compulsory jurisdiction
- 3: our procedures (which are the same for both jurisdictions)
- 4: our voluntary jurisdiction
- 5: funding.

The transitional provisions are in the Financial Services and Markets Act 2000 (Transitional Provisions) (Ombudsman Scheme and Complaints Scheme) Order 2001 (SI 2326 – 2001). These transitional provisions apply directly; but they are noted as 'guidance' in the FSA Handbook.

what types of complaint are there?

The transitional order deals with the following complaints where the firm was a member of a predecessor scheme on 30 November 2001:

- ***relevant existing complaints***: 'deadlocked' complaints that we were already in the process of dealing with at 1 December 2001 on behalf of a predecessor scheme;
- ***relevant new complaints***: 'deadlocked' complaints received from 1 December 2001 onwards about events before 1 December 2001.

That leaves the rules themselves to deal with post-N2 complaints: 'deadlocked' complaints about events from 1 December 2001 onwards.

jurisdiction and remedies

Broadly, for ***relevant existing complaints***, we are required to apply:

- the new rules about time limits (or the relevant predecessor scheme's rules about time limits if they are more generous to the complainant);
- the remaining mandatory (but not discretionary) rules about the jurisdiction of the relevant predecessor scheme;
- the new rules about procedure, but the relevant predecessor scheme's rules about any redress to be awarded.

... jurisdiction issues are narrower than under the rules of the predecessor schemes.

Broadly, for ***relevant new complaints,*** we are required to apply:

- the new time limits (or, before 1 December 2002, the relevant predecessor scheme's time limits if they are more generous to the complainant)
- the new rules about whether the complainant is covered (or the relevant predecessor scheme's rules if they are more generous to the complainant)
- the rules of the relevant predecessor scheme about whether the firm and the activity concerned are covered
- the new rules about procedure and redress, but taking into account what redress might have been awarded under the relevant predecessor scheme.

This leaves ***post-N2 complaints*** to follow the new rules in their entirety.

jurisdiction under the new rules

Jurisdiction issues are narrower than under the rules of the predecessor schemes. They are limited to whether:

- the firm is covered
- the activity is covered
- the complainant is covered; and
- the complaint is in time.

firms and activities – compulsory jurisdiction

Firms that were members of a predecessor scheme on 30 November 2001 are covered by our compulsory jurisdiction for events before 1 December 2001. The activities covered are those covered by the predecessor scheme.

Banks and building societies that are regulated by the FSA are covered by our compulsory jurisdiction for events from 1 December 2001 onwards (unless they do not do retail business). The activities covered are:

- FSA-regulated activities (deposit-takers, insurers and investment firms);
- lending money secured by a charge on land;
- lending money, other than restricted/point-of-sale credit;
- plastic cards, other than storecards;
- ancillary banking services, *eg* cash machines, safe custody, sale of insurance;
- advice and ancillary services connected with any of the above.

The relevant activity must have been conducted from an establishment in the UK, so activities in the Channel Islands and the Isle of Man are excluded.

Other firms are likely to come into our compulsory jurisdiction in future years, once they become regulated by the FSA, including:

- credit unions
- residential first-mortgage lenders that are not banks or building societies
- mortgage intermediaries.

firms and activities – voluntary jurisdiction

Firms that were members of a predecessor scheme on 30 November 2001 – but which are not regulated by the FSA – are covered by our voluntary jurisdiction (if they join) for events from 1 December 2001 onwards. The activities covered are the same as those covered by the predecessor scheme.

Mortgage lenders that are not currently regulated by the FSA are covered by our voluntary jurisdiction (if they join) for complaints about events before or after 1 December 2001 – but limited to lending money secured by a charge on land, plus any ancillary advice and services.

who can complain?

A complainant must be a customer, a potential customer, or someone who has had other specific dealings with the firm – including:

- giving a guarantee or other security;
- relying on a cheque guarantee card as a trader;
- being the true owner of a cheque which the firm has collected;
- receiving a banker's reference;
- being a beneficiary of a trust or estate where the firm is a trustee or a personal representative.

Any of these complainants can be:

- a private individual;
- a business with a turnover, or group turnover, under £1 million;
- a charity with income under £1 million;
- a trust with net assets under £1 million.

At first glance, this appears to be much like before. But there are a few changes.

- The £1 million turnover limit applies to sole traders, partnerships and unincorporated bodies – as well as to companies.
- The £1 million income limit for charities and the £1 million net assets limit for trusts are new.
- The various £1 million limits are now applied as at the date on which the complaint was made to the firm.

is the complaint 'in time'?

By now, everyone should be familiar with the new eight-week rule. If a firm has not resolved a complaint within eight weeks of its being raised, the customer can bring the complaint to us – even if the firm has not yet issued a final response letter (which banks used to call a 'deadlock' letter).

If the firm has issued a final response letter, ordinarily the complaint must be brought to us within six months. The final response letter is required to quote this time limit.

The complaint should also be brought to us no more than six years after the event complained about. But, even if the event happened more than six years ago, the complaint can still be brought to us if the complainant could only have discovered within the last three years that there were grounds for complaint.

On the last point, note that what matters now is when the complainant knew there were grounds for complaint – not when the complainant knew of the event.

early termination

Other issues that the predecessor schemes treated as matters of jurisdiction are treated by the new rules as matters of procedure. In particular, there are various procedural grounds on which we can dismiss a complaint without considering its merits (we call this 'early termination').

Paragraph 3.3 of the rules lists 17 grounds on which we ***may*** decide not to consider the complaint. The grounds include:

- the complaint is about a firm's legitimate exercise of its commercial judgement;
- there was no loss, material distress, or material inconvenience;
- a reasonable offer is available from the firm;
- the complaint has no reasonable prospect of success;
- the matter has been dealt with, or would be better dealt with, by a court.

This is a major area of change. We may decide not to consider the complaint on one of these grounds. But that does not prevent our considering the complaint if we think we should, even if it is one the predecessor schemes could not have considered. So if we thought it appropriate, we could look into a complaint about – for example – a lending decision or the setting of interest rates.

evidence

In effect, the new rules say that we decide what evidence should be submitted to us, and how it should be presented. Our statutory right to demand information overrides any duty of confidentiality that the firm has.

The new rules allow us to accept evidence in confidence. But – and this is an important point – ***we*** decide what should and should not be kept confidential. Firms can ask us to treat items as confidential but we do not have to agree – though we are likely to do so where, for example, confidential information about a third party or security matters is involved.

any questions?

As we said at the outset, this article outlines the basic framework of the new rules, and highlights some important differences between the old and the new. But it is not a comprehensive explanation. By answering some questions, it may raise others. Remember that advice on our rules and procedures is available from our technical advice desk:

e-mail technical.advice@financial-ombudsman.org.uk
phone 020 7964 1400.

But remember also that it is the FSA you should contact for advice on the chapter 1 rules about in-house complaint-handling and reporting to the FSA.

feedback on proposals for the future of the banking and loans liaison group

a guest article written jointly by the British Bankers' Association (BBA), Building Societies Association (BSA) and Council of Mortgage Lenders (CML)

A BBA/BSA/CML article regarding the future of the Banking and Loans Liaison Group appeared in the June 2001 edition of *ombudsman news*. This is a feedback statement, reporting how the BBA/BSA/CML intend to take the matter forward.

In the light of the responses received, and extensive discussion with the industry, the BBA/BSA/CML and their members have approved the setting up of a Joint Financial Ombudsman Service Steering Group (JSG) with the following structure:

Terms of reference

- Respond to all relevant consultation papers
- Examine high-level policy issues (with the focus to remain on banking and loans)
- Comment on the Financial Ombudsman Service's budget
- Own and maintain BBA/BSA/CML guidance notes
- Set up and own the Financial Ombudsman Service's Practitioners' Panel (see below)
- Report regularly, and take any requests for decisions, to the appropriate governing committee.

feedback on proposals for the future of the banking and loans liaison group

Membership

- The three trade associations: British Bankers' Association, Building Societies' Association, and Council of Mortgage Lenders.
- Around twelve members (7 from BBA, 3 from BSA, 2 from CML) serving a two-year term; initially membership for six members to be for one year to allow for rotation every 12 months. Members may send a pre-notified deputy to attend the meeting on their behalf.
- Financial Ombudsman Service representation (it may wish to use the JSG as a confidential sounding-board).

Chair

- It has been agreed that the chair should rotate between the chief executives/directors-general of the three trade associations. Ian Mullen, chief executive of the BBA, will chair the JSG for the first year.

Secretariat

- Secretariat support is to follow the chair.
- Minutes are to be skeletal – just a note of points of agreement and any action points.

Frequency of meetings

- Quarterly.

Practitioners' Panel

BBA/BSA/CML also propose setting up a Financial Ombudsman Service Practitioners' Panel, with the features detailed below. The idea of the Practitioners' Panel is to facilitate dialogue between complaint-handlers within firms, and case-handlers at the Financial Ombudsman Service.

Purpose

- Tackle practical 'nuts-and-bolts' type issues.
- Networking opportunity.
- Advisory group to the JSG. Any emerging policy to be referred to the JSG.

Frequency and format of meetings

- Initially fairly frequently (once every month/six weeks), then six monthly.
- BBA to host.

The three trade associations are currently tasked with seeking nominations for JSG, and with setting dates for meetings in 2002.

If you have any questions regarding either the JSG or the Practitioners' Panel, in the first instance, please contact Chris Rawlins on 020 7216 8899 or by email at: chrisrawlins@bba.org.uk

out and about

Explaining our role and how we operate is an important part of our work. In recent months we have organised a number of presentations for Citizens Advice Bureaux, Trading Standards departments and local advice agencies. We have also provided training on the new complaints-handling rules and related ombudsman issues for a wide range of financial firms – from large corporations to small firms of stockbrokers and independent financial advisers.

If you would like us to arrange a workshop, training day or other event for your firm or organisation, just contact

liaison.team@financial-ombudsman.org.uk

phone 020 7964 0132

glass door or window sticker

Our window sticker is now available – for firms to display on their entrance doors, windows etc, to show customers that they are covered by the Financial Ombudsman Service.

The sticker measures 21cm x 15cm. It is made of transparent vinyl which attaches to glass by static (no adhesive) – just peel off the backing-card and apply.

For more details please contact technical.advice@financial-ombudsman.org.uk

services for professional complaints-handlers and consumer advisers

our technical advice desk

- provides general guidance on how the ombudsman is likely to view specific issues
- explains how the ombudsman service works
- answers technical queries
- explains how the new ombudsman rules will affect your firm

phone 020 7964 1400
email technical.advice@financial-ombudsman.org.uk

our external liaison team can

- visit you to discuss issues relating to the ombudsman service
- arrange for your staff to visit us
- organise or speak at seminars, workshops and conferences

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