

# ombudsman news

essential reading for financial firms and consumer advisers



**Walter Merricks**  
chief ombudsman

## a quarter-century of ombudsmen

Twenty-five years ago this month the first private sector ombudsman scheme in the UK – the Insurance Ombudsman Bureau – was founded. So we are now able to look back on a quarter-century of independent dispute-resolution in the financial services sector.

The Insurance Ombudsman Bureau opened its doors in April 1981 with James Haswell as its first ombudsman. It was a genuine example of cooperation between the insurance industry and the consumer movement. The idea was simple: customers would have the right to refer complaints that their insurer couldn't resolve to an independent ombudsman, to be judged impartially, privately, free of charge – and outside the court system. Insurers would pay the costs of the scheme that would bring finality to the individual disputes that can arise between retail consumers and large organisations.

The key elements of the new scheme had been put together in discussions between insurance representatives and officials from the National Consumer Council. The latter included Richard Thomas, now the Information Commissioner, who later became a founder member of the Financial Ombudsman Service board. The main features of the scheme were that:

- consumers should not lose their legal rights by complaining to the ombudsman;
- firms should be bound by the ombudsman's decision;
- the ombudsman's decisions should be based on what is fair and reasonable in all the circumstances; ❖

settling financial disputes,  
without taking sides

### issue 52

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- the ombudsman should operate on an inquisitorial rather than an adversarial basis;
- no charge should be made to consumers for the services of the ombudsman; *and*
- the ombudsman should be able to make significant awards.

These were radical ideas at the time, but the ground-breaking Insurance Ombudsman Bureau was swiftly followed by other similar bodies – in the shape of the Banking Ombudsman and the Building Societies Ombudsman – and then by the ombudsman schemes covering the investment industry.

Six years ago, with the advent of a single financial regulator, these separate ombudsman schemes merged under a statutory framework to become the Financial Ombudsman Service. But the model of industry-funded out-of-court dispute resolution, established with the Insurance Ombudsman Bureau, has

remained almost exactly the same. Even the maximum award the ombudsman can make – £100,000 – remains the same as in 1981.

Of course, consumer and industry expectations have changed in 25 years, but the role of a private sector ombudsman is now well-established. Nearly every Commonwealth country has financial ombudsmen, and the EU encourages member states to have ‘*out of court dispute-resolution*’ schemes in place for consumer complaints. In the UK we now have an Estate Agents Ombudsman and a Telecommunications Ombudsman, among others. The legal profession is to have a scheme modelled on our own, and the Department of Trade and Industry is proposing ombudsmen to cover the energy and postal sectors. The institution is here to stay.



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# insurance – assessing the amount of benefit paid out under income protection policies

In some of the disputes we see involving income protection policies, policyholders are unhappy with the amount of benefit they receive after they have successfully submitted a claim. The problem often stems from the policyholder's misunderstanding about how the policy works. But sometimes the firm has calculated the benefit incorrectly.

## This article:

- examines some of the assessments firms make when calculating the benefits payable in individual claims
- looks at the types of complaints that may arise as a result; *and*
- provides some recent case studies.

## ***the limitation of benefit clause***

This affects the maximum amount of benefit the policyholder can get under the policy. The limit is linked to the policyholder's earnings before they became incapacitated. So policyholders who do not fully understand this – and whose earnings are too low to entitle them to the maximum amount of benefit for which they were insured – may be disappointed by the level of benefit they receive. Disappointment can also result if the maximum benefit payable under the policy is lower than the amount the policyholder was earning before becoming incapacitated.

When looking into complaints referred to us, we will examine the policy and check whether the firm calculated the benefit correctly, in accordance with the policy. If we are satisfied the calculation is correct, we may examine the advice the firm gave at the time it sold the policy. We do not assume that simply because the insurance does not *currently* meet the policyholder's needs, it must have been mis-sold originally.

We will look, in particular, at whether the policyholder was over- or under-insured. We will also examine any *fact find* or other document relating to the policyholder's financial circumstances, demands and needs at the time of the sale. And we will look at any policy brochures and marketing information given to the policyholder before they took out the insurance. For instance, where the insured benefit is subject to options that could increase it, then if there is any ambiguity in the policy about how the increases operate, we may consider what the firm told the policyholder at the time they entered into the contract.

## **definition of earnings for employed/self-employed**

Invariably, policy definitions of *pre-disability* earnings will distinguish between employed and self-employed policyholders. Generally, when calculating benefit, the firm will consider *pre-tax earnings* for employed policyholders, and *net profit* for those who are self-employed. ❖

## ... the problem often stems from the policyholder's misunderstanding about how the policy works.

Disputes can sometimes arise if a self-employed policyholder believes that – in basing its assessment on net profit rather than on some other factor, such as turnover – the firm has calculated benefit incorrectly. In such cases we will always examine the policy in question. The status of elements such as benefits-in-kind, bonuses, commission, 'drawings' and dividend payments can vary considerably between policies.

Income protection policies are designed to replace lost income. So we will not consider it unfair for a firm to take into account any income that a self-employed policyholder continues to receive from their business during a period of incapacity (even if this results in no benefit being payable) so long as the policy clearly allows the firm to do this.

### basis of assessment

A policyholder's earnings are usually assessed on the basis of their average income over the 12 months before they became incapacitated. But this can sometimes produce harsh results. For example, we may know from medical evidence that the policyholder's condition worsened progressively over a period of time, during which they struggled to continue working. In such cases their average income over the previous 12 months may not be a true reflection of their income when in good health.

A harsh result can also arise where a policyholder's income fluctuates, for example when their earnings depend on commission. If such a policyholder becomes incapacitated during an economic downturn, their earnings over the 12 months before they became incapacitated may be much lower than normal. So a fair and reasonable approach would be to take an *average* of their earnings over a longer period (for example, three years) unless the policy clearly restricts this.

### proportionate/rehabilitation benefit

*Own occupation* policies often have clauses allowing the firm to pay a reduced benefit if, after a period of *total disability*, the policyholder returns to work in a reduced capacity or a different occupation – and can demonstrate a reduction in their earnings.

In general, however, if a policyholder does not return to work, no proportional or rehabilitation benefit is payable. The requirement to return to work can be onerous for policyholders if:

- the failure of their business prevents them from performing their occupation part-time; *and*
- their disability makes them unfit for any similar occupation.

In our view, it may not be an appropriate response for the firm to either:

- make no benefit payments; *or*
- continue with full benefit.

So depending on the terms of the policy, we will consider whether good industry practice suggests the best solution would be for the firm to make some part-payment of benefit.

### deductions for other insurance

When calculating the amount of benefit payable, some policies deduct any income the policyholder receives from *other* insurances. So the policyholder may not realise, until they make a claim, that they have been paying for a policy that provides very little – if any – benefit.

In such cases, we look at the circumstances surrounding the other policy or policies (often a form of payment protection insurance). This may help us establish if the policyholder (or indeed the firm or intermediary) was aware that the risk was already wholly or partially covered by another policy.

We will also check whether the income protection policy makes it clear that the firm will make the deduction. Our approach, in line with well-established legal principles, is to interpret any ambiguity in the policy wording in favour of the policyholder. So unless the policy clearly shows what other types of insurance payments will be deducted from the benefit, we will not interpret any clause purporting to deduct income from other ‘similar’ policies as including payment protection policies.

**... sometimes the firm has calculated the benefit incorrectly.**

## case studies

### insurance – financial assessment in income protection policies

#### ■ 52/1

#### income protection – calculation of benefit where earnings unaffected by disability

Mr G, a self-employed IT consultant, took out an income protection insurance policy. The policy had a *limitation of benefit* clause restricting the amount of benefit he could be paid to 75% of his normal earnings.

Several years later Mr G made a claim under the policy, on the grounds that repetitive strain injury was affecting his ability to work.

The firm reviewed Mr G’s business accounts to see whether his medical condition had affected his income. It noted that he had not recorded payments he had made to a sub-contractor. It also found that the accounts did not show all of Mr G’s income and expenditure. So it decided the accounts were unreliable. It did, however, agree to pay the claim until it was able to review Mr G’s audited accounts, when it would re-consider the position.

When it examined the audited accounts, the firm compared Mr G’s pre-disability earnings with his net income and ‘drawings’ for the period *after* he made his claim. It concluded that he had not suffered a loss of income because of his disability, so it stopped his benefit payments. ❖

## ... the firm must be satisfied there was an actual loss of income.

### complaint rejected

When a self-employed policyholder makes a claim, the firm must be satisfied there was an actual loss of income. In this case, Mr G's audited accounts did not show a loss. Despite his disability, Mr G's business remained profitable. Indeed, the business had made a significantly higher net profit in the period *after* his claim than in the year in which his illness began.

Mr G disagreed with the firm's assessment. He said the accounts showed an artificial profit and that he had been forced to borrow money to remain trading. But the turnover figures suggested that sales sustained profits, rather than just borrowings.

In any event, under the *limitation of benefit* provision in his policy, Mr G wasn't entitled to benefit unless his earnings were less than they had been before his disability. Mr G had continued to earn more than he would have been entitled to in benefits. We rejected his complaint.

### ■ 52/2

#### income protection – calculation of increases in benefit

Mr M took out an income protection policy in October 1991. He selected an option that protected him against the effects of inflation by increasing his benefit by 7.5% each year. This option was subject to an annual increase in premium.

In 1994, Mr M became disabled and made a claim on his policy. The firm wrote to tell him how his benefit would be calculated. The standard policy restricted benefit to two-thirds of the amount the policyholder was earning immediately before becoming disabled. However, because of the option he selected when he took out the policy, Mr M's benefit payments were more than this.

For several years, Mr M's benefit payments continued to increase at the rate of 7.5% per year. But then the firm reviewed its policies. It decided the standard policy condition, which limited benefit to two-thirds of the policyholder's salary, over-rode the increases arising from the inflation-protecting option. When the firm rejected Mr M's complaint about its subsequent reduction of his benefit, he came to us.

### complaint upheld

It was clear from the policy documents that the option Mr M had selected:

- was intended to offset the effects of inflation; *and*
- had been sold to Mr M on this basis.

Neither the policy itself, nor any of the associated promotional literature, made it clear whether the benefit cap applied to the option. We decided it was reasonable for Mr M to have assumed the two-thirds cap would not have applied in his case, since it appeared to apply only to the 'standard' policy.

Selecting the option would have been pointless for Mr M if the cap had been applied from the outset of the claim, as the firm said it should have been. At the outset of his claim, Mr M's benefit was already two-thirds of his pre-disability earnings. So despite paying higher premiums for the option he could never have benefited from the increase it was designed to provide.

The way in which the policy had been sold and/or represented did not make it clear that the benefit cap would limit any increase arising from the option. We decided it would be unfair of the firm to restrict Mr M's claim to the original benefit limit. We told the firm to reinstate the increases arising from the option and to backdate any payments owing to Mr M, plus interest.

.....

■ **52/3**  
**income protection – calculation of benefit against continuing income**

Mr J, a self-employed architect, had been unable to work because he was suffering from stress. He made a claim for income replacement benefit under his income protection policy. The firm accepted his claim but said he would not be paid any benefit because he was continuing to receive earnings from his business.

The firm calculated Mr J's entitlement to benefit in accordance with the policy terms, which required it to take continuing income into account. Mr J's continuing income from his business was £55,000. This was more than the maximum allowable benefit, calculated as 75% of the first £50,000 of his annual earnings immediately before the start of his disability.

Mr J said that when he arranged the insurance he had provided the firm with copies of his accounts. The firm's adviser had not based his calculations on Mr J's annual earnings (including both 'drawings' and share of profits) but only on his annual 'drawings'. So Mr J said the level of earnings that needed replacing (£50,000) had been undervalued at the outset.

**complaint rejected**

There was no evidence that Mr J had supplied his accounts at the time he took out the policy. And the firm's adviser had based his calculation of the appropriate level of benefit on Mr J's gross earnings, as declared on the application form. On this basis, we determined that the income replacement benefit provided was likely to have been appropriate at the time of sale.

Even if this were not the case, the claim was not affected. Mr J had not suffered a sufficient reduction in income to justify a payment of benefit, so we rejected the complaint.

.....

## Tony King on pensions

Pensions are rarely out of the news at the moment and 6 April saw the introduction of pension ‘*simplification*’. We asked **Tony King** – our lead ombudsman for pensions – to outline some of the more common concerns brought to the ombudsman service, and tell us how he thinks some of the most recent pension legislation changes might affect the complaints we see.



Tony King  
lead  
ombudsman

**pension problems seem to be headline news almost every day. Is the Financial Ombudsman Service inundated with pension complaints?**

It’s important to remember that most of the pension disputes we deal with here relate to *personal* pensions and are mainly about sales advice. There are other arrangements for complaints about occupational pensions.

But no – we’re not inundated at all. In fact the overall number of pension complaints coming to us is falling a bit, although the complaints themselves are becoming more complicated.

### why’s that?

Well, for example, we still get a regular supply of complaints about ‘*pension fund withdrawal*’. This is an arrangement which allows investors to withdraw cash from their personal pension. They can then use the cash as income and defer buying

their annuity until they are 75 – although these arrangements are changing as a result of pension ‘*simplification*’. In the cases we see, the consumer generally claims they were wrongly advised to enter this type of arrangement because they weren’t made aware of the risks involved. These are fairly difficult complaints to deal with because pension fund withdrawal is itself quite sophisticated.

investments subject to risk, but the consumer is also sacrificing one of the advantages of an annuity – which is that people who die younger than average subsidise those who live longer. And they are taking the further risk that annuity rates might get worse before they buy one.

Some of these cases are upheld and others aren’t. But for those that are, working out the redress for pension fund withdrawals is also complicated – because payments will have been made to the consumer that must be compared with the alternative annuity payments, as well as taking into account investment performance. And both sides will feel strongly, partly because so much is at stake. Not only might the value of the pension fund be considerable, but the fund often represents *all* the consumer’s future income.

The new arrangements after *simplification* are likely to have many of the same difficulties associated with them.

In the pension fund withdrawal complaints we see, consumers may say they were told that annuities were poor value for money – and they may not have understood the risks of pension fund withdrawal. In particular, not only are the underlying





**will much of our work be affected by the simplification changes?**

Generally, the changes are about the tax position rather than the range of pension schemes and products available (although the tax changes will make some schemes more popular and others less so).

But some of the complaints we are already dealing with will be affected by *simplification* – for example, where the complaint relates to what the consumer was told about the *old* tax regime, or because redress is now possible in a different form because of the changes.

And I'm sure that in future we'll get complaints about whether people were advised to take appropriate steps to make the best of the tax advantages – either before or after the changes. Where complaints relate to a regulated investment we'll be able to look at them, but if they are just about tax advice, we won't.

Of course, in the run-up to *simplification*, advisers will have been working on the information available at the time. If the detail has changed, then just as with any other advice-related complaint we wouldn't apply hindsight.



**what about self-invested personal pensions (SIPPs)? There has been a lot of discussion on the effect that the simplification changes will have on them.**

Yes, there has – partly because of the greater investment freedom (although it's more limited than was first thought). It's currently intended that SIPPs will be completely regulated from 2007. In the meantime we have no jurisdiction over the SIPP 'wrapper'. We do, however, have jurisdiction over any regulated investments contained within the wrapper.

At the moment we see just a small number of SIPPs complaints (excluding the ones about pension fund withdrawal). They are sometimes about the management of the portfolio itself and we treat those pretty much as we would any other complaint about portfolio management.

Others are about advice to make particular investments – and again they are treated in a very similar way to any other complaints about investment advice, taking into account the investment objectives and risk when looking at overall suitability.

**is there anything else that is particularly relevant at the moment?**

We are continuing to see Pensions Review cases, although there are not many new ones coming in. This can generally be put down to the time limits involved. However, in applying our time limits we do not assume that the clock starts from the moment the consumer received an invitation to have the sale reviewed. Instead we look at when the review *would have been* completed if the consumer had asked for a review when first invited to do so. In deciding when that would have been, we will usually ask the firm for their normal timescales for reviews of similar cases, and we take into account any specific features of the individual case.

Some consumers may say they did not get the firm's review invitation letters. We then have to decide, on the balance of probabilities, whether they

did or did not receive the letters. We might decide the consumer probably did *not* receive a letter where, for example, there was an error in the address, or the consumer had moved, or been abroad for a lengthy period. Normally, if a letter was sent to the correct and current address we will decide it was probably delivered. We then treat those cases the same as we would any others.

### is the redress for these cases difficult to work out?

Not especially – we expect firms to follow the regulatory guidance for redress of Pensions Review cases. This provides for the possibility of reinstatement in the employer’s scheme, or calculation and redress of actual or prospective loss. The regulator has published assumptions for use in those calculations. For cases not strictly within the Pensions Review period, we would usually use different assumptions, which are published on our website. But trying to calculate the redress for a pension mortgage is much more complicated!

### why is that?

First let me say that this is an area where we get relatively few complaints – and we are not expecting huge numbers in the future. A pension mortgage is a mortgage linked to a pension plan. At the end of the interest-only mortgage term, all or part of the tax-free lump sum from the pension fund is intended to repay the capital.



The complaints we encounter with these are similar to those we see with endowment mortgages. Perhaps the firm has failed to explain the underlying risk that the investment might not produce enough, when it matures, to pay the amount needed. Or the firm may have mis-judged the consumer’s attitude to risk.

A problem specific to pension mortgages is that it can be difficult to work out which part of the premium is intended for the mortgage and which for the pension.

In addition, when the pension was sold, the consumer would not have been able to access tax-free cash until the pension was to be drawn on, perhaps at age 60 or 65. This could often mean that the interest-only part of the mortgage was intended to run for much longer than 25 years – the usual mortgage term – forcing the consumer to pay excessive interest. But this is one of the things potentially affected by *simplification*, since the restrictions on when cash can be drawn upon have been changed.

Deciding redress is particularly difficult as, unlike an endowment policy, a pension cannot be surrendered for a cash amount. We have devised a method which is loosely based on endowment redress – but takes account of the differences between the two. We discussed it with industry representatives to ensure the calculations worked and that the results were fair. But the whole area of pension mortgages is one that we’ll be looking at more closely in a future edition of *ombudsman news*. ❖

# powers of attorney on bank accounts

Some of the complaints referred to us involve bank accounts where the accountholder has given someone else a formal written authority to act for them – in the form of a *power of attorney*. This is a legal authority given by one person – the *donor* – (in Scotland the *granter*) to another person or persons (the *attorney* or *attorneys*) to conduct the donor’s financial or legal affairs.

This article:

- outlines the different types of powers of attorney, and how they operate on bank accounts
- considers some issues that commonly arise when bank customers act through attorneys; *and*
- provides some case studies illustrating some of the complaints we have considered recently involving power of attorney.

## *ordinary* and *enduring* powers of attorney

It used to be the case, broadly, that a power of attorney was valid until:

- it expired
- it was revoked by the donor (unless it had been stated to be ‘*irrevocable*’)
- the donor died; *or*
- the donor lost the mental capacity to manage their own affairs.

However, there are now two broad categories of powers:

- the *ordinary* (in Scotland, the *general*) power of attorney. This automatically ceases to have effect if the donor loses their mental capacity; *and*
- the *enduring* (in Scotland, the *continuing*) power of attorney. This continues to apply, even after any loss of mental capability on the part of the donor.

The donor can place limits on what the attorney can do, and on the length of time for which the power operates. So, for example, a donor might give an attorney power to:

- manage the donor’s financial affairs generally while they are abroad, until a given date;
- sell the donor’s house, if the donor has already moved abroad and is not available to sign the sale documents; *or*
- do everything *except* sell the donor’s house.

A power of attorney does not prevent the donor from acting. For example, if a student setting off abroad on a ‘gap year’ grants his parents a power of attorney, enabling them to write cheques on his bank account and pay his bills while he is away, he can still draw on the account himself. ❖

## ... the wording of a power of attorney is given a strict interpretation.

And so long as they retain their mental capacity, the donors of an *enduring* power of attorney can continue to manage their own affairs along with, or instead of, the attorney.

### if the donor becomes mentally incapable

Someone appointed to act on another person's behalf under an *enduring* power of attorney is entitled to act until that person (the donor) is – or is becoming – mentally incapable. At that stage, the attorney must apply to the Court of Protection to have the power of attorney registered. Once that has been done, the attorney can continue to act.

### common problems arising for banks and building societies

A donor is not bound by the actions of an attorney who acts outside their powers. Suppose a donor gives her son a power of attorney allowing him to operate her account at the AB Building Society. If he then uses the power of attorney to withdraw money from her account at the CD Bank, CD Bank may be liable to the donor for acting in breach of their mandate.

The general legal principle is that the wording of a power of attorney is given a strict interpretation. So a bank that allows the attorney to '*bend the rules*' is likely to be liable to the donor account holder for any loss caused as a result.

Banks sometimes encounter other pitfalls when they allow an attorney to operate a customer's bank accounts. Here are some of the things a bank should consider before it acts on an attorney's instructions.

- Is the power of attorney properly effective? An *enduring* power of attorney may be arranged to come into effect only when, for example, the donor loses mental capacity. So if the bank acts on it before then it will be liable to make good any loss caused to the customer as a result.
- If the donor has lost mental capacity, has the power of attorney been registered? If not, the account may have to be frozen until the Court of Protection has registered it.
- If more than one attorney has been appointed, how many signatures are needed to confirm transactions?

A newly-appointed attorney will sometimes go back over the donor's banking affairs and question, for example, whether the bank can prove that the donor authorised a particular transaction made on the bank account in the past. This often occurs where an *enduring* power of attorney has been registered because of the donor's mental incapacity. Such complaints can present evidential difficulties. But we can still consider evidence about:

- what happened;
- whether relevant law, rules, regulations and guidance were adhered to; *and*
- whether good industry practice was followed.

How firms set up and operate accounts where an attorney is involved are generally matters for them, not us. But if a firm's systems or policies mean the account cannot be operated as the donor or the attorney require, we would expect the firm to explain this clearly at the outset. It should not wait for things to go wrong before pointing out the problem.

## case studies

... we told the firm to compensate her for the inconvenience it had caused.

### powers of attorney on bank accounts

- **52/4**  
**banking – power of attorney – firm insists on registration of power despite medical evidence that donor is not lacking mental capacity**

Mrs H arranged for her son to have an *enduring* power of attorney so he could help manage her affairs. About a year later, after she had decided to move into a nursing home, the son called in at the firm’s local branch. He wanted to make arrangements to operate his mother’s account for her once she had moved. When he mentioned that she was becoming a bit forgetful, the firm said he would have to register the power of attorney before it could act on it.

Mr H felt this was unnecessary. He sent the firm written evidence from his mother’s doctor that although she was suffering from early Alzheimer’s dementia, which affected her short-term memory, she was not mentally incapable. However, the firm remained adamant that it could not act on the power of attorney until it had been registered.

Eventually, Mr H and his mother concluded that they would have to obtain legal assistance. It was only after their solicitor intervened that the firm agreed there was no need to register the power of attorney. After complaining direct to the firm about its handling of the matter, Mr H came to us.

#### complaint upheld

We accept that situations of this sort can often place firms in a difficult position. They want to protect their customers, but equally they do not want to inconvenience them.

In this case, we felt the firm had no real grounds for believing Mrs H to be mentally incapable. Even after receiving unequivocal medical evidence that she did not lack mental capacity, it persisted in saying her son had to register the power of attorney before it could act on it.

We felt it had been reasonable, in the circumstances, for Mrs H and her son to get legal help in order to resolve the situation. So we told the firm it should meet their legal costs and pay Mrs H some compensation for the inconvenience it had caused.

- **52/5**  
**banking – power of attorney – firm’s systems limit way in which donor and attorneys can operate account**

Shortly before he took on a temporary assignment abroad, Mr J appointed his parents to act as his joint attorneys. He assumed the power of attorney would automatically enable his parents to operate his current account. However, the firm told him the situation was not quite so straightforward. It said its internal procedures meant that

attorneys could only operate a donor’s account if they had first been added as parties to that account. And as the firm’s systems did not allow more than two parties to a joint account, it would not be possible to add both Mr J’s parents.

Mr J’s father thought the firm was being unreasonable. He said the power of attorney should enable him and his wife to operate their son’s account, without the need for any further ‘formalities’. So he refused to complete the forms enabling the firm to add him as a party to his son’s account. The firm refused to change its stance, so Mr J came to us.

**complaint rejected**

The impasse seemed to us to be most unsatisfactory for all concerned. However, the firm had made its position entirely clear at the outset. We did not feel we could fairly make it put special arrangements in place to accommodate Mr J and his parents. The firm had offered him £250 as a gesture of goodwill and we encouraged him to accept this.

.....

**... he thought the firm was being unreasonable.**

■ **52/6 banking – whether special circumstances allow firm to release money to customer’s relative who does not have power of attorney**

Mr D had learning difficulties and was unable to manage his own financial affairs. He held a joint bank account with his father. He also received several state benefits which were paid to his cousin, Miss E, under an informal arrangement with social services.

When his father died, Mr D became solely entitled to the money held in the joint account – about £400. But, because he lacked sufficient mental capacity, he could not withdraw it or authorise anyone else to do so on his behalf. Miss E asked the firm if it would release the money to her, so she could give it to Mr D. The firm refused because she had no power of attorney.

**complaint resolved informally**

Miss E could have asked the Court of Protection to appoint her as a receiver to deal with Mr D’s affairs. But the costs of doing so would have been disproportionate – more than the £400 in the account.

We could not say that the firm’s stance was wrong in law. But it agreed with us that (given the relatively modest amount at stake, and that Miss E was entrusted with Mr D’s benefit payments) it would be appropriate in this particular case for it to release the money to Miss E.

# feedback on our budget consultation

for 2006/07

We published our budget for the financial year 2006/07 on 12 January 2006, and invited comments and feedback by 17 February.

## summary of responses

The response to this public consultation was favourable, with agreement on the financial aspects of our proposed budget and funding.

A number of responses also noted our plans to review our funding arrangements this year. We announced this in our *corporate plan*, published in January alongside our *budget*. It will involve discussing with our stakeholders ways of increasing the flexibility of our finances, as well as reviewing the structure of our annual levy and case fee. In particular, we will consider ways to:

- further mitigate small firms' concerns about case fees;
- improve the way in which costs are allocated among the large firms which provide most of our income; and
- allow for the firms that will be brought in by the proposed consumer credit jurisdiction.

## conclusion

Following earlier approval by our own board, the FSA's board has now also formally approved our budget. So we can confirm that the standard case fee and special case fee for 2006/07 will again be £360 and £475 respectively.

The FSA's own consultation on regulatory fees and levies 2006/07 (CP 06/02) – which included consultation on the levy rates that apply in relation to the Financial Ombudsman Service – closed on 29 March 2006. The FSA expects to publish its statement on fee-raising arrangements – including levies for the Financial Ombudsman Service – in May 2006.



**2006/07 budget and case fees**

Income and expenditure  
For 2006/07 we are producing a balanced budget, with income and expenditure of £29.2 million. In addition, we expect to incur £1.5 million capital expenditure on:

- replacing our telephone system (which we have outgrown);
- continued development of our computerised case-work system; and
- upgrading our IT infrastructure and carrying out building improvements.

	actual 2004/05 £m	budget 2005/06 £m	forecast 2006/07 £m	budget 2006/07 £m
income	12.4	12.8	11.2	15.8
return of surplus	-	(1.7)	40.5	43.2
case fees	31.2	40.0	0.0	0.0
other income	0.4	0.0	0.0	0.0
<b>total</b>	<b>44.0</b>	<b>51.1</b>	<b>51.7</b>	<b>59.2</b>
staff and staff-related costs	34.7	41.1	41.5	40.1
professional fees	0.6	0.8	0.8	0.7
IT costs	1.7	1.2	1.6	1.3
premises and facilities	4.8	5.7	6.5	6.5
other costs	1.1	2.3	2.5	2.5
depreciation	2.7	3.2	3.3	3.3
operating costs	48.6	55.1	53.6	53.6
financing costs	0.2	0.3	0.3	0.3
<b>total costs</b>	<b>(1.8)</b>	<b>(2.8)</b>	<b>(1.9)</b>	<b>0.0</b>
<b>surplus/deficit</b>	<b>45.8</b>	<b>53.9</b>	<b>53.6</b>	<b>59.2</b>
cases resolved	90,900	116,000	116,000	125,000
<b>unit cost</b>	<b>£496</b>	<b>£456</b>	<b>£457</b>	<b>£472</b>

Expenditure to be 10% higher than in 2005/06, mainly because of increased IT costs.

**The Financial Ombudsman Service**  
**corporate plan & 2006/07 budget**

**about this document**  
The Financial Ombudsman Service year runs from 1 April to 31 March. Each June we publish our annual review, recording what has happened over the past year. But alongside our annual review, we also publish our corporate plan & budget – we look ahead. We consult on our proposals with our stakeholders our agenda for the next three years. Where appropriate, we will consult specifically about any significant changes that entails.

**responses**  
We invite your views. We would particularly welcome comments on our workload forecasts and proposed 2006/07 budget by Friday 17 February 2006. Please send any comments to:

Corporate Plan & Budget Consultation  
Financial Ombudsman Service  
South Quay Plaza  
Marsh Wall  
London  
E14 9SB  
2006budget@financial-ombudsman.org.uk



You can read our *corporate plan & budget* online on the publications pages of our website, [www.financial-ombudsman.org.uk](http://www.financial-ombudsman.org.uk)

### **update – section 75 of the Consumer Credit Act and transactions made abroad**

*the manager of a citizens advice bureau emails ...*

**Q** Around a year ago, in issue 43 of *ombudsman news*, you answered a query from my colleague. This was about whether section 75 of the *Consumer Credit Act* applies to transactions made abroad. I've heard there's recently been a further decision in the courts on this. Can you confirm what approach the ombudsman now takes on disputes involving overseas credit card transactions and section 75?

**A** Section 75 of the *Consumer Credit Act* says that credit card providers are jointly liable with suppliers if a consumer has a valid claim for misrepresentation and/or breach of contract. There had long been confusion about whether this applied to transactions made abroad. When the matter was taken to court in an attempt to clarify the legal position, the first instance court decision was that section 75 did *not* apply to foreign transactions. Shortly afterwards, the Office of Fair Trading said it would appeal the decision.

A number of large card-issuers decided to continue applying the old (voluntary) policy to credit card transactions abroad. This meant that if the issuers were satisfied there had been a breach of contract or misrepresentation by the supplier, they would reimburse the customer – but only to the extent of the amount of credit used. This differed from the provisions of section 75, where compensation could be claimed for *all* the loss caused by a breach of contract or misrepresentation. ...

We regarded this continued application of the voluntary policy as representing good industry practice, and have taken that into account when considering cases brought to us.

The Court of Appeal has now overturned the earlier court decision and decided that section 75 *does* apply to foreign transactions. So the current state of the law is that no differentiation should be made between UK and foreign credit transactions when applying the provisions of section 75. As the law is one of the things we must take into account when considering complaints, we now expect card-issuers to apply the new law where we uphold a complaint of this type.

Because we operate an informal dispute-resolution service, complaints about transactions made abroad can sometimes present difficulties of evidence that mean we are unable properly to decide them. The recent court decision does not make any difference to that. It is also important to remember that the court decision does not mean the consumer is now automatically entitled to a refund from the credit provider for a foreign transaction. Section 75 only applies where there has been a breach of contract or misrepresentation.

We will not be re-opening old cases where there has already been a full and final settlement, or which we have determined under the previous law which was applicable at the time.

*ombudsman news is published for general guidance only. The information it contains reflects our policy position at the time of publication. This information is neither legal advice nor a definitive binding statement on any aspect of our approach and procedure. The case studies are based broadly on real-life complaints we have dealt with.*