essential reading for people interested in financial complaints – and how to prevent or settle them

ombudsman news

issue 74

Financial Ombudsman Service

... settling financial disputes, not taking sides

Walter Merricks
chief ombudsman

the single-issue issue

This month the total count of complaints about payment protection insurance (PPI) that we have received since January 2008 reached over 25,000, while complaints about credit-card charges came to almost 10,000. These are now our two largest categories of complaints – together out-numbering the 30,000 complaints we received last year about the single issue of bank charges.

So it looks as if responding to large-scale surges in complaints driven by 'single-issue' consumer campaigns (usually led by the media and harnessed by the power of the internet), is now becoming a regular feature of our workload.

Traditionally, of course, the ombudsman's role was seen as dealing with *individual* disputes relating to *one-off* issues. The ombudsman's office was regarded as a kind of craftsman's workshop – not a factory for mass-production. So some eyebrows may be raised at the idea of the ombudsman service now handling a workload involving thousands of similar complaints, all involving the same financial product or problem.

But while some may question whether handling such surges of 'single-issue' complaints is proper work for the ombudsman, there is little consensus on what the answer might be for these disputes. Of course, the ideal solution would be for all financial businesses to treat their customers fairly (and to put things right when they go wrong) – either because businesses recognise this is the right thing to do, or because of effective regulatory scrutiny. ▸

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Where this does not happen, and a single issue arises that directly affects very large numbers of consumers, it would surely best be resolved collectively – rather than relying on individual consumers each having to make their own separate complaint. If there has been widespread consumer detriment, widespread redress is needed.

But as things stand, the ombudsman service may continue to be faced with mass surges of these single-issue complaints – which we will have no option but to deal with. The actions we necessarily have to take, in order to address the complaints, may result in our being accused of acting as a surrogate regulator – but that may be inescapable.

We can and do liaise with regulators, of course – both informally, and officially through the 'wider implications' process. But consumers rightly expect to have their complaints resolved, one way or another.

We need to ensure that none of this distracts us from our central purpose of underpinning confidence in financial services for the benefit of consumers and the financial services industry – a function needed now more than ever.

Walter Merricks, chief ombudsman

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a selection of recent complaints involving older consumers

These case studies illustrate some recent complaints brought to the ombudsman service by older consumers. In our *annual review*, covering the financial year 2007/8, we noted that 14% of the consumers bringing complaints to the ombudsman service were between 55 and 64 years of age and 23% were over 65.

Recognising that older consumers may have particular financial issues and concerns, and as part of our ongoing work to raise awareness of the ombudsman service, we have embarked on a number of initiatives with these consumers in mind. There is more information about this on our website at: www.financial-ombudsman.org.uk/news/updates/older_consumers.html

74/1

whether bank should have done more to intervene when elderly customer withdrew unusually large sums of money from her account

Mrs D, who was 98 years old, had been a customer of the same bank for many years and was well-known to the staff at her local branch. They became concerned when she suddenly started withdrawing large sums of money from her account, at regular intervals.

Because this was so unlike the way she normally managed her affairs, the bank decided to raise the matter with her, as tactfully as possible. However, Mrs D took offence and said the bank should not be questioning what she did with her own money.

After several further large withdrawals from Mrs D's account, her bank manager contacted the police. He outlined his concerns and said the bank considered her a potentially vulnerable customer, because of her age. The police enquiry led to a Mr T receiving a prison sentence for cheating Mrs D out of her money.

Mrs D's nephew, Mr K, then complained to the bank. He said it should have intervened at a much earlier stage.

... he asked if the bank had refused him a loan because of his age.

He also asked why it had failed to contact him as soon as it spotted the unusual cash withdrawals. Mrs D had told him she had arranged for him to sign cheques on her account, if necessary.

The bank explained the steps it had taken, including notifying the police. But it said it could not prevent customers from withdrawing their own money, particularly where, as in this case, the customer had insisted she knew what she was doing. The bank also noted that it had no record of any arrangement enabling Mr K to sign cheques on Mrs D's account.

Unhappy with the bank's response, and with its refusal to refund the full value of Mrs D's cash withdrawals during the period in question, Mr K brought the complaint to us.

complaint not upheld

From the bank's records, it was clear that it had been prompt in spotting the unusual activity on Mrs D's account. It had also correctly followed its procedure for handling situations involving potentially vulnerable customers.

There was no evidence that Mrs D had ever asked the bank to arrange for Mr K to sign cheques on her account. Even if such an arrangement had been in place, it would not have prevented her from continuing to withdraw funds without Mr K's knowledge.

We had much sympathy for Mrs D. However, we concluded that the bank had done everything it reasonably could do to protect her interests. The bank had no right to stop her getting access to her own money. And we could not fairly agree to Mr K's request that it should refund the money she had withdrawn from her account and given to Mr T.

74/2

elderly customer complains that bank turned down his application for a personal loan because of his age

Mr G, who was 82 years old, complained about the way his bank had handled his application for a personal loan. He had applied by phone and the bank called him back later the same day to say his application had been unsuccessful.

He said he was surprised by this and asked if his application had been turned down because of his age. However, the bank refused to comment and said it was unable to give any explanation for the decision. Mr G then wrote to the bank, again asking if he had been refused a loan because of his age.

The bank sent him a brief reply, saying his application had been assessed '*in line with normal procedures*', and that it was unable to reconsider its decision. Mr G then brought his complaint to us. He said the bank's refusal to answer his question seemed to indicate that he had indeed been '*a victim of age discrimination*'.

complaint upheld in part

The bank provided evidence to show that when it assessed Mr G's application it had followed its standard procedure, in line with principles laid down in the *Banking Code*. Its assessment clearly demonstrated that Mr G would not be able to afford the repayments for the loan he had requested. So we accepted that the bank had not treated him differently from other applicants because of his age.

However, we thought the bank had been wrong in refusing to give Mr G an explanation, when he had asked the reason for its decision. We reminded the bank of the relevant section of the *Banking Code* (13.3) that tells customers:

'*If we cannot help you, we will explain the main reason why if you ask us to. We will give you this in writing or electronically, if you ask.*'

We concluded that the bank had been entitled to turn down Mr G's loan application. However, it had provided him with a poor level of service by refusing to explain its reason for doing this. We thought it unlikely that Mr G would ever have raised a complaint if the bank had provided an explanation when asked. We said it should pay him £100 for the distress and inconvenience it had caused.

74/3

customer claims refund from credit card company when his new bed fails to provide the benefits he says he was led to expect

Mr J, who was in his 70s, complained to us when he was unable to obtain a refund for a bed he had bought with his credit card.

He and his wife, who was disabled, had been thinking for some time of buying an adjustable bed. After looking at various advertisements for beds of this type, Mr J phoned the company that supplied the particular make and model he had chosen. He later told us he had expected to place an order over the phone. However, he was told that a company agent would first need to visit him and his wife at home, to help them select the most suitable bed.

Mr J said he had mentioned during the agent's visit that his wife was currently suffering from bed sores. The agent had then persuaded him to buy a bed that was '*specially designed to alleviate bed sores*'. This bed was significantly more expensive than the one Mr J had originally intended to buy.

... he was unable to obtain a refund for a bed he had bought with his credit card.

Mr and Mrs J were very disappointed with the bed when it eventually arrived. Despite the agent's promises, the bed did nothing to alleviate Mrs J's existing bed sores, and within a week several new ones had developed.

So Mr J contacted the company that had supplied the bed. He said the bed was '*not fit for the purpose for which it had been sold*' and he asked for a refund. The company refused, saying the bed had not been designed to relieve bed sores, and would not have been sold for that purpose.

Mr J then contacted his credit card company. He remembered his neighbour obtaining a refund from her credit card company when her new washing machine – bought with a credit card – turned out to be faulty and the supplier would not give her a refund.

However, Mr J's credit card company told him there was no evidence that the agent had made any false claims for the bed. It also noted that the company's brochure did not make any reference to bed sores. Mr J then brought his complaint to us.

complaint upheld

We looked carefully at the circumstances surrounding Mr J's purchase of the adjustable bed. There was evidence that he had spent some time considering the different brands and types of bed on the market before making his original choice.

He had given a clear account of what happened when the agent visited him and his wife at home – and of what the agent had said about the more expensive bed. Neither the company nor its agent provided us with any statement about that home visit.

On the evidence available, we concluded it was more likely than not that the agent had misrepresented the benefits of the more expensive bed, in order to persuade Mr J to buy it. It seemed unlikely that

> ... the value of her investment would be affected by a 'market value reduction'.

he would otherwise have bought a bed costing so much more than the one he had originally selected.

We upheld the complaint. We said the credit card company should arrange a convenient date for the bed to be collected from Mr J's house. It should also give him a full refund and pay an additional £200 for the distress and inconvenience he had been caused.

74/4

elderly customer complains she was wrongly advised to invest in a with-profits bond

Shortly after her 80th birthday, Mrs C consulted a firm of financial advisers and was advised to place £95,000 in a bond that was invested in a with-profits fund.

Five years later, she contacted the firm to ask the exact date when her bond matured. She was dismayed to be told it did not mature on a specific date but was open-ended. She said she had thought the maturity date was imminent and she had been making plans for what she would then do with the money.

The firm told her she could surrender the bond and withdraw her money if she wished to do so. However, the value of her investment would be affected by a 'market value reduction' (MVR). This was because she was withdrawing her money at what was considered to be a relatively early stage.

Mrs C then complained that she had been wrongly advised. She said she had been led to believe she had invested for a 5-year term, and had not known there was any risk that an MVR might apply.

The firm rejected her complaint. It said the bond was suitable for her needs and that she must have understood the risks, as she had worked in financial services for many years. Mrs C then brought her complaint to us.

complaint upheld

There was no justification for the firm's assertion that Mrs C's previous employment meant that she understood investment risk. She had already been retired for many years at the time she first consulted the firm. And she had worked for a general insurance company, so had no experience of regulated investment products. In any event, as she had sought financial advice from the firm, she was entitled to receive *appropriate* advice, regardless of what the firm assumed she might already know about investments.

On several occasions since her retirement, Mrs C had invested in three-year deposits with her building society (which had introduced her to the firm's representative). And she told us she had originally asked the firm about investing in a bond for three years. However, she had been told that five years was the minimum investment period available.

We looked at the 'fact find' that the firm had completed at the time of the advice, and at the letter it had sent Mrs C, outlining why the bond was suitable for her. Neither of these documents referred to Mrs C having required an investment for a specific period of time.

However, we considered there was sufficient evidence that the bond had been sold to Mrs C on the basis that she could cash it in without charge after five years. When she contacted the firm just before the fifth anniversary of her making the investment, she had clearly thought the bond was almost at the end of its term. She had also been making firm plans about what she would do with the money over the following months.

We accepted the firm's argument that the product literature it gave Mrs C *did* mention MVRs and state when they would apply. But there was no evidence that the firm had considered the potential impact of these MVRs on the value of Mrs C's investment, given her age and the fact that she was unlikely to want her capital tied up for a lengthy period.

Many firms consider it good practice, in cases where the investor is elderly or otherwise vulnerable, to suggest that a family member, friend or solicitor might wish to attend the discussion with the adviser. It is, of course, entirely up to the consumer to decide whether they want to be accompanied when dealing with their financial affairs. But in this case, Mrs C was not told this was an option.

We upheld Mrs C's complaint and she accepted the firm's offer to waive the MVR, so that she was able to withdraw the full value of her investment.

74/5

consumer approaching retirement complains about advice to place her capital in an investment bond

Mrs Y was 59 when she consulted a financial adviser. She thought it likely that she would retire within a few months – but was not yet certain about that. She had a capital sum of just under £90,000 and was seeking advice on a '*safe investment*' that would enable her to withdraw her money at any time, if she needed it.

After meeting the adviser she invested her capital in a 'personal investment plan' (a type of investment bond). A few months later, when her retirement plans were confirmed, she cancelled the plan. She was very surprised to find that the amount she got back was less than the amount she had invested.

When the firm rejected Mrs Y's complaint that she had been wrongly advised, she came to us.

complaint upheld

At the time she sought advice, Mrs Y had been expecting to retire within a few months. She was a widow with no dependants and she worked part-time on a modest salary. She had paid off her mortgage, had no debts, and held all her capital in a deposit account.

She told us that when she met the adviser she had stressed that she needed easy access to her capital. She had also said she was not prepared to take any risks with her money, as she would need it after she retired.

The personal investment plan was invested in relatively low-risk funds. However, it still had the potential for capital loss, as Mrs Y had discovered. And placing so much in a single medium- to long-term investment did not seem to us to represent well-balanced financial planning, in view of Mrs Y's personal circumstances.

The firm attempted to defend its advice. It said Mrs Y would have been fully aware of the nature of her investment from the outset, as it had given her a detailed brochure about the personal investment plan. We told the firm it could not fulfil its responsibility for providing a client with suitable advice by simply handing her a brochure.

We were satisfied, from the evidence, that if she had not received the unsuitable investment advice, Mrs Y would probably have kept her money in a savings account at her bank. So we said the firm should restore her capital and add interest for the period it was invested, at the same rate she would have obtained if the money had been in her bank's savings account.

... the amount she got back was less than the amount she had invested.

74/6

market value adjustment is applied to consumer's pension fund when he defers his retirement and delays converting the fund to an annuity

A few months before he reached the age of 65, Mr A consulted a firm of financial advisers about his retirement plans and pension options. As a result, he decided to leave his pension fund invested, rather than converting it into an annuity and starting to draw a pension income.

Annuity rates were not particularly good at that time, and as he was able to continue working beyond his 65th birthday (his normal retirement date), he felt he could afford to delay obtaining an annuity for a while.

A year later, Mr A decided to retire. When his pension fund was converted into an annuity, he discovered that a 'market value reduction' (MVR) had been applied. He was told the reason for this was that the transaction was taking place at a later time than his normal retirement date.

After complaining unsuccessfully to the adviser, Mr A came to us. He said he had never been told his pension fund might be reduced because of an MVR, if he delayed his retirement.

complaint upheld

The firm had a duty to make Mr A aware of all the relevant facts, so that he could make an informed decision. In this instance, we considered it crucial that the firm considered the benefits and drawbacks of Mr A's not converting his pension fund into an annuity at his normal retirement date.

However, the firm insisted that it had not been necessary to do this. It said Mr A had not consulted it about converting his fund into an annuity at the age of 65.

We noted that Mr A had made it clear to the firm from the outset that he wished it to review his financial circumstances and advise him on retirement planning. The firm had recorded, in its report of the meeting, that it was '*not crucial*' for Mr A to convert his pension to an annuity when he reached his normal retirement age. However, there was no evidence that Mr A had gone to the meeting with the intention of deferring his benefits beyond that date. We were satisfied that he decided to do so because of the advice he was given.

In common with most pension fund contracts, Mr A's contract stated that no MVR would apply if he converted the pension benefits into an annuity at his normal retirement age. By not purchasing an annuity at that time, Mr A faced two risks. An MVR might apply at any time *after* his normal retirement date, and there was no guarantee that annuity rates would have improved by the time he decided to convert his fund to an annuity.

The firm had not mentioned these risks in its report and we did not see how it could have advised Mr A properly without taking these factors into account.

We noted that the amount of Mr A's annual pension, after deduction of the tax-free cash sum, was very marginally smaller (by a matter of pence) than it would have been if he had *not* deferred buying his annuity. But he had still lost out on one year's pension payment and on the use of this money during that year. We required the firm to pay Mr A an amount equal to a year's pension. We said it should also add a small sum to compensate him for the distress and inconvenience he had been caused.

74/7

annual travel insurance – retired couple cancel holiday at their own expense after disclosing an illness that occurred after they booked the trip

In September 2007, Mr and Mrs K booked a trip to the Seychelles for early in the New Year, to celebrate Mr K's retirement. Unfortunately, Mr K suffered a stroke a few weeks after making the booking. This appeared to be relatively minor and the couple had every expectation that he would be well enough to travel by the time of their trip.

At the beginning of November, the couple received the renewal notice for their annual travel insurance policy. This asked for details of any changes in their health since the policy was last renewed. Mr K provided information about his recent stroke. The insurer then said it would add an exclusion clause to the new policy, stating that he would not be covered for any claims arising '*directly or indirectly from that stroke*'.

Mr and Mrs K told the insurer this was unfair. They said they felt uneasy about travelling without cover for any health problems related to the stroke. And they said the insurer was punishing them for being honest.

In its response, the insurer stressed that it was important for *all* policyholders to provide accurate information in answer to its questions about their health. Failure to do this could lead to claims being refused. It said it had been entitled to add the exclusion clause to Mr and Mrs K's policy, and that it would only continue to provide them with cover on that basis.

Mr and Mrs K were unhappy about the situation they found themselves in. And they felt they had no option but to cancel their trip, at their own expense, when their doctor said that in view of Mr K's stroke, this might not be the best time to travel. The couple then complained to us. They said the insurer had acted unreasonably in adding the exclusion clause to the policy and forcing them into the position where they felt obliged to cancel their holiday.

complaint upheld in part

We said the insurer had made a legitimate commercial decision in excluding cover for Mr K, in relation to his change in health. But in the circumstances of this case, we thought it should have given the couple the opportunity to cancel the trip and claim under their existing policy, which did not include the exclusion. We therefore said that the insurer should reimburse Mr and Mrs K for the costs of cancelling their holiday.

the Payment Services Directive and the ombudsman

In issue 72 of *ombudsman news* (September/October 2008), chief ombudsman, Walter Merricks, mentioned a new European directive, coming into force in 2009 and intended to help protect consumers transferring money cross-border, as well as providing more of a level playing-field in this market.

In this *ombudsman focus*, we give more information about the Payment Services Directive – and about the proposed role of the Financial Ombudsman Service as part of the Directive's complaints-handling requirements.

what does the Payment Services Directive cover?

The Payment Services Directive requires countries in the European Economic Area (EU members *plus* Iceland, Norway and Liechtenstein) to regulate payment services – including, for example, payments by plastic cards, direct debits and money transfers.

The Directive will affect all businesses providing payment services in or from the European Economic Area. In the UK that will include:

- banks and building societies – already regulated by the Financial Services Authority (FSA) and covered by the ombudsman;
- electronic-money (e-money) issuers – already regulated (or certified) by the FSA and covered by the ombudsman;
- non-bank credit-card companies – already licensed by the Office of Fair Trading (OFT) and covered by the ombudsman; *and*
- money-transfer operators – *not* currently regulated by the FSA (nor licensed by the OFT) and *not* covered by the ombudsman.

when and how does the Payment Services Directive come into force in the UK?

The Payment Services Directive will be implemented in the UK through the *Payment Services Regulations 2008*. These regulations have recently been the subject of a public consultation by HM Treasury. They will come

into force on 1 November 2009 – when the requirements of the Directive will take effect in the UK.

what will businesses that provide payment services have to do – to comply with the law from 1 November 2009?

Businesses that provide payment services – and that will be covered by the Payment Services Directive – will have to comply with the Europe-wide rules on their 'conduct of business' in relation to how they handle payment-services transactions with their customers. They will also have to comply with rules on how they deal with consumer complaints about payment services. Unresolved disputes can be referred to the ombudsman, if the consumer remains dissatisfied.

The FSA has recently consulted on the changes that are required to its *Handbook* in order to implement aspects of the Directive. These changes involve:

- introducing an approach to enforcing the *Payment Services Regulations* that mirrors the FSA's general approach to enforcement under the *Financial Services and Markets Act*;
- applying the FSA's complaints-handling rules to payment services firms; *and*
- extending the jurisdiction of the Financial Ombudsman Service, so that we can carry out the 'out-of-court' redress function required by the Directive.

The FSA intends to publish a document in early 2009, outlining its approach to matters such as authorisation and supervision under the Payment Services Directive.

In the meantime, information for businesses affected by the Payment Services Directive is available on the FSA's website at www.fsa.gov.uk/Pages/About/What/International/psd/

will the ombudsman cover payment-services transactions *inside* and *outside* the European Economic Area?

The FSA proposes to extend the ombudsman's remit, so as to cover all transfers carried out by businesses providing payment services in or from the UK. This will include transactions starting or ending outside the European Economic Area and in non-European currencies. This reflects the ombudsman's current remit for the money-transfer complaints it already covers – in relation to banks, building societies and e-money issuers.

will small businesses also have the protection of the ombudsman under the complaints-handling provisions of the Payment Services Directive?

Yes. But in order to align the ombudsman's traditional definition of a 'small business' with the definition of 'micro-enterprise' used in EU legislation, the FSA plans to alter how we define those businesses that can bring complaints to the ombudsman.

From November 2009, when the Payment Services Directive comes into effect in the UK, businesses with an annual turnover of up to €2 million (approx £1.6 million) will be covered by the ombudsman – as long as they have fewer than ten staff.

This raises the turnover limit from the current threshold of £1 million – but introduces the new, separate, requirement relating to the number of staff.

This new definition of 'micro-enterprise' will affect small businesses that bring complaints relating to *everything* the ombudsman covers – not just payment services complaints.

which other UK official bodies will have responsibilities under the Payment Services Directive?

The government has appointed the FSA as the 'competent authority' for most aspects of the Payment Services Directive. This means the FSA will be responsible for authorising, supervising and registering so-called 'payment institutions'. These are businesses that carry out payment-services transactions such as money transfer – *other than* banks, building societies and e-money issuers (that are already regulated by the FSA).

In addition to the Financial Ombudsman Service's role in providing the 'out-of-court' redress functions under Article 83 of the Payment Services Directive, the OFT will be responsible for requirements relating to access to payment systems. And HM Revenue and Customs will be responsible for the anti money-laundering supervision of businesses providing payment services.

more information

Implementation of the Payment Services Directive: a consultation on the draft legislation published by HM Treasury, July 2008, and available online in PDF-format at:
www.hm-treasury.gov.uk./fin_payment_index.htm

Consultation Paper CP08/14: Implementation of the Payment Services Directive – changes to the FSA Handbook published by the FSA, August 2008, and available online in PDF-format at:
www.fsa.gov.uk/pubs/cp/cp08_14.pdf

FSA information for businesses affected by the Payment Services Directive available online at:
www.fsa.gov.uk/Pages/About/What/International/psd/

complaints made by small businesses about financial services and products

The majority of people who bring complaints to the Financial Ombudsman Service do so in their personal capacity as individual consumers. However, we also look at complaints brought by smaller businesses, charities and trusts that have an annual turnover, income or net asset value of up to £1 million.

Sole traders and people running small businesses may not always register a complaint with us specifically as a *business* dispute. This is because they often see the issues as essentially personal rather than commercial. In practice, therefore, the proportion of complaints made by smaller businesses (around 2% of all complaints referred to us) may be slightly higher.

This selection of case studies illustrates some recent banking and insurance complaints made by the owners of smaller businesses. It also highlights an important feature in our consideration of many complaints from smaller businesses – namely, the extent to which, in individual cases, smaller businesses should, effectively, be treated as though they are in the same position as consumers.

74/8

owner of small business disputes insurer's rejection of his claim for business interruption and damage to shop contents

Mr L had a small business selling office supplies. Within the space of 14 days he made two claims on the insurance policy that covered his shop for '*trade contents and business interruption*'. The first claim related to a leak of water through his ceiling from the flat above, as a result of a faulty washing machine. This damaged some of his stock and other contents.

The incident that led to the second claim happened after a couple of days of severe weather and localised flooding. A large amount of rainwater fell through the flat felt roof that covered part of his premises. The water damaged contents in a part of the shop that had not been affected by the first incident.

Mr L claimed for these contents and also for 16 days' loss of trade. He said he had been advised to close his premises for health and safety reasons after the second incident.

The insurer agreed to meet Mr L's first claim, but not the second one. It argued that there had been a problem with the flat roof for some years – certainly since before Mr L had taken out the policy. In its view, it was a defect in the roof – rather than the bad weather – that had caused the rainwater to come through into Mr L's shop. The insurer also told Mr L that it did not consider the water damage would have been serious enough to necessitate his closing the premises. Unhappy with this outcome, Mr L brought his complaint to us.

complaint upheld

The insurer had cited a policy exclusion that enabled it to turn down claims where the insured premises were suffering from '*inherent vice*' or '*latent defect*'. In other words, where the damage had come about because the premises had a structural weakness.

Our investigation revealed that there *had* been some structural problems with the roof before the date when Mr L took out his policy. However, there was evidence that repairs had been carried out well before the period of severe weather that had led to the claim. There was no evidence that those repairs had been faulty in any way, and there was insufficient evidence to back up the insurer's opinion that the roof had an inherent flaw.

We concluded that it was the severe weather that caused the incident leading to the claim for damaged contents. The policy exclusion did not apply in

these circumstances, so we said the insurer should meet this part of Mr L's second claim.

We then looked at the part of the claim relating to Mr L's loss of business. He supplied detailed evidence about the work that had been carried out after the rainwater came in through the flat roof. This showed that the electricity had been turned off at the mains for several days. Several large industrial dehumidifiers had then been required to help dry out the premises before the cleaning up and remedial work could begin.

We concluded, from the evidence, that Mr L had no alternative but to close his premises during that period. We therefore told the insurer that it should meet his claim for business interruption.

74/9

insurer rejects claim for theft and damage after thieves break into premises of a small business

Mrs A ran a small graphic design business from premises above a retail unit. One evening, after locking up the premises and going home, she realised she had left some important paperwork behind. She decided to have a meal and then return to pick up the paperwork, as she needed it early the next morning for a meeting with a client.

When she arrived back at her business premises at around 10.00pm, Mrs A discovered that thieves had broken in, stealing computer equipment and causing significant damage in the process.

In due course she put in a claim to her insurer. To her great surprise, this was turned down. Mrs A's policy contained a '*condition precedent*', stipulating that claims of this nature would only be paid if specific security devices were installed and in use, and all the doors of the insured premises were made of solid wood.

The insurer acknowledged that the correct security devices had been in place. However, it said it was unable to meet the claim because some of the doors (including the one used by the intruders to gain entry to the premises) were not '*of the correct construction*'.

Mrs A did not agree that the doors of her business premises failed to meet the criteria set out in her policy, and when the insurer refused to reconsider the matter she brought her complaint to us.

complaint upheld

It is generally accepted within the insurance industry that claims brought by some smaller businesses should be handled in the same way as if they had been brought by a consumer.

We take the view that it is fair and reasonable to judge complaints from large businesses – and from those with a more sophisticated knowledge of insurance – by legal standards. However, if we think it should have been clear to the insurer or intermediary that the business was an *unsophisticated* buyer of insurance, we are likely to judge the complaint as if it had been made by a consumer.

Mrs A's business turnover was modest and she had only two part-time employees. So we thought the insurer should have treated her claim as if it had been made by a consumer – not a business.

In such circumstances, if a claim would otherwise be unsuccessful only because of the policyholder's failure to meet a 'condition precedent', the insurer can consider whether this failure was actually connected to the loss. Where it is not, the claim should be paid.

In this case, we noted that the thieves gained entry to Mrs A's premises by forcing the front door off its hinges. So we concluded that they would have got in to the premises regardless of the precise construction of the door. We therefore told the insurer to meet the claim.

74/10

insurer cites policy exclusion when owner of a small groundworks business makes a claim on his commercial insurance policy

Mr G, who ran his own small groundworks business, was sub-contracted to carry out some work at an RAF base. While he was drilling on a runway at the base he struck a fuel-line. As well as resulting in a loss of fuel, this caused substantial damage to the surrounding area, including contamination of a local watercourse.

Later that same day Mr G learned from the main contractor that he would be held liable for any damage. He therefore contacted his insurer to say he would be claiming on his commercial policy.

The insurer told Mr G that it would not meet any claim in relation to this incident. It considered the RAF base to be an airport, and his policy specifically excluded cover for any works carried out '*on or at airports*'.

Dismayed by this news, Mr G contacted the insurer again a few days later. He said he had studied the wording of his policy very carefully and did not agree that the exclusion applied in this case. In his view, the RAF base was *not* an 'airport'. He said that dictionary definitions of the word all related to civil aircraft and the large-scale transportation of the public – not to the specialised functions of an RAF base.

However, the insurer refused to reconsider its position. It said that the statutory definition of an airport *would* include the RAF base. But regardless of the exact definition, the policy exclusion was intended to cover high-risk locations and the work Mr G had carried out at the RAF base clearly fell into that category.

Mr G then referred the dispute to us.

complaint upheld

When considering disputes involving the precise wording of a policy, we look at whether the insurer has provided a clear definition. If it has not, then we apply the ordinary, everyday meaning to the word in question, rather than a statutory definition.

Following this general approach, we concluded in this case that a reasonable person would be unlikely to think of an RAF base as an airport.

...they said the bank's '*inflexible attitude*' was damaging their business.

We noted that in the section of the policy that listed exclusions, the insurer had listed the word 'airport' next to 'railway'. We thought this significant, as it suggested these exclusions had a common theme of public transport, rather than of high-risk locations, as the insurer had suggested.

We concluded that the ordinary meaning of 'airport' was a narrow one that did not include an RAF base. So we said the insurer could not reasonably decline Mr G's claim by using an exclusion that applied to airports.

We had already established, at an early stage of our investigation, that any claim would be likely to exceed £100,000, which is the statutory limit on any award we are able to make. So before we had finished investigating the complaint, we contacted both Mr G and the insurer. We explained that if we upheld the complaint, we had no power to require the insurer to pay any sum over that £100,000 limit, although we could *recommend* that it should do so. The insurer confirmed that it would pay any claim in full, and it did that when we subsequently upheld Mr G's complaint.

■ 74/11

owners of a small company complain that their bank was too cautious and inflexible

Mr and Mrs B ran their own small company from home, trading collectibles on the internet. They complained that the bank's '*inflexible attitude*' to lending was damaging their business.

They said the bank had been unnecessarily cautious, had failed to take all relevant information into account when making lending decisions, and had not understood '*the nature and particular commercial challenges of e-commerce*'. The couple added that the bank had

forced them to convert their business overdraft into a business loan that they did not want – and had '*starved the business of essential cash flow to maintain turnover and fund growth*'.

When the bank rejected their complaint, Mr and Mrs B came to us.

complaint not upheld

We examined the bank's records of its decisions about lending to Mr and Mrs B's company. We also looked at the way the company had operated its current account, including the way in which it had managed its overdraft facility.

It was clear that the bank had become concerned about the company's dependence on its overdraft facility. The company regularly exceeded its overdraft limit. And the overdraft had become a static debt rather than a facility to be dipped into when needed, to assist cash flow.

The bank had wanted the company to convert this overdraft debt into a loan, and then start to repay it. However, Mr and Mrs B had evidently felt very strongly that the bank should have been willing to negotiate on this point. They wanted the bank to arrive at a compromise which enabled them to keep an overdraft facility and did *not* require them to take a loan.

Discussion and negotiation between banks and their business customers is generally the right way to approach lending decisions. However, that does not mean a bank may never take a lending decision with which the business customer disagrees.

In this case, we could not see that the bank had been unfair or unreasonable in requiring the company to start repaying its overdraft facility. The loan that it offered meant that the debt could be repaid in monthly instalments, and at a lower rate of interest than before.

We did not accept Mr and Mrs B's argument that the problem stemmed from the bank's failure to understand the nature of their business. The evidence we saw did not persuade us that further discussion with the couple – or additional information about their business – would have altered the bank's lending decisions in this case.

The underlying problem seemed to us to be the basic difference of approach between Mr and Mrs B and the bank. Mr and Mrs B had an ambitious business plan and were keen to be given the lending flexibility that would allow them to pursue it. The bank had a more cautious attitude.

We told the couple that the bank had not acted incorrectly and had been entitled to make its own commercial decision about the degree of risk it was prepared to take in lending to their company. We did not uphold the complaint.

74/12

a small business processes a 'card not present' debit-card transaction that the cardholder denied having authorised

In common with most small businesses, Mr M's car dealership had a facility to accept payment by credit and debit card (a 'merchant facility'). His complaint concerned the actions of his bank after he carried out a debit-card transaction for £8,000 that the cardholder later challenged.

The £8,000 represented part of a debt owed to Mr M's son-in-law, Mr K, by a third party (JG Ltd). Mr M said that his son-in-law (who also owned a car dealership) had provided vehicles to JG Ltd but had not been paid for all of them.

Mr M maintained that JG Ltd had given him permission to use its debit-card details in order to make a 'card not present' payment of £8,000 through his business account. Mr M intended to pass this money on to his son-in-law.

... the evidence consisted of a vaguely-worded and only partially-legible photocopy.

Initially, Mr M's business account was credited with the £8,000. However, his bank was subsequently contacted by JG Ltd's bankers, who wanted a 'charge-back' (in other words, to reclaim the money from Mr M's account), on the grounds that JG Ltd denied having authorised the payment.

When Mr M discovered that the charge-back had gone ahead, he complained to his bank. It told him it had no grounds on which it could have challenged the charge-back. Mr M had no signature or PIN (Personal Identification Number) from JG Ltd for the transaction, nor could he show that he had provided JG Ltd with any goods or services. Mr M then brought his complaint to us.

complaint not upheld

Some months after the charge-back had taken place, Mr M's son-in-law had obtained a court judgment in connection with the money he was owed by JG Ltd. Mr M sent us details of the judgment, saying it was '*proof*' that his bank had acted incorrectly in permitting JG Ltd's bank to reclaim the £8,000.

We noted that the terms and conditions of Mr M's merchant facility made clear that 'card not present' transactions were made at his own risk, and could be charged-back if successfully challenged by the cardholder. In this case, Mr M's bank had not believed it had adequate grounds to resist the claim for a charge-back of the £8,000.

The evidence provided by Mr M to show that JG Ltd had authorised the transaction was not persuasive. It consisted of a vaguely-worded and only partially-legible photocopy, addressed to a third party.

As there was no clear authority for the transaction, and Mr M had not supplied JG Ltd with any goods or services, we agreed with the bank that there were no viable grounds on which it could have refused the charge-back.

... there was no evidence that the bank told him to put his request in writing.

We did not accept Mr M's argument that the subsequent court judgment '*proved*' that the bank had acted incorrectly. The point at issue was whether the debit-card transaction had been authorised, not whether JG Ltd owed money to Mr M's son-in-law.

74/13

the owner of a small farming business complained that his bank failed to 'stop' a cheque he had written on his business account

A farmer, Mr H, complained to his bank about its failure to act on his instructions to 'stop' a cheque that he had issued on his business account. He had arranged to buy a second-hand tractor, on the basis of information given to him by the seller.

Mr H had been unexpectedly called away from the farm on the morning the tractor was delivered. However, he inspected it as soon as he arrived home. He then discovered it was in a much poorer condition than he had been led to believe. He estimated that it was worth no more than £500. But the cheque he had left for the seller when the tractor was delivered was for £1,800 – the price they had agreed.

He said that he rang his bank that afternoon and instructed it not to pay the cheque. However, the seller was able to cash the cheque without any difficulty a few days later.

When Mr H complained to the bank, it told him it had no record of his instruction to stop the cheque and that he would, in any event, have been asked to put such a request in writing. Since he had not done this, the bank said it was unable to uphold his complaint.

complaint upheld

The bank did not dispute that it had received a phone call from Mr H on the day in question. And it insisted that he had not said anything during that call about 'stopping' the cheque.

The bank was unable to give a clear account of what it had discussed with Mr H on the phone – and there was no evidence that it told him to put any instruction in writing.

We accepted that the bank would normally require written confirmation – particularly if the sum concerned was a large one. But in the circumstances of this case, on balance, we were satisfied from the evidence that Mr H *had* asked the bank to 'stop' the cheque.

We considered that £1,800 would have been a reasonable price for the tractor, in its *advertised* condition. And we accepted that Mr H was likely to get only £500 if he sold it in its *actual* condition, as delivered. So we told the bank to refund his business account with £1,300, and to add interest, back-dated to when the cheque was paid. We said the bank should also pay Mr H £200 for the inconvenience he had been caused.

ask

ombudsman news ...

email encryption

the IT manager at a building society emails ...

Q My customer-services colleagues tell me they have recently received encrypted emails from the ombudsman service. Can you tell me about the encryption technology you use – and who I can talk to if we have any technical queries relating to these emails?

A The cases we deal with involve personal and confidential material relating both to consumers and financial businesses. This material can range from sensitive medical records in complaints about health insurance to credit-card or bank account details in banking disputes. We take very seriously our responsibility to handle this kind of data with great care and in the utmost confidence.

This includes making sure that sensitive and confidential information is kept safe and private if we have to send it externally, as part of our work on a complaint. If we send this kind of material to a business by email, we use encryption technology. That way we can be assured the information remains private between us and the person we're sending it to.

The encryption technology we use is called PGP Universal. This software is already widely in use across the financial services sector. If your organisation has implemented encryption software then you should receive our encrypted emails without needing to take any additional steps.

Businesses that *don't* have this encryption software – or that don't have an in-house IT department to help them – can pick up any confidential email we send them by simply logging-on to the secure website at https://keys.financial-ombudsman.org.uk (rather like logging-on to a hotmail or googlemail account). If you receive an encrypted email from us, it will be delivered as a normal email containing instructions on what you need to do to access the confidential information.

If you have any technical questions about encryption technology in relation to an email we have sent you, please contact encryption@financial-ombudsman.org.uk

providing information to the ombudsman

an insurance broker emails ...

Q We've just had the first-ever complaint about us referred to you. Can you please let me know what information you will need us to provide?

A We generally settle complaints on the basis of relevant letters and other documents that you and the consumer send us. So when we contact you to ask for your view of the complaint, we will ask you to send us *copies* of the paperwork you have relating to the complaint and your investigation into it.

Very occasionally, the particular circumstances of a complaint may mean that the business concerned has to send us *original* paperwork, rather than copies. In such circumstances the business should be sure to keep a copy of everything for its own reference, in case we need to discuss a particular point with them.

looking for information for smaller businesses about complaints-handling and the ombudsman?

log on to our special resource at:

www.financial-ombudsman.org.uk/faq/smaller_businesses.html

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