ombudsman
news

Financial Ombudsman Service

issue 37 May/June 2004

essential reading for financial firms and consumer advisers

in this issue

insurance – keys left in or on cars: a continuing problem **2**

giving all customers equal access to banking services 4

calculating redress for 'loss of investment opportunity' **7**

ask ombudsman news **12**

about this issue

Making sure that all customers receive fair and equal treatment should be a concern of all firms. However, it is evident from some of the disputes that come to us that this is not always the case. Our article on page 4 outlines some of the types of discrimination that can occur, with illustrations taken from recent banking complaints. Similar issues can, of course, arise across all areas of financial services.

The fact that most motor insurers will not pay claims for stolen cars when the ignition keys were left in – or on – the vehicle often comes as a nasty surprise to policyholders, and we continue to see a number of cases where claims for theft – or attempted theft – have been turned down on these grounds. On page 2 we outline the general principles we follow when dealing with these complaints.

In issue 33 of *ombudsman news* (November 2003), we outlined our approach to the payment of 'interest' in cases where we require firms to compensate customers for financial loss. We also explained some changes that would take effect from 1 January 2004. On page 7 of this issue, we look in more detail at how redress should be calculated for loss of investment opportunity – where, because they took the firm's (inappropriate) advice, customers lost the opportunity to invest their money in some other way and to earn a return on it. Our case studies are based on disputes we have dealt with since January this year, including one that gives a detailed illustration of the compound interest calculations.

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

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1 insurance – keys left in or on cars: a continuing problem

Almost all motor policies include a clause that excludes cover for theft or attempted theft if the ignition keys were left in – or on – the vehicle. As this constitutes a major restriction on the scope of cover, insurers need to draw it to the attention of prospective customers, in accordance with the Association of British Insurers' *Code of Practice for General Insurance Business*. If an insurer cannot demonstrate that it did this, then we are likely to uphold the complaint.

left unattended?

Since the Court of Appeal's judgment in *Hayward v Norwich Union Insurance Ltd*, many insurers seem to have reworded their clauses to exclude cover for theft if the vehicle was left unlocked and unattended, or if the keys were left in or on the vehicle. This reduces the scope for disputes of fact as to whether the keys were actually *in* or *on* the car: strictly speaking, it is enough that the car was left unlocked and unattended for cover to be excluded.

The practical result is that, in many cases, we simply have to decide whether the unlocked vehicle (with or without its ignition keys) was '*left unattended*'.

The leading case on unattended property is still *Starfire Diamond Rings Ltd v Angel* (reported in 1962 in Volume 2 of the *Lloyd's Law Reports* at page 217). In this case, Lord Denning (in the Court of Appeal) held that – for a vehicle to be '*attended*' – '*there must be someone able to keep it under observation, that is, in a position to observe any attempt to interfere with it, and who is so placed as to have a reasonable prospect of preventing any unauthorised interference with it*'. He emphasised that it is a question of fact in each case as to whether the vehicle has been '*left unattended*'.

We thinkthis test is very similar to the one applied by the court in *Hayward v Norwich Union Insurance Ltd*, where the keys were '*left*' if the driver moved so far from them that it was unlikely he or she would be able to prevent the theft. Indeed, Lord Denning and his fellow judges did not state that the property/car had to be constantly in view in order to be '*attended*'. The '*Starfire Diamond Rings Ltd v Angel*' test is not concerned simply with the policyholder's actual observation of the property. It is a theoretical test to ascertain their physical proximity to the property: was the driver close enough to be able to keep the property/car under observation?

In deciding whether a driver was close enough to the vehicle to make a theft unlikely, the location of the incident is important – arguably more so than the physical distance between the driver and the car. After all, what is reasonable in one's own driveway may be unreasonable in public areas where crime of this sort is prevalent, such as petrol stations, recycling units *etc*.

Having said that, if a driver is standing right next to their car, their mere presence may have a deterrent effect and make a theft unlikely, even if the driver is not physically able to prevent a theft. Indeed, the Court of Appeal recognised this sort of scenario in *Hayward v Norwich Union Insurance Ltd*, citing the example of a thief making a move while the driver takes something out of the car boot or attends to a child in the back seat. Insurers have sometimes concluded that the mere fact that a theft has occurred demonstrates that the policyholder was not in a position to intervene, but that is not the legal position. What has to be established is whether the driver was in a position to intervene, not whether they were successful in preventing a theft.

We still expect firms to pay claims where the policyholder has not '*left*' the car. However, some of the more tightly-worded policies mean it may be more difficult for some policyholders to demonstrate factors such as their proximity to the vehicle, observation of it, prospect of intervening, *etc*. For example, policyholders who have merely turned their back on the car while closing the garage door are likely to succeed; those who have gone indoors to fetch something are likely to fail.

Because of the endless variety of scenarios that occur, these cases can be challenging, particularly when a car is on, or close to, private land – but has been left unlocked or with the ignition keys in it. Typical examples include the situation where the driver has:

- returned indoors to fetch something;
- left the car at the bottom of a drive while delivering a package; *or*
- left the engine running in order to defrost and demist the car on a cold morning.

As a general rule of thumb, we take the view that a car was '*left*' if it was actually on the public highway — however close to the driveway or private property — and the driver (and any other responsible person) turned their back on it and walked away from it.

acting recklessly?

Some policies, particularly older ones, do not contain a 'keys in car' exclusion clause. Where this is the case, firms may try to reject claims on the basis that the policyholders were in breach of the policy condition that requires them to take '*reasonable care*'. But in order to establish this, firms need to show that the policyholders were '*reckless*' – in other words, that they recognised the risk but deliberately '*courted*' it.

... consumers are frequently unaware that such an exclusion forms part of the policy terms.

People '*court*' risk if they either take no measures at all, or take measures that they know will not be adequate to avert the risk. This is the test of '*recklessness*' as set out in the leading legal case on conditions regarding '*reasonable care*': *Sofi v Prudential Assurance* (reported in 1993 in Volume 2 of the *Lloyd's Law Reports* at page 559).

Most people who leave their keys in the car simply fail to recognise the riskand/or take no precautions whatsoever. It is very difficult in these circumstances for firms to show that the policyholders were reckless. If the policyholders had been aware of the risk, they would probably not have left the keys unattended in the first place.

We do not usually need to apply the *Sofi v Prudential Assurance* test of recklessness in cases involving a '*keys in car*' or '*left unattended*' exclusion clause.

However, the tighter the wording of the exclusion, the more onerous or unusual the exclusion is likely to be – and therefore the greater the insurer's obligation to highlight the precise terms of the policy. We know from experience that consumers are frequently unaware that such an exclusion forms part of the policy terms. If an insurer attaches an unusually restrictive term to a policy, then it must make sure that anyone considering buying such a policy realises that the theft cover is unusually limited. Ideally, we would like to see these sorts of restrictions clearly highlighted on the policy certificate (which customers have to possess by law) and on the policy schedule (which is the document that customers are more likely to read).

In our next issue, we will illustrate how we put these general principles into practice.

2 giving all customers equal access to banking services

Making sure that all customers receive fair and equal treatment should be a concern of all firms. However, it is clear from some of the disputes that come to us – from a broad range of financial firms – that this is not always the case.

This article focuses on some types of discrimination that can occur. The illustrations we have used are taken from recent cases involving banking firms, although similar issues can arise across all areas of financial services.

Useful websites for information on discrimination include:
Disability Rights Commission www.drc-gb.org
Commission for Racial Equality www.cre.gov.uk
Equal Opportunities Commission www.eoc.org.uk

disability discrimination

The Disability Discrimination Act 1995 makes it unlawful to discriminate against people on the ground of disability. Since 2 December 1996, it has been unlawful for service providers, such as banks, to treat disabled people less favourably than others, for a reason that is related to their disability.

Since 1 October 1999, businesses have had to make '*reasonable adjustments*' for disabled people, such as providing extra help or making changes to the way in which services are provided. From 1 October 2004, they will have to make further '*reasonable adjustments*' to any physical features of their premises that make it difficult for disabled people to use their services.

So a firm cannot, on the grounds of a person's disability, refuse to provide that person with a service that it offers to other people. And it has a legal duty to make reasonable adjustments to ensure its services are accessible to disabled people.

Particular difficulties may arise in giving equal access to online facilities, and in relation to PINs (personal identification numbers).

The Disability Rights Commission supported a case where a firm refused to open an online bank account on behalf of a customer with a mental illness. The customer's son had an enduring power of attorney. However, the firm said that it could not allow the son access to internet banking on his father's behalf because (as a third party) the son could not comply with its security requirements. The case was settled after the firm agreed to change its policy.

In another case recently reported in the financial press, a firm told Mrs B, who had power of attorney on behalf of her elderly disabled mother, that she could only withdraw cash for her mother at the post office if she had a PIN – and that it could not give her a PIN because she was not the account holder.

The firm later changed its position and issued a PIN to Mrs B so that she could access her mother's account.

> ... firms should act fairly and reasonably in all their dealings with customers.

race discrimination

The Race Relations Act 1976 makes it unlawful to discriminate on the ground of race. It is unlawful to refuse a service, or to not give the same standard of service extended to others, on the grounds of race, colour, nationality or ethnic origin.

It is *direct* discrimination if a firm refuses to lend money because of the applicant's racial origin. But *indirect* discrimination is also unlawful. It would, for example, be indirect discrimination where a lender refused to lend money on properties below a certain value – if such properties were located in an area that was largely populated by a particular racial group – unless the refusal was justified on non-racial grounds.

sex discrimination

The Sex Discrimination Act 1975 makes it unlawful to discriminate on the ground of sex. It is unlawful to refuse a service to a woman, or, because of her sex, to treat a woman less favourablythan a man in similar circumstances. The law applies equally to discrimination against men.

It is *direct* discrimination, for example, if a firm insists that if a married woman wants to apply for a loan, she must apply jointly with her husband – unless it requires *all* married applicants to apply jointly with their partners.

It is also *direct* discrimination if the firm offers a service to women on terms that are less favourable than those it offers to men. An example is if the firm offers a woman a loan only if she can provide a guarantor, but does not impose this same condition on men of a similar financial standing who apply for loans.

It is *indirect* discrimination if a requirement is applied equally to men and women but adversely affects more women than men, for instance if a mortgage provider lends only to people who work full-time.

other forms of discrimination

Discrimination can, of course, take many other forms. And customers can sometimes complain (incorrectly) of discrimination, when all that has happened is that a firm has properly exercised its commercial judgement as to whether to provide a particular service.

The Banking Code says that firms should act fairly and reasonably in all their dealings with customers. And the ombudsman service reaches its decisions on the basis of what is fair and reasonable. So we are unlikely to consider discriminatory behaviour to be fair and reasonable, even if it is not covered by legislation.

... the firm refused to give Ms Y a mortgage, because she was pregnant.

case studies – giving all customers equal access to banking services

37/1
disability discrimination

Miss A, who was partially sighted, asked the firm if it could let her have her bank statements in large-print. The firm was happy to oblige and all went well until Miss A applied for a loan from the same firm. Her application was turned down, and she eventually discovered that this was because the address she gave when she applied for the loan (her home address) did not match the address the firm had for her on its system.

This had come about because of the firm's method of producing the large-print statements, which involved Miss A's branch sending the statements to a branch in another town, where they were reproduced in large-print and then despatched to Miss A. The firm's system showed the branch in the other town as Miss A's home address.

The firm was apologetic, but said it couldn't change the system. Miss A accepted £400 compensation for the distress and inconvenience she had been caused.

37/2
racial discrimination

Mr K was a UK citizen of Somali origin. He applied to open a bank account and presented his passport as proof of identity. The firm kept the passport for a week, and then refused to open the account. The only explanation it gave was *'problems with the current terrorist situation'*.

Mr K later accepted the firm's offer of £750 compensation for the distress and inconvenience he had been caused.

37/3
sex discrimination

The firm refused to give Ms Y a mortgage, because she was pregnant. Nowadays all women have the right to return to work after maternity leave, and many do. So the firm's practice was discriminatory on the grounds of sex.

37/4
other forms of discrimination

Mr B opened a deposit account. He had a certificate from the Inland Revenue confirming that he was a non-resident and could have his interest paid gross, not net, of tax. The terms of the deposit account that Mr B opened did not cover this point and the firm said that it was only on its offshore accounts that it paid non-UK residents gross interest.

Mr B pointed out that the firm paid gross interest to UK non-taxpayers, such as pensioners, and he claimed that the firm was discriminating against non-residents.

We did not uphold the complaint. We decided that the firm's decision to limit a service to UK residents (of all races and nationalities) was a commercial decision with which we should not interfere.

3 calculating redress for 'loss of investment opportunity'

In issue 33 of *ombudsman news* (November 2003), we outlined our approach to the payment of 'interest' in cases where we require firms to compensate customers for financial loss. We also explained some changes that would take effect from 1 January 2004. This article looks in more detail at the calculation of redress for 'loss of investment opportunity', in other words where – because they took firm's (inappropriate) advice – customers lost the opportunity to invest their money in some other way and to earn a return on it.

Even where it is not possible to establish exactly what the customers would otherwise have done with their money, we can make a reasonable assumption that they would have earned a reasonable rate of return. So we require the firm to return the sum originally invested, together with an award to compensate the customer for the amount they would have earned on that original investment. We calculate this as interest using the Bank of England base rate plus 1% per year. (Details of Bank of England rates can be obtained at: www.bankofengland.co.uk/mfsd/rates/baserates.xls)

As we noted in issue 33 of *ombudsman news*, we expect firms to comply promptly with our money awards. If they delay paying redress for more than 28 days, we will require them to pay interest at the rate of 8% simple per year, from the date of our decision on the case to the date when they pay the redress.

The following case studies are based on disputes we have dealt with since 1 January 2004.

case studies – calculating redress for 'loss of investment opportunity'

■ **37/5**
firm wrongly advised small business to invest in unit trusts

Mr J ran a small business – TJ Ltd – and for many years he kept all of its funds in a business bank account. However, after seeking financial advice from the firm, he transferred a sizeable amount into one of the firm's range of unittrusts.

Mr J had stressed to the firm's representative that he was not in a position to take any risks with the money. So he was very concerned to find – two years later – that the value of his investment was less than the amount he had originally invested. The firm turned down his complaintthatit had given him inappropriate advice, so he came to us.

complaint upheld
We concluded that the firm's advice had been inappropriate and that the firm should pay back the amount of money that Mr J had originally invested in the unit trusts.

There was clear evidence that, until he had acted on the firm's advice, Mr J had kept all of TJ Ltd's funds in a business bank account. And he was adamant that he would have left the money there if the firm had not persuaded

… his investment had fallen dramatically in value.

him to invest in unit trusts. So we told the firm it should pay Mr J a sum equal to the amount of interest he would have earned if he had left the money in his business bank account.

■ **37/6**
firm incorrectly advised customer to invest in savings bond

Mr L visited a firm of independent financial advisers to discuss how best to save a regular monthly amount. He wanted to build up a lump sum to put towards his children's future university fees.

Acting on the firm's advice, Mr L began making monthly contributions to a savings bond. Just over a year later, he discovered that his investment had fallen dramatically in value. He complained to the firm, saying it had not told him there was any risk that he would lose so much money. When the firm refused to uphold his complaint, Mr L came to us.

complaint upheld
The firm's representative had recorded that Mr L had a '*cautious*' attitude to risk. However, it had sold him a bond that was suitable only for someone who was willing and able to take a high level of risk with their money.

Since Mr L had been wrongly advised by the firm, and had lost out as a result, we said it should give him back his contributions. To establish whether the firm should also compensate him for the loss of the opportunity to invest elsewhere, we looked at what he would have done if the firm had not advised him to invest in the bond.

Mr L stressed that he had wanted to invest the money in some way, rather than simply leaving it in his bank account. However, he was not at all sure how he would have done this. He said he had been totally reliant on the firm's advice.

We told the firm that as well as refunding Mr L's contributions, it should add an amount to represent the loss of use of his money, calculated as if it were interest on the total value of his contributions, and that it should calculate the interest using the Bank of England base rate, plus 1% compound per year.

■ **37/7**
customer wrongly advised to invest in a savings bond

Mr Y received £8,000 when his investment in a building society's guaranteed bond matured. As he had no immediate need for the money, he decided to re-invest it. After taking advice from an independent financial adviser, Mr Y put the money in a savings bond.

Unfortunately, the bond did not perform at all well and Mr Y subsequently complained to the firm. When it rejected his complaint, he came to us.

complaint upheld

We concluded that the bond had been too risky an investment for Mr Y and we told the firm it should return to him the £8,000 he had invested. We noted that although Mr Y had said he wanted to re-invest the money, he was not certain what he would have done had he not taken the firm's advice.

We said the firm should compensate him for the loss of use of his money, calculated as if it were interest. We said it should do this by paying him an additional amount, calculated using the Bank ofEngland base rate plus 1% compound per year, from the date when Mr Y invested in the bond to the date when we issued a final decision on his case.

The following example illustrates in greater detail the compound interest rate calculations.

■ **37/8**

customer wrongly advised to put money in risky investment – how calculation for loss of use of his money accounted for differing Bank of England base rates during the period of the investment

Acting on the firm's advice, Mr A invested £20,000 on 6 October 2001. Alarmed at the extent to which his investment was decreasing in value, Mr A cashed it in at the end of August 2003, receiving just £12,500. When the firm refused to accept that it had given him inappropriate advice, Mr A came to us.

complaint upheld

We agreed with Mr A that the investment had been inappropriate for his circumstances as it carried such a high risk. We told the firm to pay Mr A £7,500 – the difference between the amount he had invested and the amount he had received when he cashed in the investment.

It was unclear what Mr A would have done with the £20,000 if he had not taken the firm's advice. So we said the firm should compensate Mr A for the return he could otherwise have got on his money, calculated as if it were interest, using the Bankof England base rate plus 1% compound per year.

The Bank ofEngland base rates that applied were:

- 4.50% from 4 October 2001;
- 4.00% from 8 November 2001;
- 3.75% from 6 February 2003;
- 3.50% from 10 July 2003;
- 3.75% from 6 November 2003 to 5 Febuary 2004.

Since the Bank of England base rate changes over time, different rates applied over the period up until he cashed in his investment on 23 August 2003.

The calculation below shows how the compensation for this period was calculated, using the following rates:

- 5.50% for 33 days from 6 October 2001 to 8 November 2001;
- 5.00% for the next 455 days to 6 February 2003;
- 4.75% for the next 154 days to 10 July 2003;
- 4.50% for the final 44 days to 23 August 2003.

... the firm refused to accept that it had given him inappropriate advice.

This was calculated as follows:

amount invested = £20,000

$$£20,000 \times (1 + 5.50\%)^{(33/365.25)} \times (1 + 5.00\%)^{(455/365.25)} \times (1 + 4.75\%)^{(154/365.25)} \times (1 + 4.50\%)^{(44/365.25)} - £20,000 = £1,894.$$

So the additional compensation for the period to August 2003 was **£1,894**.

We then looked at the compensation due to Mr A for the period *after* he cashed in his investment until the date of our final decision on the case (2 January 2004). Since he did not have the use of the loss of capital and the additional return from 23 August, we made a further award to compensate him for this, using the Bankof England base rates that applied, plus 1%.

The sum owed for this period was £154. This was calculated using the following interest rates:

- 4.50% from 23 August 2003 to 6 November 2003;
- 4.75% to 2 January 2004.

So the total the firm had to pay was £9,548, broken down as follows:

£7,500 (representing the lost capital)

plus

£1,894 (the sum awarded for loss of investment opportunity on the £20,000 original investment)

plus

£154 (for the lost opportunity to invest the full amount of redress – from the date when the investment was surrendered until the total compensation became payable at the date of the final decision)

Mr A accepted our final decision on the complaint, but the firm delayed its payment for over a month. So we said it had to pay interest at a rate of 8% simple, to cover the period from Mr A's acceptance of our decision until it actually paid him.

*working***together**events 2004

mortgage endowment complaints – conferences for smaller firms

Manchester Conference Centre – 29 September 2004

This conference is aimed specifically at smaller firms that deal with relatively low numbers of complaints. The conference addresses key issues relating to mortgage endowment disputes, including 'suitability' of the sale and the approach to redress. It also gives smaller firms the opportunity to discuss some of these issues informally with senior staff from the Financial Ombudsman Service.

The conference features:

- presentations by an ombudsman and other senior staff
- discussion groups on key mortgage endowment topics
- buffet lunch
- value for money – just £125 + VAT per delegate.

For more information, look on our website *or* email your details to conferences@financial-ombudsman.org.uk
***or* complete this form and return it to us.**

Please send information about the Manchester *working***together** conference:

name(s)

firm

phone

email

office address

Please send this form (or a photocopy) to:
Caroline Wells, Industry Relations Manager
Financial Ombudsman Service
South Quay Plaza
183 Marsh Wall
London E14 9SR

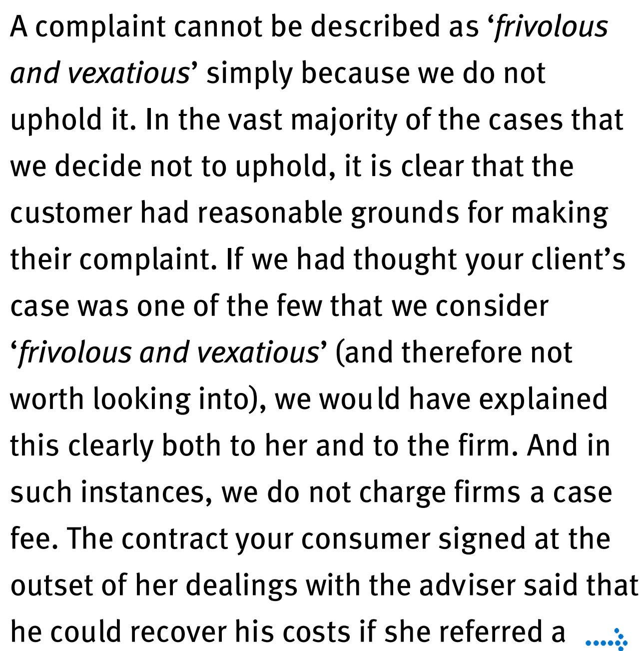
ask ombudsman news

'frivolous and vexatious' complaint?

a trading standards officer writes...

Q A consumer has just been to see us about her financial adviser. She was disappointed that you didn't uphold the complaint she made about the advice he gave her. She thought that was the end of the matter, but the adviser has now written to say that as her complaint to you was '*frivolous and vexatious*', she owes him £1,000. He says this is to cover his costs and your case fee. Is he right to demand this money?

A No. Our service is free to consumers, whatever the outcome. There is generally a cost for firms, but they are not entitled to pass on any of this directly to any customer who brings a complaint to the ombudsman service.



A complaint cannot be described as '*frivolous and vexatious*' simply because we do not uphold it. In the vast majority of the cases that we decide not to uphold, it is clear that the customer had reasonable grounds for making their complaint. If we had thought your client's case was one of the few that we consider '*frivolous and vexatious*' (and therefore not worth looking into), we would have explained this clearly both to her and to the firm. And in such instances, we do not charge firms a case fee. The contract your consumer signed at the outset of her dealings with the adviser said that he could recover his costs if she referred a complaint to the ombudsman service and we said it was '*frivolous and vexatious*' – but we didn't say this about her case.

We did not uphold your client's case because we did not consider that she suffered any financial loss as a result of inappropriate advice. However, we did say that the adviser should pay her a sum to compensate her for the distress and inconvenience that his poor complaint-handling caused. This is because he had attempted to persuade her that she'd have to pay his costs if she came to the ombudsman service and we didn't find in her favour.

conferences

Q We're a small firm, and are starting to get more mortgage endowment complaints than we've had to deal with before. Recently, a few of these have ended up being referred to the ombudsman service for the first time. I'm aware of your *working*together conferences, but wonder if you do any events specifically on mortgage endowment complaints for firms in a similar position to ours?

A Unfortunately, you've just missed one – but there will be another conference on this topic in Manchester on 29 September, specifically aimed at small firms (see page 11 of this issue). If the timing or venue are not convenient, why not contact our external liaison team on 020 7964 1400? If they can't answer all your questions over the phone, they may be able to visit your firm when they are next in your area.