Ombudsman news

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

issue 78

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redress, politics and proposals

Now that the government and the opposition parties have set out their policies on financial reform, we know what each would do with the financial regulatory system. But so far as the ombudsman service is concerned, the news seems to be 'no change' – with no one proposing to tamper with our role.

The Conservatives say that the ombudsman service plays an important role in consumer protection, as it provides a means of resolving consumer disputes. They see the ombudsman working closely with their proposed Consumer Protection Agency – which would take over the consumer functions of the Financial Services Authority (FSA) and the consumer-credit responsibilities of the Office of Fair Trading (OFT). The Lib-Dems have made it clear they have no interest in institutional reform – so presumably that means no change for us.

Financial Ombudsman Service

But it's the government's proposals for 'collective redress' that present the most interest for those of us concerned with complaints and redress in areas where there has been widespread consumer detriment in recent years.

The government's proposals say: '*Where many consumers are affected in a similar way, there should be routes to collective redress that can deal with claims more efficiently, reduce the time that claimants may have to wait, and reduce the volume of individual cases dealt with by the courts or the Financial Ombudsman Service.*' This would mean enhanced powers for the FSA and a right of collective action in the courts. These proposals echo thoughts I outlined in our most recent *annual review*.

So I'm looking forward to a busy and interesting final few months as chief ombudsman – watching some of these proposals take shape before I step down at the end of October.

Walter Merricks, chief ombudsman

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The illustrative case studies are based broadly on real-life cases, but are not precedents. We decide individual cases on their own facts.

Claiming back payments made with plastic cards

From the complaints we receive involving plastic cards, it's clear that some consumers think that if they use a plastic card to pay for goods or services, they can always claim back their money from the card provider, should things go wrong. This is not necessarily the case. Any right that the consumer might have to get a payment refunded through the card provider will depend on:

- the type of plastic card used
- the medium through which the payment was made; *and*
- why they are seeking a refund.

Using a plastic card does not provide an automatic cooling-off period, or always allow the payment to be countermanded later. So consumers are likely to be disappointed if, for example, they use a plastic card to place an order for goods, in the expectation that they will be able to cancel the payment if they subsequently change their mind.

However, the position is different if:

- the goods or services are paid for (or partly paid for) with a *credit* card
- the cost is between £100 and £30,000; *and*
- there is either a misrepresentation (a false statement of fact) or a breach of contract by the supplier.

Claiming back payments made with plastic cards

In such cases, consumers may be able to rely on their legal rights under section 75 of the *Consumer Credit Act 1974*. This gives consumers the same right to claim against the provider of credit as they would have against the supplier. So consumers may be able to recover the same amount that they paid with their card – or more, or less, than that sum.

Another common belief is that pursuing a claim for a refund through the credit provider is a last resort and that consumers must first have:

- brought legal proceedings against the supplier
- obtained a judgment; *and*
- tried to enforce it.

In fact, there is no such requirement. If a consumer is misled on that point by their credit card provider, and then spends time and money on unnecessary legal proceedings, they will be entitled to compensation for that (as happened in case 78/1 below).

However, it is important to note that claims can only be made under section 75 where the payment was made using a *credit* card. Other types of plastic card payments (for example, debit cards or charge cards) are not covered by section 75. Consumers and card issuers can sometimes get confused on this point, as we illustrate in case 78/2.

The contracts that card issuers have with their card network providers are likely to have provisions that – in certain circumstances – allow card issuers to attempt what are known as 'chargebacks'. If successful, a chargeback allows a card issuer to claim back a payment from the retailer's bank, on the consumer's behalf.

However, the provisions allowing chargebacks are not consumer rights provided by law. And the terms of the contracts – including the grounds on which a chargeback may be attempted – vary from network to network.

Consumers are not generally aware of the circumstances in which a chargeback might be attempted. However, we expect card issuers (who should understand the terms and conditions of their own contracts with the network providers) to consider making a chargeback claim if the consumer has made them aware of a situation where this might be appropriate.

Chargeback attempts are not guaranteed to succeed, and card issuers cannot force suppliers' banks to refund money paid by plastic card. Although card issuers will sometimes make an interim refund to their customer's account, pending the outcome of the chargeback, this is likely to be removed if the chargeback is unsuccessful. So it is important that the card issuer makes it clear to the consumer that their card account may be re-debited if the supplier's bank does not agree to the chargeback.

There are time limits for attempting a chargeback, and we would expect the card issuer to bear that in mind if a consumer contacts it about a situation that might entail a chargeback request. If, in a particular case, the card issuer fails to act within the time limit, and we conclude that a timely chargeback attempt would probably have been successful, then we may say the card issuer should compensate the consumer for its failure to act in time. This is what happened in case 78/4 below.

Claiming back payments made with plastic cards

Sometimes the consumer has made the plastic card payment through a third-party payment processor, rather than direct to the retailer. This is quite common in purchases made from online retailers. In such cases the *consumer/credit provider/supplier* chain that is required to bring a claim under section 75 may be broken – and the card issuer's right to attempt a chargeback may also be affected.

Finally, in some of the cases that we see, the consumer argues that they did not give their consent for the total amount that the retailer charged to the card. Irrespective of whether there could be a claim under section 75 or the chance of a successful chargeback, the consumer may have grounds for recovering the payment from their card issuer. Case 78/5 provides an example of a consumer who was partly successful with a complaint of this type.

78/1

credit card provider tells consumer to take legal action when retailer fails to deliver a purchase made by credit card

Soon after he retired from his job as a farm labourer, Mr M bought a new bed from a local furniture showroom. He paid £450, using his credit card, and was told that the bed would be delivered within four weeks. However, this date was put back several times. He was still waiting for the bed to arrive six months later, when a neighbour told him that the furniture showroom had closed down.

Unable to get more than a recorded message when he rang the showroom, Mr M contacted his credit card provider. He explained what had happened and said he wanted to reclaim the £450.

The credit card provider told him he would probably get his money back. But it said he would first have to take legal action against the company that owned the furniture showroom and get a court judgment in his favour.

Mr M was alarmed to learn this and asked if there was any other way in which he could get his money back.

He explained that he had no experience of legal matters and was nervous of taking a business to court, not least because of the expense this might entail.

The credit card provider assured him that using the small claims court was very straightforward – and that he would get his money back as soon as he produced a court order to '*validate*' his claim.

Mr M contacted the small claims court but soon ran into difficulties. He was unable to provide the answers to some key questions, including the correct name and address for the company that owned the furniture showroom – and whether or not that company was still trading. He spent several weeks trying to obtain the information he needed, without success.

His daughter-in-law then persuaded him to contact the credit card provider again and ask for a '*straightforward refund*'. She told him she thought it unreasonable that he should have to cope with so much inconvenience and worry.

However, the credit card provider turned down Mr M's request on the grounds that he had '*not provided proof of a successful claim*' against the furniture showroom. Mr M then came to us.

complaint upheld

It was clear from the information Mr M gave us that the furniture showroom had gone out of business and that he was not going to receive the bed he had paid for. We were therefore confident that he had a claim for breach of contract. Under section 75 of the *Consumer Credit Act 1974*, he was entitled to bring his claim against *either* the retailer *or* the credit card provider.

We pointed out to the credit card provider that Mr M had no legal obligation to take proceedings against the furniture showroom before making a claim under section 75. He had been caused real inconvenience, and some expense, in acting on the credit card provider's wrong advice.

We said the credit card provider should refund the £450 to Mr M's credit card account, together with interest, backdated to when he had made the payment. It should also refund the expenses he had incurred trying to take legal action. And it should pay Mr M £350 in recognition of the inconvenience he had been caused. ■

... they thought that paying by plastic card automatically entitled them to a refund.

78/2

consumers ask their bank to refund plastic card payment made for mail-order purchase

Mr and Mrs V decided to buy a suite of conservatory furniture they had seen in a mail-order catalogue. They phoned the retailer and paid for the furniture using their bank debit card.

When the furniture was delivered a few weeks later, the couple found that the fabric used to cover the seats was a slightly different shade of green than that shown in the catalogue. They later told us that although the colour was '*not quite right*', they had thought they '*could live with it*'.

Three months later, however, they asked the retailer to take the furniture back and refund their money. They said they were particularly disappointed with the '*misleading*' way in which the colour of the seat covers was shown in the catalogue. They added that – overall – the suite looked '*cheaper*' than it had appeared in the catalogue.

The retailer refused their request for a refund. It drew their attention to prominently-placed wording in the catalogue. This said that every effort was taken to reproduce colours accurately, but that there might be a slight variation between the actual colour of an item and the way it appeared in print.

The retailer referred to its returns policy, highlighted on its sales invoices and in its catalogue. In accordance with this policy, the retailer would readily have given Mr and Mrs V a refund – on a '*no questions asked*' basis – if they had returned the furniture within four weeks of receiving it. However, it was now more than three months since the furniture had been delivered – and it was not faulty, so the retailer was not prepared to give Mr and Mrs V their money back.

The couple were unhappy with this outcome. They believed that paying for goods by plastic card automatically entitled them to a refund, if they later decided not to keep their purchase. They therefore contacted their bank and asked it to help them get their money back.

Mr and Mrs V's bank then entered into a prolonged period of correspondence with them about whether or not the retailer had misrepresented the colour and quality of the furniture. Eventually the bank concluded that there had not been any misrepresentation. It explained that the bank did not therefore have any liability under section 75, so it could not refund the couple's money. Mr and Mrs V then came to us.

complaint not upheld

We asked the bank to send us some documents relating to the case – including a copy of the couple's card statement showing the purchase in question. It was clear from this statement that Mr and Mrs V had made the payment from their current account, using their *debit* card.

As this had not been a credit card transaction, the bank could never have had any liability under section 75, regardless of whether or not there had been any misrepresentation on the part of the retailer. The bank had, apparently, failed to spot how the payment had been made – and Mr and Mrs V had (understandably) not appreciated why that was significant.

We explained to Mr and Mrs V why they were unable to claim their money back from the bank. We said we had looked at whether the bank might have had grounds for making a chargeback request (a request to claim the payment back from the retailer's bank). However, we had concluded that this would not have been possible.

The bank agreed to our suggestion that it should pay Mr and Mrs V £100, in recognition of the inconvenience caused by its poor handling of the matter.

78/3

consumer complains about bank's refusal to help her recover plastic card payments

Mrs W had for some while been paying-in to a retailer's Christmas savings scheme. She had set up a regular payment on the debit card linked to her current account, enabling the retailer to use her card details to take ongoing payments, without the need for her to be present to authorise each transaction.

When the retailer suddenly went out of business, Mrs W lost all the money she had saved in the scheme, totalling over £150. Her husband told her he had seen a newspaper article about banks reclaiming money for customers by using chargebacks.

Mrs W then asked her bank to request a chargeback for her, so she could get her money back. However, the bank said this was not possible. It told her the terms and conditions of its card network had no provision for chargebacks in situations like this, described as '*cardholder-not-present transactions where no goods are provided*'.

Mrs W was reluctant to accept that the bank could not help and she asked to see the card network's terms and conditions. When the bank refused her request, Mrs W complained that she was being '*fobbed off*' – and eventually she referred the matter to us.

complaint not upheld

We could understand Mrs W's disappointment when the bank told her it could not help. And we could see why she became suspicious, after it refused to show her the terms and conditions that prevented it attempting a chargeback for her.

... there was no basis on which the bank could have attempted a chargeback.

The bank sent us a copy of its contract with the card network, and we were satisfied that there was indeed no basis on which the bank could have attempted a chargeback in order to recover Mrs W's payments. We explained to Mrs W that although we had considerable sympathy for her situation, we were unable to uphold her complaint.

78/4
consumer says bank failed to give sufficient help to recover debit card payment made abroad

While on holiday in Spain, Ms K used her debit card to buy some gifts in a tourist shop, at a total cost of 240 euros.

A few weeks after her return home, she received her bank statement and was shocked to see that the transaction had been charged at 2,400 euros. She contacted her bank and sent it a copy of the receipt she was given when she bought the gifts.

The bank pointed out that the receipt, which had been printed from the card terminal in the shop, was for 2,400 euros. Ms K admitted that she had not noticed this – either at the time or subsequently. However, she insisted the goods she bought had totalled only 240 euros.

... she complained that the bank had not done enough to help her.

She said the shop-keeper must have made a mistake, unless he was deliberately trying to cheat her.

The bank agreed to '*try to retrieve the overpayment*.' Several weeks later, having heard no more about this, Ms K contacted the bank again. It told her it was still looking into the matter. Over the next few months, Ms K contacted the bank a number of times to try to discover what was happening. Eventually, the bank wrote to tell her that it had not been successful in getting her money back. Ms K then complained to us that the bank had not done enough to help her.

complaint upheld

We were satisfied, from Ms K's evidence, and the nature of the goods in question, that she was telling us the truth when she said she had bought only 240 euros-worth of goods from the shop.

In response to our request for evidence of the action it had taken in this case, the bank showed us a copy of the letter it sent to the shop's bank in Spain.

This letter simply asked the Spanish bank if it would '*be prepared to send a refund cheque for the overpayment*'. The Spanish bank had replied that it did not see why it should do this and Ms K's bank had left the matter at that.

We could not see any good reason why the bank had not made a standard chargeback request through the proper channels, outlining the reason for the request. We thought that, if the bank had done this, then it was more likely than not that a chargeback request would have succeeded. However, as the time-limit for a chargeback had by this stage long expired, the opportunity had been lost.

In the circumstances, we decided the fair outcome was for the bank to refund to Ms K's account the difference between the amount she *should have been* charged and the amount she had actually paid. We said the bank should pay interest on this amount, backdated to when the transaction took place. We said the bank should also pay Miss K £100 for the inconvenience it had caused her. ■

... a much larger sum than agreed had been taken from his account.

78/5

customer authorises debit card payment made over the phone but says an incorrect amount was debited from his account

Mr A had sold his flat in Yorkshire and was moving to take up a new job in Kent. As he did not have much furniture, he decided to hire a self-drive van and carry out the move himself.

After researching various van-hire companies on the internet, he contacted D Ltd – which advertised itself on its website as '*the one-way hire specialist*'. He arranged for a van to be delivered to him in Yorkshire on a specific date – and to be collected from him in Kent three days later. He said he gave D Ltd his debit card details over the phone to pay for the hire, which he was told would cost a total of £179.99.

The move and the van-hire went ahead as planned, but two weeks later Mr A discovered that D Ltd had taken a payment of £628.81 from his account. When D Ltd insisted that this payment was correct, Mr A complained to his bank.

He said he had given D Ltd his debit card details in good faith. However, a much larger sum than agreed had been taken from his account. Initially, the bank credited his account with the disputed payment. It later re-debited this sum, saying that D Ltd had provided confirmation that he did indeed owe £628.81.

Mr A complained that the bank had acted incorrectly. He said it should re-credit his account with the entire amount paid to D Ltd. When it refused, Mr A came to us.

complaint upheld in part

D Ltd had provided an invoice in response to the bank's request for details of the costs Mr A had incurred. We asked to see this invoice, and noted that it was based on a two-way hire and was dated some two weeks *after* Mr A's account had been debited. We were therefore not convinced that it was an accurate representation of what had been agreed with Mr A on the phone.

We also noted that D Ltd had told the bank that it never provided one-way van hires. This did not accord with what it said on its website.

After looking at all the available evidence, we were satisfied that Mr A authorised the use of his card details to pay the cost of the one-way hire, plus fuel. We were *not* satisfied that he had agreed to pay a total of £628.81. Equally, we could not see that D Ltd would have agreed to his paying a total of only £179.99, as this sum did not include the cost of any fuel.

We did not agree with Mr A that, in view of the inconvenience he had been caused, he should not have to pay anything at all. We calculated that the total cost of his one-way van-hire, plus fuel, was £275.10 and we saw no reason why he should not pay that amount.

So we said the bank should refund him £353.71 – the difference between the amount we thought he owed and the amount that was debited from his account. We said the bank should pay interest on the £353.71 for the time he had been without it – and that it should also pay him £50 for the inconvenience he had been caused. ■

... we did not agree that he should not have to pay anything at all.

See-through complaints: transparency and openness at the ombudsman service

David Baker joined the Financial Ombudsman Service in March 2009 as a lead ombudsman and our head of practice – a new role created as part of our commitment to being increasingly open about our approach to casework and the way we arrive at decisions on complaints.

In his new role, David has responsibility for coordinating and documenting information and guidance on issues relating to our casework policy – including the ombudsman's approach to decision-making.

In this *ombudsman news* feature he tells us about his role, his initial thoughts on the ombudsman service, and the current challenges for his fellow ombudsmen.

how do you see the challenges of openness for the ombudsman service?

I think many of the challenges in being open ultimately come down to *what it is* we put in the public domain – and *why* and *how* we do this. An important reason for wanting to be very clear about the approach we take to deciding complaints is to help the businesses covered by the ombudsman service handle complaints more effectively themselves in the first place.

But let's not forget, every year we issue thousands – literally – of letters to financial businesses, setting out our decisions on individual cases. So this should already be helping larger firms in particular to understand how we approach the issues behind many of the types of complaints we see time and time again from their customers.

And disappointingly, despite receiving repeated explanations from us about our approach – in the context of individual cases – some of the businesses we deal with don't seem to have learned lessons from the complaints we frequently find against them. So being clear and open about our approach, and how we apply this in the circumstances of individual cases, is unlikely on its own to lead to improved levels of complaints handling across the financial services industry – and to fewer complaints being referred on to us – if individual businesses choose not to act on what we are telling them.

On the other hand, we *do* expect that publishing complaints data about named individual businesses – as we will be doing this autumn (see www.financial-ombudsman.org.uk/publications/complaints-data.html

David Baker
lead ombudsman and head of practice

for more details) – should focus minds across the financial services industry and help improve standards of complaints handling by businesses.

While individual businesses and consumers are given a direct insight into ombudsman ‘thinking’ in the context of each separate case we decide, others who are not involved in the disputes we resolve – for example, key stakeholders such as trade associations, consumer groups and the media – are less likely to see at first hand how ombudsmen and adjudicators go about deciding cases.

At present, few of our decisions are seen by anyone beyond the consumer and business directly involved. But that can make it difficult to observe the approach the ombudsman actually takes in deciding cases – unless you have direct previous experience of a similar dispute. Hearing it straight from the horse’s mouth has to be preferable to having to rely on hearsay, rumour and reports filtered through those who may have their own vested interests.

So we believe strongly that a whole range of people would be empowered by having a closer understanding of why and how we reach our decisions.

Lessons learned from where others have got things right or wrong are generally the best way of encouraging positive change. Businesses and consumers could all benefit from knowing more about why we reject or uphold complaints – and this must surely mean the ombudsman service would have to step in less often to sort out disputes in future.

so does this mean publishing every case the ombudsman service handles?

We’re looking to resolve over 150,000 cases this year – so probably not! Too much information can sometimes be worse than too little. And making reams of data available can be counterproductive, if it just turns people off. Being open isn’t just a question of putting it all on the website and letting people make of it what they can.

... of course, this isn't a new challenge for the ombudsman service.

To be really effective, opening up our casework to public scrutiny is more about analysing and editing information – to help people make sense of it and draw clear conclusions – rather than publishing each and every word we write.

And obviously, in publishing information about actual cases, we need to respect the privacy of each individual consumer – as well as protecting any confidential or market-sensitive information that businesses might give us.

We also need to bear in mind the risk that some consumers and businesses might misuse the information we publish, either by 'coaching the witness' about the right evidence to give to secure a successful outcome to the complaint, or by giving a selective and misleading picture of the actual position we take.

My role is to help us find the right balance in all this. Of course, this isn't a new challenge for the ombudsman service. For many years it has been setting out its approach to different types of complaints. By now, at least a thousand or so case studies have been published in *ombudsman news*, covering every area of our work – from pet insurance to spread-betting. This information, together with the material already on our website – and the additional material we will be publishing there – hopefully goes a long way to helping people understand how we are likely to view particular issues.

Our aim is to show our real commitment to taking a consistent approach within the specific context of each individual case we handle.

... I was truly surprised by the scale of operations here at the ombudsman service.

... too much information can sometimes be worse than too little.

as the 'new boy', what are your first impressions of life at the ombudsman?

I was truly surprised both by the scale of the operation here – handling almost a million consumer enquiries and 150,000 disputes this year – and also by the fact that the workload shows no sign of reducing.

The ombudsman service sees only a very small proportion of the total number of complaints that consumers raise with financial businesses. This makes me realise how much work needs to be carried out by businesses to handle their customer complaints – and just how many consumers feel they have some grounds for dissatisfaction with the service that businesses have provided. I hope the steps that we are taking at the ombudsman service to increase the transparency of our work can really contribute to improving that picture – to the benefit of businesses and their customers.

and how does your work fit in with that of the ombudsmen?

Working alongside our teams of adjudicators in handling our substantial caseload are 41 ombudsmen – of whom I'm the latest recruit. Grouped in small teams under my fellow lead ombudsmen – each of whom has responsibility for a particular sector of the financial services market – our ombudsmen are able to share best practice across product areas, to help ensure consistency of approach. I hope that our work to be increasingly open about our approach to casework policy will help 'lift the lid' on the issues our ombudsman are engaged with.

what are the main casework issues keeping the ombudsman service busy at the moment?

On the insurance front, the biggest issue by far is the very large volume of complaints we're receiving about the sale of payment protection insurance (PPI) policies.

Regrettably, these cases continue to expose poor complaints-handling by many businesses. We're still receiving 750 new PPI complaints every week, and we're currently upholding most PPI cases in favour of the consumer.

As we highlighted in our recent *annual review*, the number and type of complaints we receive has clearly been affected by the recession. The credit crunch has led to increasing financial insecurity and money worries for many consumers, and this is reflected in the mortgage, banking and credit-related cases we see, where indebtedness and financial hardship are significant issues. We are also seeing the impact of disruption in financial markets being reflected in a steadily growing workload of investment-related disputes. As we go through difficult economic times, businesses, too, tighten their belts and are more likely to take a tougher line with their customers.

any tips for businesses on complaints handling – from what you've seen so far?

Broadly speaking, it's true that many situations could have been better handled – and prevented from escalating into hard-fought disputes – simply through improved communication on the part of the business concerned.

We still see some businesses responding to customer complaints defensively and legalistically – where a more measured and sympathetic approach might have defused the situation and helped the consumer better understand and accept the position.

I know that consumers can sometimes raise complaints in an unbalanced – even intemperate – way. But this doesn't automatically mean that their complaints are vexatious or without merit. For example, we are currently seeing an increasing number of complaints from consumers who are angry about poor investment performance during the recent market downturn.

Businesses can sometimes be too quick to reject these grievances as invalid – on the simple basis that poor performance is a fact of life – without properly dealing with any related concerns the consumer may have been raised, for example about the appropriateness of the advice that was given, or the suitability of the underlying investment.

... our ombudsmen are able to share best practice across product areas, to help ensure consistency of approach.

Our recent *annual review* noted a significant rise in investment-related complaints that turn on the assessment of product risk, customer suitability, and the way in which relevant information was disclosed at the point of sale. Good record-keeping means that businesses can provide important evidence in cases like this, should there later be any dispute about the way the product was sold or the advice was given.

Clearly, too, some of the patchy complaints-handling we are currently seeing reflects a lack of resources in some businesses – and sometimes a lack of senior management commitment and focus – to address customers' complaints fairly and properly. This takes me back to the need for us to be more open about fair outcomes in individual cases.

what happens next?

Our strategic approach to transparency (published in July 2008 and available in the publications section of our website) set out an ambitious agenda of developments to further improve openness. Much of my immediate work will be focused on the delivery of that agenda. With everything from payday loans to self-invested personal pensions to consider, there is a lot of ground to cover. Producing a complete review of our approach will be a long-term task – so as far as possible I want to prioritise our work to best meet the needs of consumers and businesses.

recent investment complaints involving stockbroking, foreign currency exchange and spread-betting

As we reported in our recent *annual review*, investment-related complaints made up 17.5% of the total number of new cases we received during the financial year 2008/2009. As in previous years, mortgage endowments formed the largest category of investment-related complaints, followed by complaints relating to:

- whole-of-life policies and savings endowments
- 'with-profits' and unit-linked bonds; *and*
- pensions.

But we also noted a 30% increase in the number of new complaints relating to '*other types of investment*' – and the following case studies focus on complaints involving some of those other types of investment activity – including stockbroking, foreign currency exchange and spread-betting.

78/6

consumer complains that he made a loss after spread-betting firm failed to contact him by phone

Mr D held an account with a spread-betting firm. Essentially, spread-betting involves gambling on the outcome – at a given date – of a particular event. The event is generally the value of a share index or of shares in a specific company, or the outcome of a sporting fixture.

Mr D had taken what is known as a 'long position' on the shares of a particular company. In other words, he had bet that the value of these shares would increase to a certain value – within a specified timescale. He was expecting to make a sizeable profit as a result.

Shortly after he had taken this position, however, the value of the shares dropped so sharply that it looked as though his loss would be greater than the *margin* that he had paid the firm in case of such an eventuality. (A *margin* is a variable payment required by a firm as partial security against potential losses. It can be increased, as potential losses increase.)

As is usual in such situations, the firm phoned him to ask for an increased margin. Unfortunately, it was unable to get any response from the number it called him on. It therefore 'closed' the position – and Mr D made a substantial loss.

Mr D said the firm should compensate him for this loss, as it had '*made little effort*' to contact him. He said it had rung him on an out-of-date mobile phone number, even though '*it must have been aware*' he had a new number. And he complained that, having failed to contact him by phone, the firm had not then written to him. As a consequence, he had been unaware of the need for an increased margin until it was too late to do anything about it.

He said that if the firm had phoned him on his new number, he would have paid the sum required right away. That would have enabled the firm to keep the position open for longer – increasing the chance that he might still benefit if the share price improved.

... he complained that – having failed to contact him by phone – the firm had not then written to him.

The firm rejected Mr D's complaint. It said it had phoned him on the number he had registered when he first opened his account. Its terms and conditions clearly stated that customers must provide details of any changes to their contact details in writing. Mr D had not done this.

Unable to get any further with his complaint, Mr D then came to us.

complaint not upheld

We examined the firm's terms of business. These did indeed state that customers were required to notify it – in writing – of any amendments or additions to their contact details. The terms of business also stated that the firm could make requests for margin payments by phone and did not need to confirm any requests in writing.

Mr D had maintained that the firm must have known his new number, as it had called him on it. We established that although the firm *had* used that new number, it had only done so once – in response to a voicemail message he had left. He had asked if someone could ring him back on that number about a routine administrative query.

There was nothing to suggest that he had ever informed the firm – either in writing or by phone – that he had a new number. If he had mentioned this in the course of a phone call, then he would, as a matter of course, have been told that the firm needed written confirmation before it could update its records.

Overall, we did not consider it unreasonable or unfair for the firm to require customers to notify it – in writing – of any changes in their contact details. We said the firm could not be held responsible for the breakdown in communication. We did not uphold the complaint.

78/7

advisory client of a stockbroking firm complains about poor advice, when company in which he has invested goes into administration

Mr B became a customer of a stockbroking firm on an *advisory* basis. Under this type of arrangement, the firm does not manage a portfolio of shares on the client's behalf. Instead, it makes recommendations about where to invest. The client then decides whether or not to follow the advice.

... the firm could not be held responsible for the breakdown in communication.

Not long after he invested in a particular company's shares, on the firm's advice, the value of those shares plummeted and the company eventually went into administration.

Mr B told the firm he held it responsible for the fact that he was now left with '*worthless*' shares. He said he would never have made this particular investment if he had been properly advised. And he complained that as well as failing to tell him how risky the shares were, the firm had failed to keep him informed about the company – *after* he bought the shares.

The firm rejected Mr B's complaint. It said it had made him fully aware of the risks before he bought the shares – and had no obligation to keep him up-to-date with the company's affairs after he had made his purchase.

Unhappy with this response, Mr B brought his complaint to us.

complaint not upheld

We noted that the firm had recorded, in its client agreement, that Mr B had a '*medium*' attitude to risk. Mr B's investment in the shares of the company in question was in line with his stated attitude to risk – and we saw evidence that he had made broadly similar investments in the past.

The firm's terms of business, a copy of which he had signed, stated clearly that the firm was not obliged to keep him informed about the progress of any of the companies in which he had invested. We concluded that the firm had not provided Mr B with inappropriate advice or treated him unfairly. We did not uphold the complaint. ■

... the value of the shares plummeted and the company eventually went into administration.

78/8

advisory client of a stockbroking firm complains that firm gave him poor advice

Mr C had an *advisory account* with a stockbroking firm, and received recommendations from the firm about suitable shares that he might wish to buy. Some while after he had invested in a particular range of shares, on the firm's advice, he noted that the value of his portfolio had fallen sharply.

He complained about this to the firm, saying it should never have recommended the shares in question. Quite soon after opening his account, he had told the firm he could not afford to buy any more shares for the time being, as his funds were all tied up elsewhere. Despite this, the firm had persisted in making recommendations, and had suggested he should sell some of his existing shares to pay for new ones.

The firm turned down Mr C's complaint. It said it had given careful consideration to all the recommendations it had made – but could not be held responsible if the shares subsequently performed poorly. It added that there was nothing inherently wrong in an investor selling shares considered to be '*poor performers*' in order to fund the purchase of other shares with better prospects.

Unhappy with the firm's response, Mr C brought his complaint to us.

complaint upheld

We noted that the firm's client agreement with Mr C recorded that he was prepared to make '*high-risk*' investments. The types of shares that the firm had recommended were in line with this attitude to risk, and he had made significant investments in similar shares in the past. The poor performance of shares recommended by the firm was not, in itself, a reason why his complaint should be upheld.

... the firm said it could not be held responsible if the shares performed poorly.

We then considered whether the recommended share purchases had been affordable, given Mr C's overall circumstances at the time. The firm had recorded in Mr C's client agreement that he had '*only £5,000 of liquid assets*' – and that the rest of his capital was already invested in shares.

The client agreement specified that the firm was only to advise Mr C on investing his '*liquid assets*'. However, the firm had quickly recommended the purchase of shares in excess of £5,000 and had suggested he should sell some of his existing shares to help fund these purchases.

As the firm had clearly noted that Mr C should not invest beyond the limit agreed at the outset, we concluded that it had not given him appropriate advice. We told the firm to pay him redress, calculated on the basis that he should be put back into the position he would have been in, if he had not been poorly advised.

78/9
advisory client of stockbroking firm complains she was wrongly advised to buy high-risk shares

After receiving a mailing from a firm of stockbrokers, Mrs G became an *advisory client* of the firm. It undertook to advise her on suitable stocks and shares and – over the next couple of years – she bought a number of shares recommended by the firm, including some high-risk technology stocks.

However, when the value of her portfolio fell dramatically, she complained that the firm had failed to advise her correctly. She said she had made it clear, from the outset, that her main objective was to achieve capital growth by investing in medium-risk shares. A number of the shares that the firm advised her to invest in carried a high-risk, and it was the significant fall in value of these shares that had so badly affected her overall investment.

... when the value of her portfolio fell dramatically, she said that the firm had failed to advise her correctly.

The firm rejected Mrs G's complaint. It accepted that some of the shares it had recommended carried a higher risk, but it said their '*purpose*' was to balance some of the lower-risk investments in her portfolio.
Mrs G said that this had not been her understanding – and she referred her complaint to us.

complaint upheld

We asked to see the firm's client agreement with Mrs G. This clearly stated that she was not prepared to take more than a '*medium level of risk*' with her investments. So we told the firm that by recommending shares that carried a higher risk, it had failed to provide Mrs G with suitable investment advice.

We said that, in this particular case, fair compensation could be calculated by comparing the value of the inappropriately-recommended investments with the return that Mrs G would have received, if she had invested the same amount – over the same period of time – in FTSE 250 shares. The firm should then pay Mrs G the difference. ■

■ 78/10

consumer complains that IFA gave him false assurances when introducing him to a foreign currency exchange service

Mr T was an experienced investor who regularly traded in a range of financial instruments, including derivatives and foreign currency exchange.
While discussing possible investment opportunities with his independent financial adviser (IFA), he asked the IFA to introduce him to Z Ltd, a foreign currency exchange trading service that was based overseas.

After completing a client agreement, Mr T set up a trading account with Z Ltd – and made an initial deposit of $100,000. Six months later, Z Ltd went into administration. Mr T was dismayed to learn that he might not get back any

of the funds in his trading account. It seemed that, at best, he would receive only a proportion of his money – when the firm's remaining assets were divided between its unsecured customers, on a *pro-rata* basis.

Mr T complained to the IFA that had introduced him to Z Ltd. He said the IFA had – falsely – assured him that Z Ltd was '*safe to do business with*' and that it always kept client money in a separate account. He claimed the IFA had also told him – incorrectly – that Z Ltd was regulated by the Financial Services Authority (FSA), so its customers were protected, should things go wrong.

The IFA denied having given any assurances about Z Ltd. It said it had simply arranged an introduction, as Mr T had asked it to do. The IFA pointed out that the documents it had sent Mr T contained nothing to suggest that Z Ltd was regulated by the FSA, or that it held all client money in a separate account. Mr T then referred his complaint to us.

complaint not upheld

It was clear that Mr T had investigated a number of different currency exchange services before he asked his IFA for an introduction to Z Ltd. We were satisfied that the IFA had acted purely as an introducing broker in this case, and that it had not given Mr T any advice. So the crux of the dispute was whether Mr T had been misled about the funds he deposited with Z Ltd.

The IFA and Mr T provided conflicting evidence about what had been discussed during their initial phone conversation. Unfortunately, the IFA was unable to provide a recording of that phone call, so we were unable to establish exactly what had been said.

We looked the documents that the IFA had subsequently sent Mr T. They contained nothing that we considered misleading. There was no suggestion that Z Ltd was regulated by the FSA and no reference to funds being held in separate client accounts. The documents confirmed that Z Ltd was subject to New York law and that it could use clients' funds – as long as it repaid the money.

We noted that Mr T was an experienced investor. While we could not be certain what the IFA had told him over the phone, we thought it unlikely that he had been misled in the way he suggested. He had been sent detailed paperwork and could easily have detected any inconsistency between what he had been told and what was stated in writing. We did not uphold the complaint. ■ ■ ■

the Q&A page

featuring questions that businesses and advice workers have raised recently with the ombudsman's technical advice desk – our free, expert service for professional complaints-handlers

Q. In issue 77 of *ombudsman news* (May/June 2009) you mentioned confidentiality when handling complaints. Can you confirm the legal position on this, for businesses wanting to submit evidence to the ombudsman in confidence?

A. This is an area where businesses sometimes misunderstand the legal position. A business will sometimes argue – incorrectly – that a particular piece of evidence provided by a consumer is '*inadmissible*'. Or a business may say that information we have asked for is '*confidential*' (when it is actually just embarrassing or awkward – such as bluntly-phrased comments on customer notes).

The rules relating to evidence submitted to the ombudsman are set out in the 'DISP' section of the FSA handbook (available online at http://fsahandbook.info/FSA/html/handbook/DISP).

These rules say (at DISP 3.5.9) that the ombudsman may:

- exclude evidence that would otherwise be admissible in a court – or include evidence that would not be admissible in a court;
- accept information in confidence – where *we* consider it appropriate to do so;
- reach a decision on the basis of what information has actually been supplied – taking into account a business's failure to provide information we have requested; *and*
- dismiss a complaint if a consumer fails to supply information we have requested.

The law provides various exceptions to a financial business's duty of confidentiality. One is that our statutory right to demand information overrides a business's duty of confidentiality to any third party. But we may agree to treat some evidence as confidential, for example where it involves sensitive material about third parties and/or security information.

If you believe some information should be confidential between you and the ombudsman service, you should provide the information anyway, mark clearly whatever you would like us to consider treating as confidential – and tell us why you think we should not pass it to the consumer. We will consider the request carefully.

The rules (DISP 3.5.11) give the ombudsman the power to require a business to provide evidence – and failure to comply with the request can be dealt with by the courts. The rules (DISP 3.5.12) also allow the ombudsman to take into account evidence from third parties, including the FSA, other regulators, experts in industry matters and experts in consumer matters.

Q. Is it true that Walter Merricks is leaving the ombudsman service?

A. Yes, Walter Merricks will be stepping down at the end of October after ten years as chief ombudsman – to become the first chair of the Office of Health Professions Adjudicator. For more information about this, see the news page (30 June update) of our website.

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