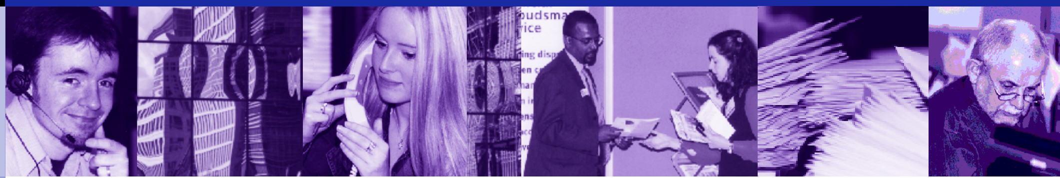
ombudsman news

December 2002 issue 23

Financial Ombudsman Service

essential reading for financial firms and consumer advisers



in this issue

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

about this issue – *December 2002*

We continue to receive more complaints about mortgage endowment policies than about any other topic, so we begin this issue of *ombudsman news* with a selection of some of these complaints. These include a case where the firm refused to pay up after we upheld the complaint, so the customer had to take legal action to get our decision enforced through the courts.

We focus, too, on some of the problems that can occur following the renewal of insurance policies, especially if insurers fail to make it clear to policyholders that they must disclose any relevant information when they renew their policies.

The complaints we receive about savings accounts generally concern changes to the rates of interest. In this issue we provide banking firms with a reminder of some of

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the points they need to consider before they alter interest rates – including the potential impact of the *Unfair Terms in Consumer Contracts Regulations*.

Finally, our selection of case studies illustrates the wide range of matters we have dealt with recently, including a complaint about poor advice on investing money for school fees, a case where a bank had to write off the loan it made to a trader after it incorrectly told him it would provide his new business with credit card facilities, and a complaint about pensions advice that we rejected on the grounds that the customer, a teacher, presented contradictory and unreliable evidence.

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1 mortgage endowment complaints

Here is a selection of some of the many complaints about mortgage endowment policies that continue to reach us.

■ 23/1
mis-sold mortgage endowment policy – customers' unrealistic expectations of compensation

Mr and Mrs O had taken out a repayment mortgage when they bought their first property. When they moved to a larger house several years later, they thought they still had the same kind of mortgage. But two years after their move, in the course of a meeting with an adviser to discuss other financial arrangements, they discovered that they had been sold a mortgage endowment policy.

After the couple complained to the firm that sold them the policy, it offered them compensation in accordance with the regulatory guidance. But Mr and Mrs O were dissatisfied with the amount offered so they brought their complaint to us.

... the firm's offer of compensation was fair and reasonable, so we did not uphold the complaint.

Mr and Mrs O thought the firm should pay them:

- a refund of the premiums they had paid in to the policy;
- the policy's surrender value;
- an amount equal to the commission the firm's representative received for the sale;
- an amount equal to the capital they would have paid on a repayment mortgage to date, if they had taken this type of mortgage from the outset;
- the fee that the firm would normally charge to convert an endowment mortgage to a repayment mortgage;
- the additional amounts they had paid out for an endowment mortgage over the amount they would have paid for a repayment mortgage; *and*
- £10,000 additional compensation.

complaint rejected
We agreed that the sale of the mortgage endowment policy had been unsuitable for Mr and Mrs O. But the firm's offer of compensation was fair and reasonable, so we did not uphold the complaint.

Initially, Mrs O disagreed with our view. She eventually decided to accept the firm's offer after we had a lengthy telephone conversation with her.
We stressed that the offer was in keeping with the regulator's guidance and that the aim was to put her and her husband back in the position they would have been in if they had taken a repayment mortgage from the outset.

■ 23/2

mis-sold mortgage endowment policy – attitude to risk not assessed – policy extends beyond customer's retirement

Mr and Mrs Y had been in their mid-forties when they became first-time house buyers. They took out a mortgage for £20,000 to buy their council house under the 'Right to Buy' scheme. Their adviser arranged a unit-linked mortgage endowment policy for them. This extended over a 15-year term, which meant it would not be paid off until after Mr Y had retired.

Several years after taking out the mortgage, the couple complained to the firm, saying the adviser had never told them there was a risk that the policy might not produce enough to repay their mortgage.

The firm rejected their complaint. It said its records showed that the adviser had:

- discussed with them the possibility of their having a repayment mortgage;
- assessed their attitude to risk as 'balanced' (which would suggest that the endowment policy was suitable);
- explained that the policy ran past Mr Y's retirement date; *and*
- checked that they would still be able to afford the premiums after Mr Y had retired.

complaint upheld

We noted from the 'fact find' completed at the time of the sale that the couple had no loans, credit cards, store cards, previous investments, savings plans or life cover.

When the adviser had asked them about their financial objectives, the couple had said that their main aim was to pay off the mortgage, although Mr Y said he also wanted a new garden path and his wife said she wanted to win the lottery.

We concluded that:

- the couple's attitude to risk had not been assessed on the 'fact find';
- there was no evidence to show that the adviser had explained the risks associated with a unit-linked endowment; *and*
- the adviser had not discussed with the couple the fact that the policy continued after Mr Y retired.

We were satisfied that the proper advice would have been for the couple to take out a repayment mortgage with a term that coincided with Mr Y's retirement date.

The firm agreed with our view and offered compensation of £2,300, calculated in accordance with the regulatory guidance.

■ 23/3

mis-sold mortgage endowment policy – policy incompatible with attitude to risk and extends beyond customer's retirement

Mr L complained to the firm after discovering that his mortgage endowment policy was not guaranteed to pay off his mortgage, and that it continued after his normal retirement date.

... a policy that matured before he retired would have been the more suitable option ...

The firm agreed that its sale of this policy had been unsuitable, since Mr L had not wanted to take any risk with his investment. But it did not accept his complaint about the length of the policy. It said that he had been made aware of this from the outset and that he could, if he wished, have chosen a policy with a shorter term.

Mr L did not agree with the firm's conclusion so he brought the complaint to us.

complaint upheld

We were unable to find any evidence to support the firm's sale of a policy that extended beyond Mr L's retirement. The firm's representative did not appear to have discussed any alternative with him, and there was no reason to believe that Mr L could not have afforded a policy with a shorter term.

The firm argued that, in all probability, Mr L would still have been able to afford the endowment mortgage after he retired. But in our view, since Mr L could have afforded a policy that matured *before* he retired, this would have been the more suitable option. We decided that the firm should pay compensation, calculated on the basis of a comparison between his present position and the one he would have been in if he had taken a repayment mortgage that matured at his planned retirement date.

■ 23/4

mis-sold mortgage endowment policy – whether firm should pay cost of advice for client

The firm upheld Mr G's complaint about his mortgage endowment policy and offered him redress, calculated in accordance with the regulator's guidance.

Mr G wanted to put this money towards paying off his mortgage and to then switch the rest of the amount he owed into a repayment mortgage. But he wanted first to take financial advice on how to switch, the ramifications of doing this and the type of replacement life cover that would be most appropriate. When the firm refused to reimburse Mr G for the cost of this advice, he brought his complaint to us.

complaint upheld

The Financial Services Authority's (FSA's) *Guidance on Mortgage Endowment Complaints* states that:

'*The reasonable costs and expenses the complainant may have incurred in limiting his loss are to be taken into account in assessing compensation. This is likely to include the complainant taking advice on whether he should convert from an endowment to a repayment mortgage and incurring expenses in doing so...*' (Paragraph 2.2.15).

The costs Mr G incurred were reasonable and were a direct consequence of the mis-selling, so we decided that the firm should reimburse them.

■ 23/5

mis-sold mortgage endowment policy – firm ignores ombudsman's decision

Mrs C complained to the firm when she realised that the firm's representative had given her incorrect advice. He had told her that her mortgage endowment policy was guaranteed to repay her mortgage and to provide an additional lump sum. The firm ignored her complaint, so Mrs C came to us.

We wrote to the firm and asked it to send us a copy of the relevant file. It failed to respond. Mrs C's evidence therefore remained unchallenged. We concluded that the firm's sale of the policy had been unsuitable. Mrs C had no previous investment experience, had previously had a capital repayment mortgage and, on the basis of the information she provided, was not prepared to take a risk with her mortgage.

The policy premiums had been invested in a high-risk fund for the first 10 years and had then gradually been transferred into a low-risk fund, so we concluded that this was a medium- to high-risk investment.

complaint upheld

The firm eventually contacted us just before we issued a final decision. In a very brief note, it claimed that the complaint was time-barred under the Limitation Act and that we could therefore not consider it. This was not in fact the case, because three years had not yet elapsed since the date when Mrs C ought reasonably to have been aware that she had cause for complaint.

We awarded redress in accordance with the regulatory guidance and Mrs C accepted our decision. This made it binding on the firm but the firm refused to pay. So Mrs C has now taken legal action to enforce our decision through the courts, as she is entitled to do under the Financial Services and Markets Act 2000.

... this made it binding on the firm but the firm refused to pay.

2 other investment complaints

These case studies illustrate some of the complaints we have dealt with recently about a wide range of other investment matters.

■ 23/6

life insurance – claim declined on grounds of non-disclosure

Before Mr and Mrs E took out a joint life insurance policy, they were asked to complete a questionnaire about their smoking and alcohol consumption. The questionnaire asked whether they had consumed more alcohol 'in the past' than they did now. However, it did not include any questions about whether they had previously smoked more.

Mr E had, in fact, been a heavy smoker at one time. Several years before taking out the policy, he had consulted his doctor about what he thought was a chest infection. On his doctor's advice, he had cut down on the number of cigarettes he smoked.

... a year after taking out the life insurance, Mr E died of lung cancer.

A year after taking out the life insurance, Mr E died of lung cancer. The firm refused to pay the sum assured under the policy, on the grounds that Mr E had failed to disclose his chest problems. So Mrs E brought the complaint to us.

complaint upheld

We discovered that Mr E's doctor had diagnosed Chronic Obstructive Pulmonary Disease when Mr E first consulted him, although the doctor had not told Mr E this. He had simply told him he had a chest infection.

Mr E had not failed to disclose relevant information when he completed the questionnaire. He had completed it correctly, to the best of his knowledge. When we put this to the firm, it agreed to pay the claim.

■ 23/7

inappropriate advice – investment of funds needed for school fees

Mrs J complained about the investment advice the firm gave her in connection with money she planned to use to pay her children's school fees. She thought the product that the firm had recommended represented too high a risk.

Since she had made it clear that she would need to withdraw some of the money fairly soon, she also thought the firm should not have advised her to invest all of it.

The firm rejected her complaint. It said the investment was consistent with Mrs J's attitude to risk and that it had not been wrong to invest all of the money. It claimed that Mrs J already had sufficient money in a savings account to cover the first year's school fees, so would not have needed to make an early withdrawal.

complaint upheld

The purpose of the investment was to provide funds to meet a known and imminent cost, so we did not think a high-risk strategy was appropriate. Moreover, a high-risk strategy did not match Mrs J's attitude to risk. And there was no evidence that she had sufficient funds set aside to cover the first year's school fees, so the firm should not have advised her to invest all the money.

We decided the appropriate remedy was for the firm to pay Mrs J an amount equivalent to a full refund of her initial investment, less the amounts she had subsequently withdrawn.

■ 23/8

whether firm should have informed customer about charges it would deduct when she cashed-in the investment

Mrs G complained to the firm when it deducted charges from the amount she received when she cashed in her investment. She said the firm's customer service representative had not mentioned any deductions when she had telephoned the firm to make arrangements and to find out how much money she would get.

When the firm checked its tape recording of Mrs G's call, it found that she had not asked how much she would receive and the firm had not quoted any figures to her.
It therefore rejected her complaint.

complaint rejected

The only telephone call Mrs G had made to the firm was the one it had recorded.
And the firm had been under no obligation to tell her, in the course of that call, that it would deduct charges if she withdrew her money. When Mrs G had taken out the policy, the firm had sent her a brochure that included clear information about the charges that it might deduct when the policy was surrendered. We considered this information was sufficient and we did not uphold her complaint.

■ 23/9

pension opt-out advice – customer's evidence unreliable and contradictory

Mrs A had a permanent job teaching five mornings a week at a local school. She worked at the same school every afternoon as a supply teacher. Her complaint concerned the advice she said the firm had given her about her pension arrangements. She claimed that she had acted on the firm's advice to opt-out of the teachers' pension scheme, as the firm told her that supply teachers were not eligible to be in the scheme.

Mrs A said she had subsequently discovered that supply teachers *were* eligible to join the scheme, so she complained to the firm. However, it refused to uphold her complaint so she came to us.

... her evidence was unreliable and contradictory, so we did not uphold her complaint.

complaint rejected

We asked Mrs A to send us some of her recent payslips. We noted that one of them showed that her employer had deducted a contribution to the teachers' scheme. Mrs A said this deduction had been made in error and that the money had been refunded to her shortly afterwards. She said that no other pension contributions had been deducted from her pay on any other occasion. We asked to see other payslips, but Mrs A was unable to supply any.

We checked with the teachers' pension scheme and with the county council that employed Mrs A. We found that she had been a member of the scheme but, before the date when she said the firm had advised her, she had completed and signed an opt-out form, and had received a refund of four months' worth of contributions.

When we asked Mrs A about this, she said the date she had originally given us had been incorrect and that the firm had advised her a month earlier than that. This would have meant she was advised *before* she completed the opt-out form.

However, the firm's 'fact find', completed at the time of the sale, showed the date that Mrs A had quoted originally. Since Mrs A's evidence was unreliable and contradictory, we did not uphold her complaint.

■ 23/10

life insurance – premium receipt books no proof that policy still valid

Mrs B brought her complaint to us after the firm refused to pay out on two life insurance policies belonging to her late father, Mr W. It had told her that the policies no longer existed but that it would send her £37.18 as a goodwill gesture.

complaint rejected

When we looked into the matter, we found that Mr W's mother had taken out the policies for him in 1916 and 1918. After Mr W died in 2000, his daughter had found the receipt books for the policy premiums. She had no other documents relating to the policy, but she sent the books to the firm, hoping to get a considerable sum.

We explained to her that the firm had been correct in telling her that it could not pay out on a claim simply on production of premium receipt books. These books merely proved that premiums had been paid, not that the policies still existed.

Initially, the firm had been unable to trace the policies at all. Eventually it confirmed that they had lapsed in 1938, when Mr W's mother had died and the premium payments had stopped. The sum that the firm had offered Mrs B as a gesture of goodwill – £37.18 – represented the total death benefit it would have paid out under the policies had her father died in 1938, immediately before the policies lapsed.

3 banking: varying interest on savings accounts

The complaints we receive about savings accounts tend to relate to firms having varied their interest rates. These cases raise questions such as:

- Can the firm reduce the interest rate by more than a fall in the Bank of England base rate?
- Can the firm leave the interest rate where it is if the Bank of England base rate goes up?
- How will the customer know if either of these has happened?
- Can the customer withdraw the money if dissatisfied?

The *Unfair Terms in Consumer Contracts Regulations* (the *'Regulations'*) are often relevant to the individual complaints we deal with. The Financial Services Authority (FSA) and the Office of Fair Trading, amongst others, have the power to take firms to court for breaches of these regulations. The FSA has recently been consulting about its approach to that power, in the context of interest-rate-variation provisions, and about its view of what good practice might require.

... firms need to consider a number of points before they vary the interest rate on savings accounts.

As the *Regulations* have been in force since 1 July 1995, firms should already have reviewed the terms of their contracts. However, it may be timely to provide a reminder about the potential impact of these *Regulations* on variations in interest rate for savings accounts. In some circumstances, the *Regulations* may require firms to send personal notification of interest rate changes to customers where, currently, the *Banking Code* (the *'code'*) does not. However, the industry has promised to update this part of the *Code* once the FSA publishes its guidance.

The *Regulations* are relevant to what the contractual terms require the firm to do, rather than to what the firm voluntarily does in practice, or what the *Code* requires. If the contractual terms do not comply with the *Regulations*, the firm may find that it is unable to vary interest rates – even if, in practice, the firm follows, or goes beyond, the *Code* requirements.

Firms need to consider a number of points before they vary the interest rate on savings accounts. For example:

- Do the contractual terms only allow an interest-rate change for a valid reason?
- Are particular valid reasons specified in the contractual terms?
- Does the interest-rate-variation provision create a significant imbalance in favour of the firm?
- Do the contractual provisions require the firm to send customers personal notification?

To illustrate this, we look here at three of the most typical situations surrounding interest-rate changes.

where the change is for a valid reason and that reason is specified in the contractual terms:

***Power to change*:** The fact that the valid reason is specified in the contract does not automatically guarantee that the interest-rate-variation provision will be fair. It might still be unfair – if it creates a significant imbalance in favour of the firm. That might be so, for example, where the customer is locked in and has to accept the new rate.

Requirement to notify: The *Regulations* are unlikely to require personal notification to customers of an interest-rate change (for a specified valid reason) in all cases. Fairness might require personal notification in some cases, depending on the other terms of the account. But it is unlikely that a requirement for personal notification alone will render fair an otherwise unfair interest-rate-variation provision, particularly in relation to a customer who is locked in.

where the change is for a valid reason but that reason is not specified in the contractual terms:

Power to change: The power to change interest rates may still be unfair – if it creates a significant imbalance in favour of the firm.

Requirement to notify: The *Regulations* are likely to require the contractual terms to say ***either***: the firm will give customers prompt personal notice once the change takes place ***and*** customers can, at that time, close their account freely; ***or*** the firm will give customers sufficient advance personal notice to enable them to close their account without becoming affected by the change.

where the change is not for a valid reason, even if it is for a reason specified in the contract:

The power to change interest rates is likely to be unfair unless:

- the account is not a term account; ***and***
- the contractual terms require the firm to give customers sufficient advance personal notice to enable them to close their account without becoming affected by the change.

Arguably, it is unlikely that making special provision for accounts with little money in them (a *de minimis* provision) could turn an invalid reason for an interest-rate change into a valid one. But it might be possible for a reasonable *de minimis* provision, incorporated in the contractual terms, to modify the firm's obligation to give customers personal notice – if this were confined to circumstances where there is no possibility of material detriment to the customers.

... the power to change interest rates may still be unfair – if it creates a significant imbalance in favour of the firm.

4 insurance renewals

Insurers want to make it as easy as possible for their customers to renew their policies and it is normal market practice for them to notify policyholders when a policy is about to expire. It is now it is a requirement under the General Insurance Standards Council's Code that firms should do this in good time. This is a useful service for many customers.

Most insurers want policyholders – when they renew – to disclose any changes in their circumstances that might be material. But there are wide variations in how clear firms make this to their customers. Frequently, policies are renewed without any specific questions being asked of customers other than about their credit card details. And in a case reported on page 16 of this issue (23/15), the firm's renewal letter to the customer opened with the words '*If you want to renew then do nothing, it's that easy*'.

If a customer fails to disclose relevant information when renewing a policy, the firm might reject the whole claim. We take the view that if the firm wants to reject a claim on the grounds of a customer's failure to disclose information, then it should be able to show that it asked the customer clear questions when the customer renewed the policy.

Customers cannot be expected to remember all the details of information they provided perhaps several years earlier. So if firms ask them general questions such as '*has anything changed in the information we asked for in your proposal form?*' when they are renewing a policy, the responses are unlikely to be reliable.

We will not normally support a firm in declining a claim if it asked a similarly general question when a policy was renewed, and it then bases its rejection of the claim on the customer's failure to provide full disclosure of information in response to the question.

Our general approach to renewals is to apply the spirit of the *Statement of General Insurance Practice*. That is, to expect firms to ask clear questions about information that the policyholder can reasonable expect to possess.

If a firm wants policyholders to check and re-confirm all the information they provided originally, then it is good practice for the firm to send them a copy of that information, or to ask all the questions afresh. A firm that does not follow good practice may not be able to use a customer's failure to provide information as a reason to decline a claim.

Of course, the fact that a firm may not set out its questions clearly does not absolve the policyholder of all responsibility for disclosing relevant information. In case 23/15 (on page 16 of this issue), for example, although the firm had not set out its questions at all clearly, the policyholder should have known that his insurer would have wanted to know about his drink-driving offence.

... if a customer fails to disclose relevant information when renewing a policy, the firm might reject the whole claim.

case studies – insurance renewals

■ 23/11

household contents – renewal – change of policy terms – whether sufficient to note amendment on renewal documents

In 1984, Mr K took out index-linked household buildings and contents insurance. This included cover for his personal possessions, which were valued at £9,150 in total. He renewed the insurance every year. However, when he was burgled in 2001, the firm rejected most of his claim. It said that some of the personal possessions that had been stolen were worth more than £500 each and that such items were not covered unless they were insured separately.

Mr K was very surprised by this. He said he had no reason to think these possessions were not covered, as they were items of jewellery that his wife had owned since he first took out the insurance in 1984. He pointed out that the firm's promotional literature stated '*New for Old Replacement means exactly that.*' and that it promised '*Reimbursement in full at today's prices, whatever the original cost*'. The literature also said that index-linking '*automatically takes account of inflation when assessing claims and renewal premiums*'. Since none of the stolen items of jewellery had been worth more than £500 in 1984, he considered that they should all still be covered.

The firm based its rejection of the claim on the renewal notices that, since 1991, had stated, '*any item worth more than £500 is not insured at all unless specified*'. The firm said that Mr K should have noticed this and made sure that each item of expensive jewellery was individually specified.

complaint upheld

We considered that the firm's decision to exclude all personal possessions worth more than £500 constituted an unusual and onerous policy term. And such policy terms should be clearly drawn to the attention of policyholders. It is not sufficient for firms merely to print them on the renewal notice without giving policyholders any explanation or notice of the change. Most insurance policies contain a price limit on claims for any single article but it is not common for a firm to withdraw all cover for such items.

The firm knew that Mr K had over £10,000 worth of personal possessions and it should have made it clear to him that he had to specify any item over £500. We concluded that the firm was unreasonable to limit its settlement of Mr K's claim on the grounds that the claim did not meet strict policy terms that the firm had not made clear to him. We required it to meet his claim in full, although we said it could deduct the additional premiums it would have charged for the past five years if Mr K had specified the valuable items.

... there was nothing to suggest that the firm had subsequently altered the policy terms.

■ 23/12

household buildings – change of policy terms – need for clear notification – swimming pool dome – dome specifically excluded from policy – intermediary stating policy covered dome – whether insurer entitled to reject claim for storm damage to dome

Before Mr and Mrs A took out household insurance with the firm in 1994, they asked their intermediary if the policy would cover the PVC dome over their swimming pool. The intermediary wrote to them confirming that the dome would be covered '*at no extra cost*' so they took out the insurance and renewed it each year.

In October 2001, a storm damaged the dome and Mr and Mrs A made a claim. However, the firm told them the policy specifically excluded swimming pool covers. Mr and Mrs A disputed this and said that if the policy wording had been amended, the firm should have informed them.

The firm argued that swimming pool covers had probably been excluded even in 1994, although it could not produce a copy of the original policy to confirm this. It said Mr and Mrs A should have checked the policy terms at the outset to see if the policy was suitable for them. Dissatisfied with this response, the couple brought their complaint to us.

complaint upheld

Mr and Mrs A had specifically asked whether the policy would include their dome and in our view they were entitled to rely on the intermediary's letter as confirmation that the dome *was* covered. It was not reasonable of the firm to expect the couple to have then checked the policy terms to see if the intermediary's statement was true.

The couple had every reason to believe that the dome was covered when they first took out the policy. There was nothing to suggest that the firm had subsequently altered the policy terms and notified its customers that it had done this, so we did not agree that it should have rejected the claim.

The firm agreed to meet the claim, but said it would not cover the swimming pool dome against any loss after Mr and Mrs A's current insurance expired.

■ 23/13

motor – renewal – firm choosing not to invite renewal – whether policyholder entitled to compensation when policy not renewed

Shortly before Mr E renewed his car insurance in February 2002, the firm wrote to tell him that it was transferring customers to a subsidiary. It said Mr E would not be able to renew his policy. The subsidiary had different underwriting criteria and was not prepared to insure him because of the number of claims he had made.

Mr E was upset about this decision, saying it was a '*one-sided variation*' of his policy. He did not think the subsidiary was reasonable to have counted windscreen damage as a 'claim'. He said he was entitled to £300 for distress and inconvenience and he asked for his policy to be reinstated.

complaint rejected

The insurance contract was an annual policy and the firm was entitled to decide not to offer renewal. It was also entitled to decide how many claims policyholders could make before it would decline to insure them. We did not agree that the firm had exercised its discretion unreasonably or that Mr E's complaint was justified.

■ 23/14

motor – renewal – automatic renewal – failure to pay premiums – whether policy should have been renewed – whether subsequent loss covered

Mr H had insured his car with the same firm since 1994. He renewed his policy every year and, from 1997, the firm had renewed the policy for him automatically.

So after he had an accident in October 2001, he was shocked when the firm rejected his claim, telling him he was no longer insured. The firm said that Mr H had telephoned in April 2001 to say he had decided not to renew. It said it had subsequently written to him to confirm his instructions.

Mr H denied this. He said he had no idea that his insurance had lapsed and he had not noticed that the monthly premiums were no longer being deducted from his bank account. The firm told him he should have realised he did not have a valid policy.

complaint upheld

We asked the firm to send us a recording of the telephone conversation in which Mr H had said he would not renew his policy. But it could neither do this nor supply any notes of the conversation. Nor could it produce a copy of the letter it said it had sent Mr H, acknowledging his decision to cancel the policy.

As the monthly premium was small, we were not surprised that Mr H had failed to notice that the deductions from his bank account had stopped. We thought he should have noticed that he had not received a new certificate, but we accepted his statement that he believed the policy had been renewed automatically, as usual.

We put it to the insurer that Mr H had intended to renew his insurance and his failure to do so was an innocent oversight. It agreed to reinstate the policy and to reimburse the cost of repairs plus interest, subject to his paying the outstanding premiums.

... he was shocked when the firm rejected his claim, telling him he was no longer insured.

... it was regrettable that the firm did not record its telephone conversations with customers.

■ 23/15

motor – renewal – non-disclosure – automatic renewal – whether firm made policyholder aware of need to disclose change of circumstances

Mr J's motor insurance was due for renewal on 30 January 2001. The firm sent him renewal papers, including a letter that opened with the line '*If you want to renew then do nothing, it's that easy*'. Further on, the letter said, '*If your details aren't the same, then please ring us*'.

The letter referred to the premium being based on '*the details we already have on file for you. These are listed for you on the enclosed renewal notice*'. However, the renewal notice did not include any information about driving offences or accidents. At the end of the letter, there was a checklist that included a request to call the firm if any details such as '*convictions or prosecutions*' had changed.

Mr J's car was stolen in July 2001 and the firm found out that he had been convicted of a drink-driving offence on 11 January that year. So it told him that it would not meet the claim and that it was cancelling his policy from the date of the renewal.

Mr J said he had been away from home until February 2001, but that he had called the firm then and disclosed his conviction. The firm agreed that he had called, but it said he had not mentioned his conviction. It said he had only asked about reducing his cover from *comprehensive* to *third party, fire and theft*.

complaint rejected

We did not think that the firm's renewal invitation made it clear that policyholders had to disclose new information to the firm. So we did not think it was entitled to decline to meet claims on the grounds that a policyholder had failed to disclose routine information, including minor offences.

It was regrettable that the firm did not record its telephone conversations with customers, since a recording would have resolved the dispute. In the absence of a recording, we had to decide what had occurred on a balance of probabilities.

We thought it highly improbable that any member of the firm's staff would have overlooked the significance of Mr J's being disqualified from driving. If he had mentioned it, we thought the firm would have said it was not prepared to offer him cover on any basis.

We also thought that any driver would know their insurer would consider the conviction and disqualification highly significant and would realise they had to disclose this when renewing their insurance. So we decided that in this particular case the firm acted reasonably in cancelling the insurance from the date of renewal.

5 round-up of banking cases

A round-up of some of the banking cases we have dealt with recently.

■ 23/16

debit card – implied request for overdraft

Mr M objected when the firm chased him to repay the overdraft on his current account. The main reason for the overdraft was that he had placed two bets with a bookmaker, using the debit card for his current account. He said that the firm was responsible for letting his overdraft arise, since it should not have made the payments if there was not enough money in his account.

complaint rejected

If a customer uses a debit card or a cheque when there is not enough money in the account, the firm is entitled to treat this as a request for an overdraft. It is a matter for the firm's commercial discretion whether to grant the overdraft. If the customer has a good history with the firm, the firm may well agree to do so, sparing the customer the embarrassment of having the payment 'bounced'. But it is not obliged to do this. We rejected Mr M's complaint.

... the firm is entitled to treat this as a request for an overdraft.

■ 23/17

cash machine – account-holding firm responsible

Mrs T had a bank account with firm A. She tried unsuccessfully to withdraw £30 from this account, using a cash machine owned by firm B, a member of the same cash machine network as firm A. She later managed to withdraw the £30 from another machine.

However, firm A debited her account with the first (unsuccessful) withdrawal as well as with the second one. Firm A said that was not its responsibility and that Mrs T should pursue a complaint against firm B.

complaint upheld

Having examined the records for firm B's cash machine, we were satisfied that Mrs T had not received the first £30. Her complaint was therefore not about firm B's machine failing to issue the money, as firm A had apparently suggested. It was about firm A debiting her account with money she had not received. We required firm A to credit Mrs T's account, and to compensate her for the inconvenience it had caused by trying to fob off her complaint.

... we required the firm to write off the loan it had made, and to pay a further £2,500.

■ 23/18

credit card – trader misled about available facilities

Mr Z set up a specialist travel agency with £12,000 of his own money. In April 2001, he opened a business account with the firm after meeting one of the firm's business managers.

Mr Z expected to do most of his business by phone or through the internet, so he wanted to have the facility to accept credit card payments. The manager told him this would be possible after his company had been trading for a probationary period of six months.

During this time, Mr Z invested more money in the business, including a loan from the firm. However, at the end of the probationary period, the firm would not enable him to accept credit card payments. It said this was a matter of policy, since it considered this type of travel agency too high-risk for such facilities.

complaint upheld

There was nothing wrong with the firm having a policy of refusing credit-card-acceptance facilities to types of business it considered high-risk. But the firm's business manager should have known that this policy applied to this type of travel agency.

Mr Z would not have invested so much extra money in his business if the manager had not led him to believe he would be able to accept credit cards after a satisfactory probationary period. We required the firm to write off the loan it had made, and to pay Mr Z a further £2,500.

■ 23/19

personal loan – churned – insurance cover lost

In 1999, Mr C took out a £7,000 personal loan with the firm, which included the cost of insurance to cover his repayments if he lost his job. Two years later, in 2001, his employers reduced his hours and he fell behind with his payments. The firm's debt management team advised him to take out a new £5,000 loan to cover the balance of the old one.

In 2002, Mr C was made redundant. When he tried to claim on his redundancy insurance, he discovered that the new loan had no insurance cover.

complaint upheld

We decided that Mr C would not knowingly have given up redundancy insurance in 2001, when he was already working shorter hours. The firm should not have advised him to take the new loan without making it clear to him that the insurance cover would lapse and that there was no redundancy cover on the new loan. We required the firm to make up the insurance benefits Mr C had lost.

■ 23/20

personal loan – maladministration – financial difficulties

Mr Q took out a £3,000 personal loan, and kept up the payments for three years. Then he took out a £6,000 loan. He agreed with the firm that it would use part of this to pay off the balance of the first loan. It would then credit the rest to his current account, where he planned to use it to cover the costs of moving house. ▷

By mistake, the firm credited all £6,000 of the second loan to Mr Q's current account and failed to pay off the first loan. So Mr Q was making repayments from his current account for the original loan, as well for the new one. It was only when his current account became overdrawn a year later that he became aware of the problem.

complaint upheld

The position was clear from Mr Q's bank statements. But he convinced us he had never looked at these – he had just checked his balance from time to time. Under the Consumer Credit Act, the firm should have documented both loans but it could not produce any evidence that it had done so.

We required the firm to write-off the first loan and to pay Mr Q £200 for inconvenience. We also required it to refund, with interest, the payment protection insurance premium it had included in the second loan. This was designed for people in employment and Mr Q was retired.

■ 23/21

secured loan – not affected by bankruptcy discharge

In 1992, Mr D took out a second mortgage on his home to secure his overdrawn business account. Two years later, in 1994, he became bankrupt. The firm decided not to repossess the house because at that time it was only worth enough to pay off the first mortgage.

Mr D was discharged from bankruptcy in 1997. That year, and the following year, the firm sent him statements showing the amount he still owed it. Then in 2001 it told him that as the value of the house had increased sufficiently to pay off both mortgages, he would have to repay his debt or sell the house.

Mr D then queried the existence of the second mortgage and complained about the firm's delay in recovering its debt.

complaint rejected

We were satisfied that the second mortgage existed. It had been a legitimate exercise of the firm's commercial judgement to wait until the house had increased sufficiently in value to cover its debt. The firm had continued to monitor the property's value.

We thought the firm could have done more to keep Mr D informed. But we did not think it appropriate to award any compensation for this. Mr D had benefited from the firm's delay. He had continued to occupy part of the property and had obtained income from letting the rest.

help and advice for firms and consumer advisers

our technical advice desk can

- provide general guidance on how the ombudsman is likely to view specific issues
- explain how the ombudsman service works
- answer technical queries
- explain how the ombudsman rules affect your firm.

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

our external liaison team can

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

phone 020 7964 0132
email liaison.team@financial-ombudsman.org.uk

ask ombudsman news

your questions answered

if my client's complaint to the ombudsman service fails, can my firm make the client pay our costs?

Q One of my clients has complained that we mis-sold his mortgage endowment policy. I am certain I can prove him wrong, so it seems he's just out for what he can get.

If he brings the complaint to the ombudsman service and is unsuccessful, can I claim back the ombudsman case fee and our associated costs from him? I'll go though the courts if necessary.

A No. Consumers have a statutory right to refer disputes to us if they are unhappy with the way the firm has dealt with a complaint. And as a matter of law, the service is free to consumers.

If a firm threatens to penalise a customer for exercising the right to refer a complaint to us, then the FSA has indicated that it will treat the firm as having failed to meet certain of its *Principles for Businesses*. These are Principle 6 (*A firm must pay due regard to the interests of its customers and treat them fairly*) and Principle 8 (*A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client*).

If a firm fails to meet the FSA Principles, the regulator can take disciplinary action that, in some circumstances, may put the firm out of business. Where appropriate, we may inform the FSA if we become aware of a firm putting pressure on any customers to try and stop them referring their complaints to us.

how should my firm show we're covered by the ombudsman service?

Q Is there any set wording for the notice I'm meant to have on display in my offices about the Financial Ombudsman Service?

A The FSA's rules require firms to display a notice in their branches or sales offices to show they are covered by the Financial Ombudsman Service [rule reference DISP 1.2.9(3)].

This rule does not prescribe the format, size *or* wording of the notice. So you have the scope to produce the notice in your own house style, to match your marketing and information materials if you wish.

We can provide firms with the artwork for our logo – provided you agree to comply with our conditions of use and you don't use it misleadingly.

We can also provide an adhesive vinyl window sticker that firms can display to show they are covered by the Financial Ombudsman Service. For more details, please contact our technical advice desk on 020 7964 1400.