

essential reading for
financial firms and
consumer advisers

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welcome to insurance intermediaries



from
**Walter
Merricks**
chief
ombudsman

I am pleased to have this opportunity to welcome insurance intermediaries, who came under our jurisdiction for the first time on 14 January 2005. This follows the expansion of our jurisdiction at the end of October 2004 to cover mortgage intermediaries.

We are not expecting to receive a significant number of complaints about mortgage or insurance intermediaries, but it is important that these firms understand our process, and that they are aware of the range of services we offer to help them. By working with firms we can help identify and reduce problems that might otherwise lead to expensive and time-consuming disputes. ❖

The services we offer as part of this complaints-prevention work include:

- A technical advice desk dedicated to answering firms' queries about the ombudsman service and its general approach – call 020 7964 1400 or email technical.advice@financial-ombudsman.org.uk
- Tailor-made training days, conferences and seminars on complaints-handling issues – call 020 7964 1400 or email liaison.team@financial-ombudsman.org.uk
- Free copies of this monthly newsletter, *ombudsman news*. This provides articles and case-studies illustrating our approach to the wide variety of cases referred to us. *ombudsman news* is available online at <http://www.financial-ombudsman.org.uk/publications/ombudsman.htm>

To join our mailing list, just email your details to publications@financial-ombudsman.org.uk

Past editions of the newsletter can be found on our website, which also features detailed information and guidance for firms www.financial-ombudsman.org.uk

about this issue of *ombudsman news*

CHAPS (the Clearing House Automatic Payments System) is used for high-value transactions where money is transferred from one bank to another on the same day. On page 3 we conclude our study of the three payment systems in UK banking by taking a look at how CHAPS works. We illustrate some of the problems that can occur by outlining a few of the complaints we have dealt with recently on this topic.

On page 8, we follow up our article on insurance fraud in issue 41 with some insurance case studies involving fraud. And on page 11, we reproduce an extract from our recently-issued publication, *an introduction to the financial ombudsman service*. Designed primarily for firms that don't generally have much direct contact with us, this is a brief guide to our procedures and general approach in resolving disputes.

Finally, in *ask ombudsman news* on the back cover, we answer queries about time limits in bringing a complaint to the Ombudsman Service, and about the arrangement whereby firms are charged only for the third and any subsequent complaint against them that is referred to us in a year.

phone	0845 080 1800
switchboard	020 7964 1000
website	www.financial-ombudsman.org.uk
technical advice desk	020 7964 1400

Financial Ombudsman Service
South Quay Plaza
183 Marsh Wall
London E14 9SR

1 banking: automated payments

There are three payments systems in UK banking, all overseen by the Association for Payment Clearing Services (APACS). In previous issues of *ombudsman news* we have looked at the system for clearing cheques and that for clearing standing orders and direct debits.

This month, we look at the third system – the Clearing House Automatic Payments System – usually referred to as ‘CHAPS’. CHAPS is used by both banks and building societies and references throughout this article to banks and bank accounts include building societies and building society accounts.

what is CHAPS?

CHAPS is a system used for high-value transactions, where money is transferred from one bank to another on the same day. Banks themselves use CHAPS to move money around the financial system, but it is also used regularly by:

- businesses – where one business transfers money from its bank account to the bank account of another business; *and*
- solicitors/licensed conveyancers – to transfer the purchase price of a house between the bank accounts of those representing the buyer and the seller.

Private individuals seldom make CHAPS payments themselves. They are most likely to come across these transactions when buying or selling a house.

how is CHAPS set up?

The main banks and larger building societies are ‘direct’ members of CHAPS. There are also over 400 ‘indirect’ members – typically smaller banks and building societies who have access to the system through a ‘direct’ member. This arrangement is similar to the way the cheque clearing system is set up.

Payments are made electronically and should start and finish on the same day. CHAPS opens for business at 6.00am each day and payments usually have to be started by 4.00pm. But there is a facility to make late payments, in certain circumstances, up to 5.00pm.

Regular users of CHAPS can give their instructions for payment electronically, usually using internet or electronic banking. But a large number of instructions for CHAPS payments are still made by customers filling in forms manually. And although the payment itself is made electronically, the sending bank has to make various clerical checks first – typically to check signatures/payment authorities, as well as to ensure customers have enough money in their accounts to make the payments. ...❖

... payments are made electronically and should start and finish on the same day

how does a CHAPS payment work?

This can be illustrated by looking at a typical CHAPS transaction, where an individual asks solicitors to complete the purchase of a house on a particular day.

We will assume that the solicitors already have the money needed for the transaction in their 'client account' – the separate bank account that solicitors are required to use for client's money.

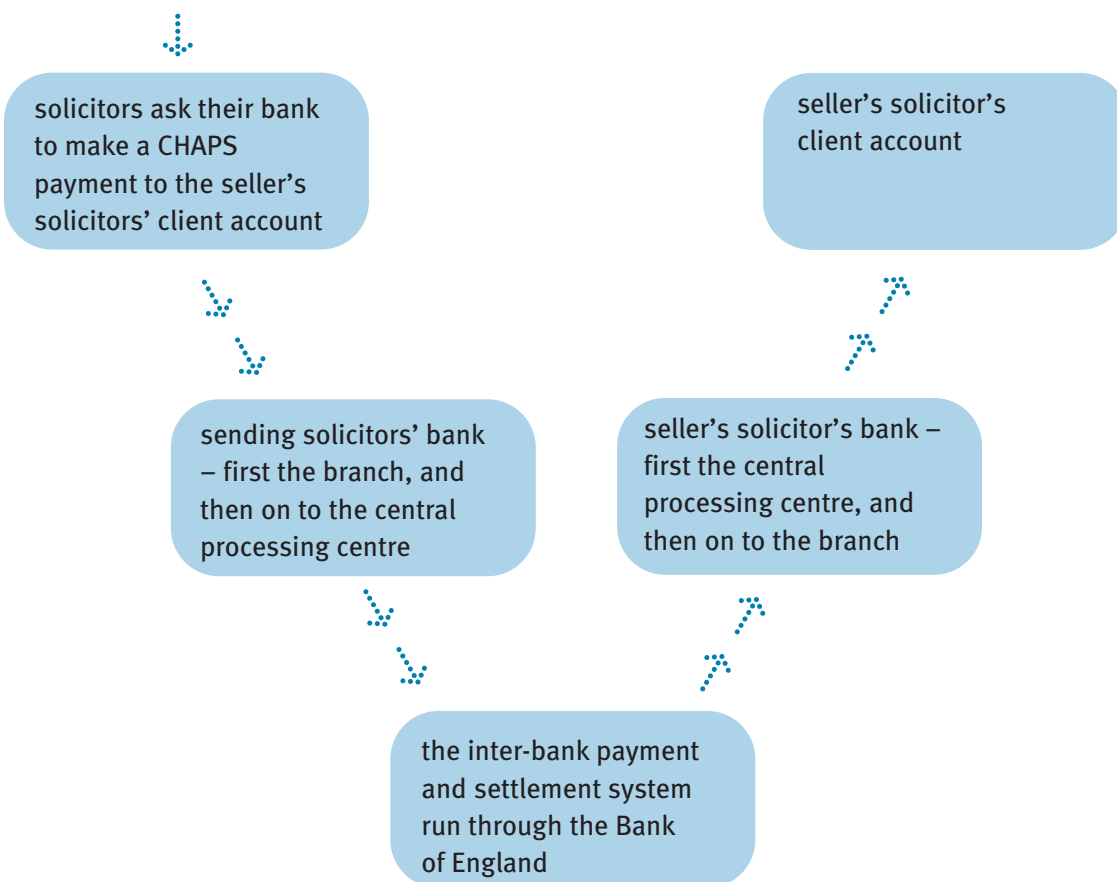
So we begin at the point on 'completion day' when, on behalf of their buyer client – the solicitors start to make the payment from the solicitors' client account.

what can go wrong?

When things go wrong, the consequences can be extensive and wide-ranging, bearing in mind that a fair amount of money is usually involved.

The two most common problems are: delays – when the money arrives late; or faulty instructions – when incomplete or incorrect payment instructions cause problems in crediting the money to the right account when it arrives at the receiving bank.

The case studies on page 5, based on recent complaints, illustrate some of the problems that can occur.



... when things go wrong, the consequences can be extensive and wide-ranging

case studies – banking: automated payments

- **42/1**
delayed CHAPS transaction – bank exceptionally busy – unable to process payment until very late on the specified day – whether it is liable for costs resulting from the delay

Ms W, a sole-practitioner solicitor, was acting for Mr and Mrs F, who were first-time house buyers. At 9.50am on Friday 28 February, Ms W handed in a written CHAPS instruction to her branch of Bank A, asking it to send £135,000 to the seller's solicitors' client account at Bank B.

At 11.10am, having first checked the CHAPS instruction, the branch of Bank A faxed it to Bank A's processing centre.

Nothing then happened until 4.25pm when, after completing further checks, Bank A's processing centre authorised the payment. The money arrived in the seller's solicitors' client account at Bank B at 5.40pm. By then it was past the time specified in the purchase contract. It was also too late to complete the deal that day – let alone to use the money to complete the seller's own purchase and the other transactions further up the chain.

This meant that Mr and Mrs F's house purchase could not be completed until the next *working* day – so they had to wait over the weekend until Monday. The knock-on effects were even worse further up the chain of property transactions – parts of which could not be completed until the Tuesday.

Bank A told Ms W that the delay was caused by an exceptional rush of CHAPS transactions. But Ms W complained that Bank A had been grossly negligent in holding on to her CHAPS instruction until 4.25pm. This had caused her and her clients unnecessary stress and inconvenience. She wanted Bank A to pay the additional interest and costs that Mr and Mrs F incurred as a result of completing late.

Ms W said that Bank A knew she was a solicitor who specialised in property transactions. So she thought the bank should reasonably have realised what the payment was for – and that other transactions would be delayed if it did not make the payment promptly. She said it should have been prepared for a rush of business on a Friday. Fridays are always the busiest day of the week for such transactions – as most buyers like to settle in over a weekend. There are also more transactions made, as in this case, at the end of a month. ❖

... the bank had brought in all available staff to deal with these transactions

But Bank A did not agree. It said it had met its obligations by making the payment within the day. It drew Ms W's attention to the clause in the CHAPS instruction that she had signed. This said that *'no liability will attach to the bank in respect of any losses arising out of delays or errors unless they are directly due to negligence on the part of the bank or its staff'*. Dissatisfied with the bank's response, Ms W came to us.

complaint rejected

We asked the bank if it had foreseen the likely increase in payment volumes on the day in question. It was eventually able to prove to our satisfaction that it had done so and had brought in all available staff to help deal with these transactions.

Unfortunately, the volume of transactions that day was exceptionally high and there were no more staff that it could possibly have brought in.

Because of that, and the very unusual nature of that day's business, we decided Bank A was not liable in this particular case. But if it had been a 'normal' Friday at the end of a month, we could well have concluded that Bank A should have made the payment more quickly and that it *was* liable, even though the payment eventually reached its final destination just within the same day.

.....

■ 42/2

CHAPS transaction – inadequate payment instructions result in problems applying the money when it arrives at customer's bank

After he retired, Mr V decided to sell his flat and move to Italy. He asked his solicitor to send the net sale proceeds to his current account as soon as possible after completion. He then set off for Italy by car. He planned to spend a couple of weeks touring through France before heading for Milan and completing the purchase of the property he was buying there.

However, when Mr V's bank received the CHAPS payment it was not sure what to do with it. The payment instruction did not give Mr V's account number or identify the branch where he held his account. All it gave was his name and the address in England that he had recently left.

Instead of just returning the money to the solicitor, Mr V's bank tried to sort matters out. It trawled through its records to find an account in Mr V's name at the address given on the payment instruction. It was unable to find details of Mr V's current account, because he had already given the bank his new address for that. But it did find his savings account, for which he had forgotten to update the address details, so it credited the money to that. Then it sent him a letter, saying what it had done. But that went to the old address – so Mr V did not receive it.

Mr V expected the money from the sale of his flat to be safely in his current account within a day or two of his leaving the UK. He planned to use his debit card to pay for meals, petrol and accommodation while he was *en route* to Italy. But almost as soon as he reached France, Mr V began to have problems using his debit card. His bank was refusing debit card payments because it said there was insufficient money in the current account.

Some months before he left home he had signed up with an agency that offers help to British people moving abroad. He contacted the agency as soon as he began having problems using his debit card. The agency arranged to lend him some money and he asked it to phone his bank to sort things out for him. But the bank would not discuss matters with the agency, because of customer confidentiality. The bank was concerned that some kind of fraud was being attempted, since the agency seemed to know Mr V's security details.

Eventually, Mr V decided he would have to return to the UK to sort matters out. His bank blamed Mr V's solicitor, saying that he had not given adequate information. The solicitor blamed Mr V's bank, insisting that he had given full payment instructions at the outset. It eventually became clear that it was the *solicitor's* bank that was really at fault – because it had missed off the crucial information when sending the CHAPS payment to Mr V's bank.

complaint settled

We concluded that Mr V's bank had acted reasonably in trying to work out where to credit the money. And even if it had traced the current account, in the absence of any indication to the contrary it would still have been reasonable for it to credit the money to Mr V's savings account, where it would earn interest. Even if it had written to Mr V at his new address, he would not have received the letter until he arrived in Italy, long after his problems in France.

Mr V's bank recognised that he had suffered a fair amount of distress and inconvenience, even though that was not really its fault. It knew that he could not pursue a complaint against the other bank, because he was not its customer. So Mr V's bank offered him £500 as a gesture of goodwill. We felt that was fair and we encouraged him to accept it.

.....

... the bank had acted reasonably

2 insurance fraud: case studies

In issue 41 we set out our approach to some aspects of insurance fraud, concentrating on ‘immaterial’ fraud and the remedies available to the insurer.

Among the key points we set out, we noted that although a policyholder has a duty to act in *‘utmost good faith’*, the onus is on the insurer to show *‘beyond reasonable doubt’* that a fraud has taken place. If the fraud is perpetrated only in order to recover a genuine loss and does not affect the insurer’s ultimate liability, then the policyholder will still be able to recover their losses. If the fraud is sufficiently serious to:

- affect the insurer’s ultimate liability; *or*
 - entitle the insurer to repudiate the policy for fundamental breach of contract;
- then the firm will be able to ‘forfeit’ the policy (refuse to pay the claim or provide any future cover). We do not generally believe it is fair or reasonable for insurers to ‘avoid’ policies retrospectively in cases of fraud.

The following are a few summaries of insurance cases involving fraud that we have dealt with recently.

... he asked a friend to fake the receipt he needed

■ 42/3 policyholder forges documents in the course of making a valid claim – insurers wrongly attempt to ‘avoid’ entire policy

Mr H was a self-employed plumber. In January, his home was burgled and he made a claim under his home insurance policy, which the firm duly paid. In May, his van was broken into and a number of personal possessions were stolen, including the tools he used for his work. He made another claim to the firm under the personal possessions section of his home contents policy.

During the course of its enquiries, the firm’s loss adjusters insisted that Mr H substantiate all his losses with original purchase receipts. Mr H was unable to find all the receipts, so he asked a friend to fake one for him.

When the firm discovered the forged receipt, it ‘avoided’ the policy – in other words, cancelled it from the start. The firm not only refused to pay for the items stolen from the van, it also tried to recover the money it had previously paid out to Mr H for his earlier burglary claim. After complaining unsuccessfully to the firm, Mr H came to us.

complaint upheld

The firm accepted that the theft from the van was genuine. Mr H had been foolish to obtain a forged receipt but he was not dishonestly trying to obtain something to which he was not entitled. The loss adjusters had, in fact, been rather overzealous in insisting on strict proof of purchase for all the items stolen.

We applied the rationale of ‘*The Mercandian Continent*’ case (reported in [2001] Volume 2 of the Lloyd’s Law reports at page 563) which concerned the principle of ‘*utmost good faith*’. Ultimately, the case held that insurers should only be able to ‘avoid’ a policy for fraud where the insurer’s ultimate liability was affected, or when the fraud was so serious it enabled the insurer to repudiate the policy for fundamental breach of contract.

Following this rationale, we concluded that the fair and reasonable solution was for the insurer to reinstate the policy and pay the claim. In any event, it was unlikely that the firm’s ultimate liability would be affected by the fraud, as Mr H’s work tools were specifically excluded from the home policy. Home policies often exclude cover for contents or possessions that are for *business* rather than *personal* use.

We also pointed out to the firm that even if Mr H *had* been guilty of fraud, it would only have been entitled to ‘forfeit’ the policy from the date of the current claim, leaving the earlier burglary claim intact. It was not entitled to recover previous payments for valid claims.

.....

■ 42/4 policyholder supplies misleading and fraudulent documents in the course of making a valid claim – insurers able to ‘forfeit’ policy from the date of the claim

Miss J made a claim under her general household policy for ‘escape of water’ damage. As the damage was reasonably limited, the firm simply asked her to send in repair estimates. She provided three. The firm discovered that all three estimates — purporting to come from different contractors — were fraudulently produced by one contractor who had carried out extensive works for Miss J in the past. The firm considered Miss J to be guilty of fraud. It cancelled her policy and refused to deal with the claim. Miss J then bought her complaint to us.

complaint rejected

Miss J had already admitted supplying false information to the firm, and in an attempt to resolve the matter, had produced further – genuine – estimates

... he had dishonestly claimed for something he was not entitled to

from independent contractors. However, these merely served to show the extent to which the prices quoted in the fraudulent estimates had been exaggerated.

Once again, we applied the principles of *'The Mercandian Continent'* case (see case 42/3). If the fraud had not been discovered, the firm would have ended up paying more in compensation than was properly required of it, and more than Miss J was legally entitled to. To this end, the fraud affected the firm's ultimate liability and was a fundamental breach of contract.

Having applied that rationale, we decided that the firm had been entitled to 'forfeit' the policy from the date of the claim.

.....

■ 42/5 policyholder purposefully gives wrong details of stolen items – insurers able to 'forfeit' policy from the date of the claim

Mr G made a claim for goods stolen from his home during a burglary. Among the many items he claimed for were some *Star Wars* DVDs. This alerted the firm's loss adjusters to the possibility of fraud, since at the time of the burglary the films in question had not been released on DVD. The firm rejected the claim and 'forfeited' Mr G's policy from the date of his claim.

Mr G complained to us, arguing that he must have mistakenly claimed for pirated copies of the DVDs, and that this mistake did not warrant 'forfeiture' of the policy.

complaint rejected

We were satisfied that this was a clear attempt to defraud the firm. There was evidence that showed *'beyond reasonable doubt'* – more than the usual civil requirement of *'balance of probabilities'* – that Mr G was claiming for something that he could never have owned. This higher standard of proof indicated that Mr G would still be guilty of fraud, even if the pirated DVDs *did* exist, since he had attempted to claim for legitimate copies.

The value of the DVDs was relatively small compared with the overall size of the claim, but we did not feel this was a case of *'innocent and minimal exaggeration'*. Mr G had dishonestly claimed for something he was not entitled to. This went to the very root of the insurance contract, and was a breach of the policyholder's duty to act in *'utmost good faith'* when submitting a claim.

We also felt that this fraud, and Mr G's subsequent attempt to cover it up, cast doubt on the validity of the entire claim. The firm's decision to 'forfeit' was therefore fair and reasonable.

.....

3 an introduction to the Financial Ombudsman Service

This is an extract from our recently-updated guide, *an introduction to the Financial Ombudsman Service*. Intended primarily for firms that don't generally have much direct contact with us, this brief guide outlines our procedures and our general approach to resolving disputes.

You can download the complete guide from the publications page of our website (www.financial-ombudsman.org.uk).

To order copies (free of charge), contact our orderline – 020 7964 0092 – or email publications@financial-ombudsman.org.uk



what exactly is the ombudsman service?

The Financial Ombudsman Service is an independent organisation, set up under the Financial Services and Markets Act 2000.

We replaced a number of former complaints-handling schemes – including the Banking Ombudsman, Building Societies Ombudsman, Insurance Ombudsman, Investment Ombudsman, PIA Ombudsman and the SFA Complaints Bureau.

The job of the Financial Ombudsman Service is to help resolve individual disputes between consumers and financial firms. We are not a regulator, or a trade body, or a consumer champion. We settle disputes – without taking sides.

how do you deal with complaints?

We consider each complaint on its own merits and make what we believe to be fair and balanced decisions – based on the individual facts and circumstances of each case.

Although we are impartial – like a judge – the complaints-resolution service we provide is not like going to court. We can get to the bottom of most complaints by writing to – or phoning – the people involved. Sworn witnesses, cross-examination and formal legal submissions are not part of our usual process. And we tell customers they do not usually need professional, legal or financial help to bring a complaint to us. ❖❖❖

... we tell customers they do not usually need professional, legal or financial help to bring a complaint to us

one of my firm's customers has sent us a complaint – what do we do?

The complaints-handling rules set out by the FSA require you to try to resolve complaints at the earliest opportunity. The FSA's rules set out various time limits for dealing with complaints. These include the requirement to send your customer a final response – (or an explanation of why you are unable to do this) no more than 8 weeks from the date the complaint was received anywhere within your firm.

You must also send the consumer our contact details – with a copy of our leaflet, *your complaint and the ombudsman*. (To order our leaflet, download the order form from our website at www.financial-ombudsman.org.uk/publications/index.htm or phone our orderline for details 020 7964 0092.)

what happens if my customer complains to the ombudsman service?

In the first instance, all consumer enquiries are dealt with by staff in our front-line customer contact division, who give consumers general advice and guidance on what to do if they are not happy with a financial service or product.

If consumers complain to us before they have given you the opportunity to put things right, we will refer the complaint on to you. If you can resolve the complaint to the consumer's satisfaction at this stage, we will have no further involvement in the case.

But if the consumer remains dissatisfied, we can look into their complaint if:

- you have already sent your final response letter (and the consumer brings the complaint to us within six months of the date of that letter); *or*
- the eight weeks that normally apply have passed – and you have been unable to send the consumer your final response letter.

what happens then?

The consumer will need to complete our complaint form. They can download a copy from our website. Or they may prefer to phone us on **0845 080 1800**. If they do this, we can guide them through the form over the phone, complete as much of it as possible, and then send it to them to check and sign. This can be more efficient for us, because we can encourage people to focus on the key facts.

When we receive a completed complaint form, our customer contact staff will check it, looking at any accompanying documents. In some circumstances, we may decide a case is not something we deal with. Otherwise our customer contact staff will pass it on to one of our adjudicators.

We will invoice your firm for any case fees due. (Case fees are only charged for the third and any subsequent complaint that we receive against your firm each year.)

what information will you need from my firm?

We generally settle complaints on the basis of the paperwork that you and the customer provide – rather than on face-to-face meetings. When we ask you for your side of the complaint, it is important that you send us all the relevant information – and that you set out your view clearly, explaining why you do not think we should decide in the customer's favour.

At any stage in our process we may ask you for further information about the complaint (including any information involving third parties) and we expect you to provide this promptly.

how do you handle cases?

Our approach will depend on the facts and merits of each individual case – but will generally involve mediation or conciliation. This is the informal way in which we try to resolve the majority of complaints brought to us by consumers. It can be quicker and more efficient than a formal investigation. Often, just by taking a fresh look at the facts – and identifying and agreeing the key issues as we see them – our adjudicators can come up with a solution that satisfies both sides. So our informal approach may involve our contacting you by phone to suggest a way forward.

... our approach will depend on the facts and merits of each individual case

If we are unable to resolve the matter over the phone, or if the nature of the case makes a written explanation more appropriate, we will confirm our position in writing. This will explain the adjudicator's view on the case and will set out how, in the adjudicator's opinion, the case should be resolved.

If the consumer accepts an ombudsman's decision within the time limit specified by the ombudsman, both the consumer and the firm are bound by the decision. Otherwise, the firm is not bound – but the consumer remains free to take court proceedings against the firm.

In some of our more complex cases, the adjudicator may issue an adjudication report. This is a formal document, setting out the details of the dispute, the findings of the adjudicator and any redress that the adjudicator considers appropriate. The adjudicator will send the report to both the firm and the consumer at the same time, and will give both parties the opportunity to respond.

what if my firm doesn't accept the adjudicator's view?

In most cases, both sides accept the adjudicator's findings and the complaint is then settled. But in around 1 in 10 cases, either the firm or the consumer asks for a review and final decision by an ombudsman. This is also the stage when any request for a hearing would be considered.

Where the ombudsman becomes directly involved in a case at this stage, he or she will first carry out an independent review of the complaint before issuing a final decision.

...in most cases, both sides accept the adjudicator's findings and the complaint is then settled.



window stickers

The FSA's rules require firms to display a notice in their branches or sales offices, showing that they are covered by the Financial Ombudsman Service [rule reference DISP1.2.9(3)]. This rule does not prescribe the format, size or wording of the notice, so firms have the scope to produce the notice in their own house style, to match their marketing and information materials.

A number of firms have chosen to show they are covered by the Financial Ombudsman Service by displaying our window sticker in their offices. For more details about the sticker please contact our technical advice desk on 020 7964 1400.



services for firms and consumer advisers

our **external liaison team** can

- provide training for complaints handlers
- organise and speak at seminars, workshops and conferences
- arrange visits

phone **020 7964 1400**

email liaison.team@financial-ombudsman.org.uk

contact our **technical advice desk** for

- information on how the ombudsman service works
- help with technical queries
- general guidance on how the ombudsman might view specific issues

phone **020 7964 1400**

email technical.advice@financial-ombudsman.org.uk

is it too late to complain?

an advice agency writes :

Q One of our clients has complained to a financial firm and is unhappy with the outcome, but the firm says he is too late to complain to the Financial Ombudsman Service. It says this is because it sent him its final response nine months ago and that if he wanted to refer the matter to you, he should have done so within six months of getting that final response.

Our client was not aware of any time limits and the firm did not mention them when it sent the final response letter. But it says he should have known because it sent him a copy of your leaflet, *your complaint and the ombudsman*. Is it true that you will not be able to consider his complaint?

A In the particular circumstances of this complaint, the simple answer is 'No, it's not true'. Under our rules, we cannot consider complaints referred to us more than six months after the firm sent its final response, advising the complainant of the right to refer the complaint to us. But the rules also say that we *can* consider complaints outside these time limits when, in our view, the failure to comply with the time limits resulted from exceptional circumstances, or where the firm has not objected to our dealing with the complaint.

The rules give examples of such exceptional circumstances and include cases where the firm's final response letter did not tell

complainants that they may refer their complaint to us, or did not say that they must do so within six months.

In your client's case, it would seem that the firm is trying to rely on the fact that it sent him a copy of our leaflet (which mentions the six-month time limit) in order to 'time bar' this case. We do not consider that sending a copy of the leaflet is sufficient to alert complainants to the limit, and we will generally accept cases for consideration where a firm has failed to mention the six-month limit in the text of its final response. Firms wishing to familiarise themselves with the FSA's rules on what information a final response should contain should refer to the glossary of definitions in the FSA handbook of rules and guidance: http://www.fsa.gov.uk/handbook/hbk_glossary.pdf

'free cases' to continue?

Q Will you be continuing with the scheme whereby you only invoice firms for the third and any subsequent complaints against them that you get in a year?

A This is the 'two free cases' arrangement that we introduced at the beginning of the 2004/05 financial year. The arrangement has been broadly welcomed and it appears to be working well. In our recently-issued *plan & budget* for the 2005/6 financial year we have said that we propose to continue with the arrangement, allowing authorised firms two free cases in 2005/06.

ombudsman news is published for general guidance only. The information it contains is not legal advice – nor is it a definitive binding statement on any aspect of the approach and procedure of the ombudsman service.