

Ombudsman news

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



David Thomas, chief ombudsman (interim)

redress, regulation and mass claims

On page 12 of this issue we feature an interview with **Natalie Ceeney**, our new chief ombudsman and chief executive, to whom I hand over on 22 March. As I revert to my role as corporate director, a key issue continues to be the implications of ‘mass claims’ – where thousands of consumers complain to the ombudsman service about broadly similar topics.

Next month sees the tenth anniversary of when the previously-separate ombudsman schemes for banking, insurance, investment *etc* came together. In our first year together, we received around 31,000 cases. At that rate it would have taken until 2032 for us to receive a million new cases in total. But we now expect to receive our millionth new case around the middle of 2010. In the past year we received around 160,000 new cases (a five-fold increase over ten years ago). The growth of mass claims has been a significant factor in this increase, with more than half of all the cases we have received relating to just six topics, of which payment protection insurance is the latest.

The *Financial Services Bill* proposes ways for dealing with mass claims – as well as new powers for the Financial Services Authority to create ▶

issue 84

page 3

Recent banking complaints
involving ‘set off’

page 12

Ombudsman focus:
interview with new chief
ombudsman and chief
executive, Natalie Ceeney

page 19

Investment complaints
about property funds,
deferral periods and market
value reductions (MVRs)

page 28

the Q & A page



Financial
Ombudsman
Service

consumer redress schemes and new powers for the courts to deal with collective claims. It is for Parliament to decide on the appropriate solutions – and consideration of current proposals may run out of time before the election. But all parties have accepted that the ombudsman service is currently having to carry a burden that it was not designed to bear.

We have joined with the Financial Services Authority (FSA) and the Office of Fair Trading in issuing a discussion paper: *consumer complaints (emerging risks and mass claims)*. Responses should be sent to the FSA by 10 June 2010.

A key element in rebuilding consumer confidence in financial services is that financial businesses treat customers fairly – including handling complaints fairly and promptly, putting right recurring problems, and considering the position of *all* affected consumers, not just those who complain.

The paper considers the identification of new and emerging risks – to give regulators an opportunity of stepping in and nipping problems in the bud, thereby preventing new mass claims from arising. Examples are given of where that has already happened.

The primary responsibility for resolving mass claims lies with the regulators, who can consider across-the-board action to address the causes, whether or not affected consumers have complained – while the ombudsman service can deal only with individual complaints. But the law requires the ombudsman service to decide what is fair in the circumstances of each individual case – a potential mismatch that can only be resolved by legislation (such as the new section 404B proposed by the *Financial Services Bill*).

These are important issues, with great significance for financial businesses and their customers, as well as for our workload. The ombudsman service will play a constructive part in any new arrangements that emerge. But, pending some other solution, we will carry on deciding cases.



David Thomas
chief ombudsman (interim)



South Quay Plaza
183 Marsh Wall
London E14 9SR

switchboard
020 7964 1000

consumer helpline
0300 123 9 123
open 8am to 6pm Monday to Friday

technical advice desk
020 7964 1400
open 10am to 4pm Monday to Friday

www.financial-ombudsman.org.uk

© Financial Ombudsman Service Limited.
You can freely reproduce the text,
if you quote the source.

Ombudsman news is not a definitive
statement of the law, our approach or our
procedure. It gives general information on
the position at the date of publication.

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

Recent banking complaints involving ‘*set off*’

In issue 40 of *Ombudsman news* (September/October 2004), we looked at cases where a consumer had more than one account with the same bank – and the bank had *set off* (or combined) the consumer’s accounts in order to recover some or all of the money owing on one of the accounts. In certain circumstances, banks have a general legal right to do this – regardless of whether it is specifically provided for in the terms and conditions of the relevant accounts.

When we last wrote about this topic, we were seeing a significant number of complaints where there was some difference in ownership between the two accounts involved in a set off – for example where a bank took funds from a consumer’s sole-named savings account to reduce the arrears on a mortgage account the consumer held jointly with another person.

Since then, we have seen some changes in the types of complaint referred to us – reflecting differences in the way some banks are now using set off – as well, perhaps, as the more difficult economic climate. It continues to come as a shock to some consumers that their bank could ever be entitled to ‘*dip into*’ or ‘*help itself*’ to their money – whatever the circumstances. But the complaints we receive tend now to centre on whether the bank acted fairly in the way it used the right of set off.

The Banking Code (which covered banking transactions before 1 November 2009) did not include any specific commitment about how banks would use set off. However, it undertook that subscribers to the *Code* would be sympathetic and positive when considering customers’ financial difficulties. ▶

recent banking complaints
involving *'set off'*

Since 1 November 2009, retail banking has been covered by the *conduct of business* regime of the Financial Services Authority (FSA). This sets out that banks must provide a service which is prompt, efficient and fair to the customer. The FSA's *conduct of business* rules also say that banks must pay due regard to the interests of their customers, treat them fairly and, in particular, be fair to customers who are in financial difficulty.

The Lending Standards Board has also recently drawn attention to the importance of using set off fairly.

When considering complaints about set off, we will look at the period leading up to the set off to see what discussion the bank had with its customer about repaying the outstanding debt. As we illustrate in case 84/1, if the bank has taken appropriate action to make the consumer aware of its concerns, and has fairly given the consumer sufficient opportunity to discuss the situation, then we may consider that it acted fairly in setting off the consumer's accounts.

By contrast, in case 84/3 we did not consider that the bank had treated its customer fairly when it twice took money from her current account for a recently-missed loan repayment – without first making any attempt to discuss the situation with her. In doing this, it put her already-stretched budget into disarray. Here, it seemed to us that the bank had unfairly used its right of set off as an informal method of debt collection – with very unhelpful results.

If, in a particular case, we conclude that the bank was entitled to use its right of set off, then we must also be satisfied that it carried out the set off in a fair manner. Case study 84/2 shows the difficulties that can arise when a bank fails to tell the customer what it has done.

■ **84/1**
**consumers complain that bank
 took money from their savings account
 to pay off the overdraft on their
 current account**

Mr and Mrs J complained that their bank had acted unreasonably when *'without asking permission or giving any warning'*, it took money from their savings account to pay off the overdraft on their current account.

The couple had for some time been waiting for their insurance company to pay out on a claim. They had asked for the money they were owed – amounting to just over £5,000 – to be paid direct to their savings account.

As soon as the insurance company confirmed that it had paid in the money, Mr and Mrs J attempted to withdraw it. They said they were *'horried'* to discover the bank had already used the money to clear the overdraft on their other account.

The bank turned down their complaint about its actions, so Mr and Mrs J came to us.

complaint not upheld

Evidence supplied by the bank showed that the couple had an agreed overdraft limit of £3,850 on their current account. The bank had allowed them ten temporary increases to this limit over the past two years, to help them avoid charges and additional interest.

It had also written to ask if there was any underlying problem that it could help with. The couple had not responded to this letter – or to several subsequent letters, in which the bank expressed concern about the way in which they were running their current account.

Eventually, the bank wrote to the couple asking them to return their current account to within its agreed limit. By that stage the account was overdrawn by around £5,000.

Several weeks later, having had no response, the bank again wrote to Mr and Mrs J. It said that, in the circumstances, it was *'not prepared to continue to provide an overdraft facility'* and it asked the couple for their *'proposals for repaying the overdrawn balance'*. ▶

**... the bank took money
 from their savings account to
 pay off the overdraft on
 their current account.**

... he said the bank had acted unfairly in *'helping itself'* to his savings.

The bank's records showed that Mr J had phoned shortly after receiving this letter. He had said that *'within a few days'* he would be able to clear the overdraft (then still around £5,000), as he was expecting *'about £6,000'* from an insurance claim.

Mr and Mrs J agreed that they had always planned to use the proceeds of their claim to pay off their overdraft. However, they said they had then found they needed some of the money for *'other, urgent expenses'*. They had therefore decided to pay enough into their current account to reduce the amount they owed to just under their overdraft limit. They said they had thought the bank would then offer to reschedule the overdraft, perhaps asking them to pay it off by means of a personal loan.

We noted that both of Mr and Mrs J's accounts remained open, although there was very little money in either of them. The bank had withdrawn the overdraft facility on their current account. We told the couple we did not think the bank had acted unreasonably in doing this, as they had failed to respond to a number of requests to return their current account to within its overdraft limit.

We also said that, in the circumstances, we did not agree that the bank had acted unreasonably when taking money from the couple's saving account to pay off their overdraft. We did not uphold the complaint. ■

■ **84/2**
bank transfers money from consumer's savings account to reduce overdraft on his current account

Mr G had a current account and savings account at the same bank. The overdraft facility on his current account was originally £5,000. However, on several occasions over the previous three years the bank had agreed to his request for an increase. He had said he needed the money temporarily while he was waiting for his divorce settlement to be finalised.

When the overdraft reached £40,000, his bank wrote to tell him it would only extend his overdraft facility for a further three months. It said he would then have to repay the money – and it asked him to set out how he proposed to do that.

Mr G wrote back suggesting the bank should reduce his debt to £25,000. He said he would be able to repay that amount, interest-free, by making a lump sum payment of £5,000 followed by monthly payments of £500.

The bank did not respond to that letter. Three months later, it sent Mr G a formal demand for the repayment of his overdraft debt – which then

stood at £38,000. At the same time, and without telling Mr G, it transferred £12,000 from his savings account to his current account, to help reduce the overdraft. It also cancelled all the direct debits on his account and stopped his debit card. Mr G only discovered this after his debit card was ‘swallowed’ by a cash machine and he started to receive calls about missed payments from direct-debit mandate holders.

Mr G complained to the bank that it had acted unfairly in ‘*helping itself*’ to his savings ‘*without warning*’. He also complained that the bank had caused him considerable difficulty by cancelling his account arrangements. The bank did not uphold his complaint, so Mr G came to us.

complaint upheld in part

The bank provided evidence that, well before it had written asking Mr G for his repayment proposals, it had made clear to him its concerns about the level of his debt. We considered that, in the circumstances, the bank had been entitled to use the balance of his savings account to help repay the long-standing debt. ▶

However, we did not think the bank had handled the situation well. It was unable to explain why it had not responded to Mr G's letter about his plans to repay his debt. If it had contacted him when it received that letter, Mr G would have realised in good time that his proposals were not acceptable.

We also thought that the bank should have told Mr G that it had set off his accounts and cancelled his direct debits and debit card. The bank admitted that its failure to do this had come about because of poor communication between the branch where Mr G's accounts were held and the collections department at the bank's head office. Each assumed the other had written to Mr G to tell him what had happened.

We did not uphold Mr G's complaint that the bank had treated him unfairly in setting off his accounts. However, we said that the bank's administrative failings had caused him some embarrassment and inconvenience. The bank offered to reduce Mr G's debt by £350, in acknowledgement of this. We said this was a fair settlement in the circumstances. ■

■ 84/3 consumer complains about the way her bank took money from her current account to meet a loan repayment

Ms M, who worked as a hospital cleaner, had a current account and a loan with her bank. She complained that the way in which the bank had taken money from her current account for a loan repayment had created a number of difficulties for her. She said it had made it impossible for her to budget effectively. She had been unable to meet some of her other regular payments and had incurred interest and charges.

The difficulties had arisen shortly after she changed employers. Her pay continued to go direct to her current account but the timing and pattern of the payments changed. As a result, there had not been enough money in her current account for her monthly loan repayment to be made on the due date.

Ten days after that payment was due, Ms M's new employer deposited a sum of money in her current account, representing only a part of what she was owed. Shortly afterwards, Ms M checked her account online. She found that the bank had already taken most of that money and used it to pay half of her outstanding loan repayment.

... the bank's administrative failings had caused him some embarrassment and inconvenience.

She rang the bank to complain. She said that its actions had made it difficult for her to keep track of her finances and plan her spending. The bank told her it would '*make a note*' of her '*new circumstances*'.

The following week, Ms M received some back pay from her former employer. Again, on checking her account she found that the bank had already taken most of the sum deposited. It had used the money to meet the remainder of her outstanding loan repayment.

The bank rejected Ms M's complaint about its actions. It said it had been entitled to take the money for her loan repayment – and that if it had not done this she would have been '*in default*'. She would then have been required to repay the entire balance. Unable to reach agreement with the bank, Ms M came to us.

complaint upheld

We looked at the records for Ms M's current account. It was clear that the bank's actions had meant that some of her other commitments – including direct debits and standing orders – had been returned unpaid. This had resulted in her incurring charges and interest.

We accepted Ms M's argument that by taking the money in the way it did, the bank had made it very difficult for her to manage her account. It had also caused her more inconvenience than she might reasonably have expected, when moving to a new employer and a different pay schedule. ▶

... she said the bank had made it impossible for her to budget effectively.

We said it would have helped matters if she had contacted the bank before she changed employers, to discuss how the transition to her new pattern of payment could best be managed.

But equally, we could see no reason why the bank could not have contacted Ms M to agree a course of action as soon as it became evident that she did not have sufficient funds to meet the loan repayment.

We said the bank had acted unfairly in the way it had set off the accounts. It agreed to cancel the interest and charges that she had incurred on her loan and current accounts, as a result of its actions.

Ms M had already made an additional payment to her loan account – to cover the missing payment. And the bank agreed to alter the date of her monthly loan repayments, to suit her new pattern of pay. The bank also agreed to pay her £250 in recognition of the stress and inconvenience it had caused her. ■

■ 84/4

consumer complains that bank took money from his savings account to reduce the overdraft on his current account

Mr W had both a savings and a current account with his bank. He had an overdraft limit of £250, but over the previous year had regularly exceeded that limit.

After a payment to his mortgage (held with another lender) resulted in the overdrawn balance on his current account rising to just over £3,000, the bank wrote and asked him to pay money into his account to return it to credit. Mr W did not reply, so the bank sent him a formal demand for the money.

Mr W sent the bank a brief response saying, in effect, that it could take him to court. The bank then used the money in his savings account (just over £600) to reduce the overdrawn balance on his current account.

In response to the bank's letter telling him what it had done, Mr W said it should instead have taken him to court. He complained that it had acted '*improperly*' in taking the money out of his savings account – and he said he would have moved his savings elsewhere if he had realised the bank might do this.

... we said the bank had been entitled to set off the accounts and had done so fairly.

When the bank rejected Mr W's complaint, he referred the matter to us.

complaint not upheld

The records of Mr W's current account showed that he had for some time been finding it difficult to keep within his overdraft limit, and he regularly exceeded it by a significant amount.

The overdrawn balance on his account rose sharply each month when the bank met the direct debit for his mortgage. However, he normally paid in a sum of money around the same time, to cover that particular payment.

The bank had written to Mr W on a number of occasions, making it clear that it was not happy with the way he was managing his account. However, there was no indication that he had made any effort to discuss his position with the bank.

The bank had only set off Mr W's accounts at the point when – on the basis of his response to its formal demand – it had concluded that he would not cooperate in reducing the debt. And it had written to him immediately to tell him what it had done. We concluded that, in the circumstances of this case, the bank had been entitled to set off the accounts and had done so fairly. We did not uphold the complaint. ■

ombudsman focus: new chief ombudsman's initial view

Natalie Ceeney starts as the new chief ombudsman on 22 March. *Ombudsman focus* catches up with her in her last few days as chief executive at The National Archives, as she clears her desk ready for her move to the Financial Ombudsman Service.

Welcome to the Financial Ombudsman Service. First of all – people seem unsure whether to pronounce your surname with a soft ‘c’ (as in ‘Seeney’) or a hard ‘c’ (as in ‘Keeney’). And is it Ms, Miss, Mrs or just Natalie?

My name is pronounced ‘Seeney’, but I like to be called just ‘Natalie’. I’m so used to my surname being spelt and pronounced strangely that I won’t take offence if people get it wrong!

But I do have fairly strong views on names other than my own. One of my bugbears is that I really loathe acronyms. If we want to make ourselves accessible, acronyms are the worst possible way of doing it. So I’ll be a stickler for spelling out the ‘Financial Ombudsman Service’ in full – or ‘the ombudsman service’ for short – rather than saying ‘FOS’, which must be a pretty meaningless acronym to many people.

So how does it feel to be appointed chief of the largest ombudsman scheme in the world?

The Financial Ombudsman Service isn’t just large. It’s also well respected globally. And that gives us a standard to live up to. I feel very proud to be appointed to lead the service.

What do you do in your current job as chief executive at The National Archives – and how will this be similar (or different) at the ombudsman service?

While there are clearly major differences, the job of chief executive of The National Archives does have many parallels with the Financial Ombudsman Service.

Libraries and archives can have an old-fashioned connotation to those who haven’t worked closely with them. But what I have been doing for the last five years is running a national institution that provides complex services to over 20 million people a year. It operates across ‘multiple channels’ (face-to-face, internet and phone), and serves a very wide range of customers, from informed experts to people who have never done research before.



Like the ombudsman service, The National Archives has a wide range of external stakeholders to work with and support – often with different views and competing priorities. Both organisations rely heavily on professional staff providing world-class services.

But every organisation is different. And I certainly won't be joining the ombudsman service assuming that the same solutions that I've used before will work here. Instead, I'll be using the skills I've learned in running a large, complex organisation to ensure we offer an excellent service to everyone we serve.

The press release announcing your appointment as chief ombudsman said you'd also been appointed as chief executive. Why two job titles?

Although the concept of having two job titles may appear strange, it's actually one I'm fairly used to. I've had a similar dual role for the last five years at The National Archives – where I'm both Chief Executive and Keeper of the Public Records.

The Financial Ombudsman Service is heavily professionally-based, relying on its expert ombudsmen and adjudicators to provide its services. From a professional viewpoint, being the chief ombudsman will therefore be key to my role. ▶

ombudsman focus: new chief ombudsman's initial view

But at the same time, my job will be to run the organisation effectively. The service has grown hugely over recent years, now handling almost 200,000 cases a year with a head-count of over 1,500 people. I will be responsible for managing the budget effectively, ensuring we have the right people in the right roles, and setting clear goals in terms of accountability, transparency and excellent customer service. These are all pretty classic jobs for a chief executive. So the dual title really does reflect the role of running the ombudsman service.

Will you be making decisions on complaints yourself?

I don't believe the leader of any team should try to replicate the jobs of their individual team members. It's not good value for money – and it can understate the level of expertise and experience that you need, to do a job like an ombudsman's. So I don't expect to get involved in many individual complaints from start to finish.

But at the same time, I don't have much respect for senior managers who don't understand their own business. So I expect to get very involved in the complex issues that arise from the complaints we handle – to ensure we draw the right lessons from what we're seeing, and to make sure we are appropriately consistent. You can rely on my keeping in very close contact with our ombudsmen on the issues we're facing. I'll be in touch with them on all the difficult issues.

What projects did you work on when you were at McKinsey, the management consultants?

Most of my work at McKinsey can best be characterised as 'making organisations work better'. I led quite a lot of work on customer insight and customer-service delivery. This included advising FTSE 250 and FTSE 100 clients on how to really understand their customers' needs – and deliver outstanding service.

I also worked on some major organisational-change projects. These frequently involved mergers and acquisitions (M&A) activity, particularly the organisational dimensions, as well as more general organisational re-design. My work crossed a number of different industries. But McKinsey works on a completely confidential basis, so I can't reveal which ones.

You have no previous experience of working in financial services. Is that an advantage or disadvantage?

Moving to a new industry is not a new experience for me. It's something I've done across most of my career. As an 'outsider', I've found I can often see things in a different way. After a while, we all get used to the idiosyncrasies of the job and to the jargon we use. We can often forget how off-putting this might be to consumers and 'new entrants'. As an 'outsider', I'm often able to ask questions that are harder for people to ask if they're already within the industry.

The ombudsman service is full of experts. I'm someone who trusts and relies on my team, so I see my skills as complementing theirs. I know I have a learning curve around financial services. And I've already started meeting people both within the ombudsman



service and across the financial services industry – to ensure I understand the key issues and learn the language. But I've also found that the skills of running an organisation don't tend to change that much across industries. Managing people well, delivering excellent customer service, and running efficient and focused services are pretty generic skills. ▶

ombudsman focus: new chief ombudsman's initial view

What did you already know about the Financial Ombudsman Service before you applied for the job of chief ombudsman?

I've always considered myself a fairly well-informed financial consumer, so I was already aware of the Financial Ombudsman Service. And I had friends and relatives who had used the service, all with positive feedback about the way they were treated and the way their case was handled. I've never had to use the ombudsman service myself. I've been fortunate in always getting very good service from the banks and insurance companies I've used.

What do you think your biggest personal challenge will be in your new job?

Without a doubt, my biggest challenge will be getting to understand the details of the different sectors that the ombudsman service covers – from spread betting to hire purchase and pet insurance to payment protection insurance (PPI). I've already started getting briefings from the different teams within the ombudsman service. And I'm reading up like crazy – with my own copies of all back issues of *Ombudsman news*!

Part of your current title is *Keeper of the Public Records* – and you're responsible for the government's information management policy.

How will you apply this area of work to the ombudsman service?

We live in an information society, with consumers' expectations of all organisations heavily influenced by their experience of getting the information they need online, 24/7, through services like *Google*.

It doesn't matter whether we're talking about government or financial services – the same applies. What that means for the ombudsman service, as with all service organisations, is that we need to raise our game to meet those expectations.

This involves ensuring there is a high degree of transparency about what we do, that people can communicate with us at times that suit them, and that we'll protect and secure the information they entrust to us. It also means that, as consumers' expectations rise, we need to keep raising our service levels accordingly. My first impressions are that the ombudsman service is already doing some of this but, like most organisations, it could do more.



When did you last complain about something? Did you get the problem sorted to your satisfaction?

I feel passionate about great consumer service. If I'm standing in a long queue, then I admit I'm one of those people who will mentally re-design the queuing process as I wait. I get really riled by poor service. And yes, I *have* complained in the past.

I remain staggered when large organisations deal with complaints badly. My most recent complaint was to an airline comparison website (I won't name it). It managed to send me to Gatwick for a plane leaving from Heathrow. I eventually got my money back, but only after complaining vigorously.

There was very clear evidence (a *ticket*) that they were in the wrong, but at no stage did they apologise for their mistake. I'm someone who knows my rights so I stuck to my guns. But I'm not sure that everyone would have done that. Of course I understand that mistakes happen. But if they'd just apologised when I first queried it – and offered me an immediate refund – I'd now be telling everyone about their excellent customer-service levels. Instead, I just won't use them again.

When did you last have an appraisal at work – and how did you fare?

I've had six-monthly appraisals for most of my working life. I had my last one just a few weeks ago. I firmly believe that the best way to improve is to know how you're doing. Getting regular feedback is the best way to do this.

I feel so strongly about feedback that I instigated '360-degree' feedback for me and for senior managers in my role at The National Archives. This means we all got the feedback we needed. I've also been known to hire a coach for a day, and send them around the organisation to interview people about how I'm doing – feeding it all back to me at the end of the day.

I'm pretty open about my strengths and weaknesses – but I'll leave sharing details of my last appraisal to colleagues close to me!

***The Times* quoted a colleague of yours who described you as a 'small tornado'. Is this how you'd describe yourself?**

I care strongly about doing a good job and I'm impatient for change. So I can see where the description might have come from. But unlike a tornado, I like to think I leave services *better* after my intervention, not worse! Measuring 5'2" tall, I've got used to the '*small*' part ... ▶

ombudsman focus: new chief ombudsman's initial view

Apparently you did your maths A-level two years early, you got a First in maths at Cambridge, and you know how big a terabyte is. Does this make you nerdy – or just scary?

Hopefully neither! I pride myself on being pretty approachable – and I try to do what I can to be visible and accessible (and human too). After starting in the new job, I'm going to ensure I get to know colleagues across the ombudsman service as soon as I can. I've already scheduled days to work with – and shadow – different teams, to see what everyone does and to learn how it feels to do the different jobs across the organisation.

The gym or watching *EastEnders*? What do you do to relax after work?

The nature of the job for any chief executive seems to involve a pretty full working week. I'm used to evening meetings most days – and I suspect this will be similar in financial services. So I don't expect to get home early enough most evenings to do either. But I always take weekends off. I enjoy relaxing by doing a lot of reading and – when the weather's good – gardening and walking in the Kent countryside.

And finally, in twelve month's time what would you like to say you'd achieved in your first year at the ombudsman service?

The ombudsman service has seen a massive rise in workload over the last few years. This has caused problems in not having enough people to deal with all the complaints as quickly as everyone would have liked. The service is already working really hard to clear the queues, so that we can deal with new cases as they come in. Supporting and driving forward this work is my top priority.

As the new chief executive, it's a great opportunity to look at the service and ask '*how can we do it better?*' So this year I'll be talking with staff, consumer groups and the financial services industry, to ensure we've got the right strategy for the future. At the end of my first year, I'd like to say that we've already improved the service we offer, and have a strategy in place to deliver even more. ❖

Investment complaints about **property funds, deferral periods** and **market value reductions (MVRs)**

Volatile market conditions have led to an increase in the number of investment complaints referred to us by consumers who have put money in property funds and seen a decline in the value of their investment. We do not deal with complaints that clearly relate solely to poor investment performance.

However, it is not uncommon for a complaint prompted by poor performance to reveal underlying issues that we *are* able to look into, including inappropriate advice and failure by a business to disclose relevant information about any risks relating to an investment.

We have also seen an increase in complaints from consumers who have discovered, when withdrawing money from an investment (or attempting to do so), that the business has implemented a *deferral period* or a *market value reduction (MVR)*.

Deferral periods (sometimes called ‘deferment periods’) may be introduced by a fund manager to protect the overall value of a fund by temporarily preventing investors from withdrawing their money, or limiting the extent of withdrawals.

Market value reductions can be applied to with-profits funds, resulting in investors receiving a smaller amount than they were expecting when they ▶

Investment complaints about **property funds, deferral periods and market value reductions (MVRs)**

withdrew their investment. The purpose of these reductions is to help protect the value of a fund's underlying assets by preventing those investors who withdraw their money early from receiving more than their fair share of the fund's current value.

Businesses are required to set out, in their terms and conditions, the possibility that a deferral period or market value reduction might be introduced.

The possibility must also be brought to the attention of individual investors at the point of sale. Nevertheless, it frequently comes as an unpleasant surprise to investors when they are faced with the practical consequences of such measures.

We are not usually able to consider complaints relating solely to the timing or extent of deferral periods or market value reductions – since these are properly matters for the commercial judgement of the business concerned. But we will check that the possibility that the business might implement such measures was properly brought to the consumer's attention at the time of the sale. We will also look at whether the investment was suitable for the consumer. The possibility that an investment could be subject to deferral periods or market value reductions might be an important factor if, for example, the consumer's circumstances meant they required easy and immediate access to their money.

The following case studies illustrate our approach in the type of complaints we have seen recently.

■ **84/5**
consumer complains that her withdrawal from a property fund was subject to a deferral period

Several years after Mrs B invested in a property fund she decided to withdraw her money and invest elsewhere. She downloaded a withdrawal form from the website of the business concerned and followed the instructions for completing it. She then signed the form and sent it off to the business.

A week later she received a letter telling her it was '*not possible at present*' for her to withdraw her funds. The business explained that the day after she had downloaded the form it had imposed a '*deferral period*' of up to six months for all withdrawals from – or surrenders out of – the property fund.

Mrs B rang the business to say she was surprised and concerned to learn she could not get access to her money immediately. The member of staff she spoke to assured her that her request would be processed '*as soon as cash is available in the fund*'. However, he was unable to tell her when that would be.

She then wrote to the business to complain. She said that before downloading the withdrawal form she had taken care to read all the information on the business's website about withdrawals. She had not seen

any warning that she might have to wait up to six months before she got her money. She thought the business had behaved in a '*misleading manner*' by not publishing a warning about the forthcoming deferral period.

Unhappy with the response she received, Mrs B brought her complaint to us.

complaint not upheld

The terms and conditions of the property fund allowed the business to apply a deferral period '*at its discretion*'. And this possibility was clearly stated in the information Mrs B had been given when she first invested in the fund.

The business provided evidence that it had applied the deferral period the day after Mrs B downloaded the withdrawal form. The business explained that it never made any advance announcement that a deferral period was coming into effect. Any such announcement might prompt a large number of investors to withdraw their money – to the detriment of the fund and its remaining investors.

We accepted that the timing of this particular deferral period had been unfortunate for Mrs B. However, the business had not acted improperly or in a '*misleading manner*', so we did not uphold the complaint. ■

■ **84/6**
**consumer complains he was wrongly
 advised to invest in a property fund**

Shortly before he retired, Mr D contacted a financial adviser about investing a significant sum of money. He subsequently invested all of this money in a property fund.

A couple of years later he complained that the adviser had misled him. He said he had been very disappointed to find the value of his investment had gone down. He claimed that the adviser had told him he could expect *'an annual return of at least 10%'*.

When the business denied that its adviser had misled him in any way, Mr D brought his complaint to us.

**... an investment in
 commercial property presented
 potential risks – as well as
 potential rewards.**

complaint not upheld

The business sent us the record of its adviser's meeting with Mr D, together with a copy of the adviser's subsequent letter to him. The adviser had noted that Mr D expressed a strong preference for putting all his money in a property fund. Mr D had said he knew about commercial property and was *'comfortable with it'*.

However, the adviser had recommended that Mr D should spread his investment across several different areas. He had specifically advised Mr D *against* concentrating purely on the property fund.

We did not uphold Mr D's complaint. We said there was clear evidence that he had been advised to spread his investment across different areas rather than putting all his money in the property fund.

Until he retired, Mr D had for many years managed a firm that was engaged in the buying, letting and management of commercial property. We said that in view of this, it was reasonable to assume that he would have realised an investment in commercial property presented potential risks – as well as potential rewards. ■

... the business said the poor performance of his investment '*resulted from the difficult economic climate*'.

■ 84/7 consumer complains about advice to borrow money and invest it in a property fund

Mr J complained that he had been wrongly advised to invest in a property fund bond.

At the time he was given this advice, Mr J was 59 and had a £3,000 repayment mortgage with 18 months left to run. He was advised to borrow a further £50,000 from his mortgage lender, over an 11-year term, and to invest this money in a property fund.

He said he was told the investment would have done so well by the time he was 65 that, as well as being able to repay the £50,000, he would also have a '*healthy surplus*' for his retirement. However, the value of his investment fell considerably, leaving him with the prospect of still having to meet his mortgage repayments after he had retired.

The business told Mr J that the poor performance of his investment '*resulted from the difficult economic climate*'. It said it had given Mr J all the relevant paperwork before he proceeded with the investment. In its view, it was therefore entirely his responsibility that he had gone ahead with an investment that he had later found unsuitable.

Unable to reach agreement with the business, Mr J referred the complaint to us.

complaint upheld

We pointed out to the business that it was responsible for ensuring the advice it gave Mr J was suitable for his needs and circumstances. The fact that it had sent him some written information about the property fund did not mean it had fully discharged that responsibility. ▶

... There was nothing to indicate that the adviser had considered the suitability of the advice he had given.

There was nothing to indicate that the adviser had considered the suitability of the advice he had given Mr J. In addition to the risks normally associated with an investment in a property fund, the proposed course of action required Mr J to borrow the money, before he could invest it.

We said it should have been evident that the property fund investment needed to provide an above-average return just to cover the mortgage interest costs and allow Mr J to break even. If the investment fell in value, then Mr J would find himself having to repay the loan (and meet the monthly payments) after he had retired, when his income would be much reduced.

We thought it very unlikely that Mr J would have been prepared to follow the adviser's recommendation, if those risks had been explained to him.

We said the advice had been unsuitable and that the business should put Mr J back in the position he would have been in, if he had not been wrongly advised.

This meant providing him with a sum equivalent to the amount he needed to pay off his mortgage (including any fees and charges), as well as reimbursing him for any additional costs he had incurred while servicing the new mortgage. The business could then deduct the amount realised by the surrender of the bond.

We said the business should also pay Mr J £250 in recognition of the distress and inconvenience it had caused him. ■

■ **84/8**

investor in a with-profits bond says he was not warned that a market value reduction might be applied when he withdrew his money

When Mr A withdrew his investment from a with-profits bond, he received a much smaller sum than he had been expecting. He said he was very surprised to learn that a market value reduction (MVR) of over £6,000 had been applied, and he complained to the business.

Mr A said the business had assured him that his investment ‘*could not fall in value*’. And he said it had never warned him that a market value reduction might be applied when he came to withdraw his money.

The business did not accept Mr A’s complaint. It said the use of market value reductions was accepted practice and the reduction had been properly applied in his case. The business told him the only ‘*problem*’ was that he had chosen to surrender his bond before the end of its intended term. If he had waited for a while and allowed sufficient time for markets to recover, then there was ‘*a strong chance*’ that no reduction would have been applied.

complaint upheld

The business told us it had made it very clear to Mr A that the with-profits bond was a long-term investment, with a moderate degree of risk. It said it had ‘*fully explained*’ the possible effects of any market value reduction that might be applied when he withdrew his money.

We noted that Mr A had been in his late thirties when he was advised to invest in the bond. The information we obtained about his circumstances at that time suggested that he had been in a position to accept a certain degree of risk. However, there was no evidence to support the claim made by the business that it had ‘*fully explained*’ the risks associated with this particular investment. ▶

... he was very surprised to learn that a market value reduction (MVR) of over £6,000 had been applied.

**... the business said he had
'brought the problem on himself'
by withdrawing his investment at
that particular time.**

None of the documents given to Mr A mentioned the possibility that a market value reduction might be applied. And in both a letter to Mr A and a product brochure, the business had stated that unit prices could not fall. We considered this to be misleading, because the business had not *also* mentioned that a market value reduction could bring about a fall in the actual value of an investment, when the investor cashed it in.

Given that Mr A had not been properly informed about market value reductions – and their potential effect on his investment – we did not accept the point made by the business that he had '*brought the problem on himself*' by withdrawing his investment at that particular time.

We upheld the complaint and told the business to calculate redress in a way that put Mr A back in the position he would have been in, if he had not invested in the bond.

**... None of the documents
mentioned the possibility
that a market value reduction
might be applied.**

It seemed likely that he would have invested the same sum elsewhere, with a view to obtaining a reasonable return. So we said that in its calculations, the business should assume that by investing elsewhere, Mr A would have received the Bank of England base rate over the period concerned, plus one per cent. ■

■ 84/9

consumer complains that he was wrongly advised to invest in a with-profits bond

After consulting a financial adviser, Mr L invested £50,000 in a with-profits bond. Five years later, he wrote to the business to complain that he had been wrongly advised to make that particular investment.

He said his concerns had been raised after reading several newspaper articles highlighting the risks of with-profits investments. He said it was only after reading these articles that he had realised the bonus rates could fluctuate. And he said the business had never told him that a market value reduction might affect the value of his bond if he needed to cash it in.

Mr L said he would have invested his money elsewhere if the adviser had explained these ‘drawbacks’ to him. He asked for compensation for the amount he had ‘lost because of inappropriate advice’. When the business rejected Mr L’s complaint, he referred it to us.

complaint not upheld

We looked at details of Mr L’s circumstances at the time he was advised to invest in the bond. The evidence suggested that he had been seeking a better return than he would have got by leaving his money in a deposit account. He had been prepared to leave his money invested over the longer term and had other funds in a readily-accessible savings account elsewhere.

The letters and product literature that the business had given Mr L set out very clearly the features of the with-profits bond, including prominent warnings that a market value reduction might be applied to withdrawals and that bonus rates might fluctuate. We did not uphold the complaint. ■ ■ ■



Mixed Sources

Product group from well-managed forests and other controlled sources
www.fsc.org Cert no. SGS-COC-2842
© 1996 Forest Stewardship Council

Printed on Challenger Offset paper made from ECF (Elemental Chlorine-Free) wood pulps, acquired from sustainable forest reserves.

100% of the inks used in *Ombudsman news* are vegetable-oil based, 95% of press chemicals are recycled for further use, and on average 99% of waste associated with this publication is recycled.



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. I was reading some information on the internet about the ombudsman but it didn't seem quite right. Then I realised I was looking at an overseas ombudsman's website. Will you warn *Ombudsman news* readers not to make the same mistake?

A. The internet makes it possible to find out about ombudsman schemes round the world at a click of the mouse – with ombudsman websites, e-news and online forums available to anyone, anywhere, at any time.

But it also means it is very easy to find yourself accessing information online that may have been specifically written for, and directed towards, a very different audience somewhere else in the world.

For example, the Australian Financial Ombudsman Service (www.fos.org.au), the Irish Financial Services Ombudsman (www.financialombudsman.ie) and the UK Financial Ombudsman Service (www.financial-ombudsman.org.uk) share a similar name, ethos and guiding principles. We are in regular contact with each other – including through the International Network of Financial Ombudsmen (INFO). But at a practical level, there are many operational differences between our three schemes, reflecting the different law, customs and practice that apply in each of our jurisdictions.

So if you are looking for complaints-related information on the internet – and you find yourself on an ombudsman website – please check carefully whose site you are actually on and where that ombudsman is based. Web and email addresses

generally contain a national code which helps identify their origin (for example, au for Australia and ie for Ireland).

Q. How can you judge a complaint made today about advice given in the past?

A. We do not apply today's standards to yesterday's events. We take account of all the evidence available now that dates *from the time* of the advice. And we judge what did – or did not – happen against the law, rules, codes and good practice that applied at the time.

As part of the information they give us about their case, either side can tell us what they remember saying or being told. Documentary evidence – particularly paperwork from the time – is often very helpful. But the existence – or otherwise – of specific pieces of paperwork does not mean we will automatically uphold or reject a complaint.

We are very experienced in spotting when hindsight has crept into an argument. Our job is to decide which side we believe has the more credible case overall – based on the facts and circumstances at the time the advice in question was given.

This often involves weighing contradictory information on the balance of probabilities. We decide what we think is *more likely* to have happened in the past – in the light of the evidence available now. But this is not 'retrospective' decision-making. This is how a civil court would also have to resolve a dispute (unlike a criminal court where decisions are made on the basis of 'beyond all reasonable doubt').