ombudsman news

from the **banking** division

Financial Ombudsman Service

September 2001

Financial Ombudsman Service

Aimed at financial firms and professional advisers – and at consumer advice agencies – we focus each month on news from one of our three case-handling divisions: insurance, investment – and this month – banking & loans

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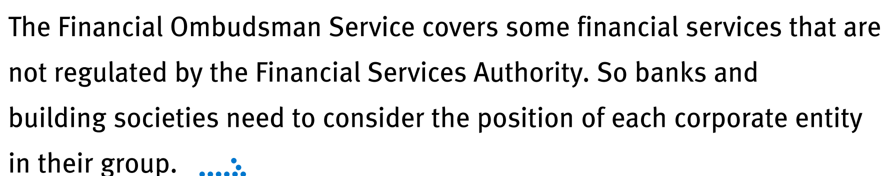
about this issue of ombudsman news

by **David Thomas**
principal ombudsman
banking & loans division

Until 30 November 2001, we continue to deal with banking and loans cases under the rules of the Banking Ombudsman Scheme and the Building Societies Ombudsman Scheme. But from 1 December 2001, when the majority of the Financial Services and Markets Act 2000 comes into force, we will deal with them under the new rules of the Financial Ombudsman Service.

The almost-final text of those rules was published by the Financial Services Authority (FSA) in June 2001, in Consultation Paper 99. The final rules, approved by the boards of the FSA and the Financial Ombudsman Service, are likely to be published in early October. These are unlikely to contain any surprises.

Under the transitional provisions, firms are likely to have up to eight weeks (until 26 January 2002) to issue final response letters on any unresolved complaints already on hand when the new rules come into force.



The Financial Ombudsman Service covers some financial services that are not regulated by the Financial Services Authority. So banks and building societies need to consider the position of each corporate entity in their group.

1 endowment mortgages: missing endowment policies

background

An endowment mortgage is one where the payments to the lender only cover interest, and the intention is for the capital of the loan to be repaid by an endowment policy. Problems with endowment mortgages are not confined to cases where, because expected returns have now fallen, there are fears that the endowment policy may not produce enough to pay off the mortgage. We receive a significant number of complaints about cases where, although the intention was for the borrower to have an endowment mortgage, there is no endowment policy. The borrower therefore has no way of paying off the mortgage. In some cases the endowment policy was never taken out. In other cases, it was taken out, but then cancelled during the lifespan of the mortgage.

We recently issued briefing notes, summarising our approach to compensation in such cases. This approach is similar to that adopted in the past by both the Banking Ombudsman Scheme and the Building Societies Ombudsman Scheme. But it also incorporates the approach to past savings about which we consulted in the context of mortgage underfunding cases.

[Mortgage underfunding cases are where the borrowers make the monthly payments quoted by their lender, but the lender has quoted too low a figure. The result is that the borrowers owe more on their mortgage than they should do. They are faced with increasing their monthly payments, or having the mortgage continue for much longer (possibly even after they have retired). We consulted about our approach to these in the March 2001 edition of ombudsman news, and reported the outcome in the June 2001 edition.]

This article summarises the briefing notes about missing endowment policies and may help borrowers and lenders who wish to settle such cases. It deals with our approach to awarding compensation where:

- a mortgage was to be paid off by an endowment policy;
- the monthly payments to the lender only covered interest;
- the endowment policy was never taken out ***or*** was not continued; so
- there is now no way of paying off the mortgage.

We are required to decide each case on the basis of our existing powers and of what is fair in the circumstances of that individual case. We may decide that, in the interests of fairness, a particular case requires a different approach.

where the policy was never taken out

if the lender was not at all to blame

Typical cases where we would probably consider the lender was not at all to blame are where:

- The lender made it clear at the outset that the mortgage was interest-only; it was the borrowers' responsibility to ensure they took out a policy or had some other way of paying off the mortgage; and the terms of the mortgage did not require the lender to see the policy.
- The lender provided an endowment mortgage; it was agreed that the borrowers would arrange their own endowment policy; the lender made it clear that it was the borrowers' responsibility to arrange the policy; and the terms of the mortgage did not require the lender to see the policy.

In such cases, we would not award any compensation to the borrower.

if the lender was 100% to blame

A typical case where we would probably consider the lender 100% to blame is where: the lender agreed to arrange the policy; the borrowers had reasonable cause to believe their monthly payments to the lender included the policy premiums; and the borrowers raised the matter with the lender as soon as the discrepancy became obvious.

If we consider the lender was 100% to blame, we will require it to pay the current value of a replacement policy's 'extra premiums', calculated as follows:

Premiums that will have to be paid from now onwards — **A**

Total premiums that will have to be paid from now for a replacement policy of the same type based on:

- the original loan
- the original maturity date
- the current age and health of the life/lives assured.

Premiums that *should* have been payable from now onwards — **B**

The total premiums that would have been paid, from now, if the original policy had been taken out. If the amount of the original premiums is unknown, we will base this on current rates for a replacement policy of the same type based on the original:

- loan
- term of the policy; and
- age and health of the life/lives assured.

Extra premiums — **A-B = C**

This amount is the difference between the premiums that:

- will have to be paid on the replacement policy, from now [A], and
- would have been paid, from now, if the original policy had been taken out [B].

Current value of the extra premiums — **D**

The borrowers receive compensation now in a lump sum, but the extra premiums will be paid gradually from now to the end of the term. So the current value of extra premiums [D] is the amount that would have to be invested now to make up the extra premiums [C] over the rest of the term. Currently we assume a yearly investment return of 4%.

If the original policy was for the amount of the loan 'plus profits':

- We are unlikely to deduct the notional past 'savings' that the borrowers made as a result of not having paid premiums. These 'savings' will compensate the borrowers for the reduced time during which profits can be earned.
- Where appropriate, we will also award compensation for past distress or inconvenience.

In other cases:

- It is likely that the borrowers will have arranged their expenditure on the basis of their known outgoings. We are only likely to deduct the notional past 'savings' that the borrowers made as a result of not having paid premiums:
  - To the extent the lender can show that the borrowers still retain the 'savings' as identifiable and readily-realisable assets;
  - Unless the borrowers can show it would be unreasonable to do so in their particular circumstances.
- Where appropriate, we will also award compensation for past distress or inconvenience; but only so far as it exceeds any 'savings' we have disregarded.

If we do deduct any past 'savings', we will not add interest to them.

Usually, we will not award compensation for any future inconvenience of having to pay the original premiums.

Example calculations

The following examples are based on a case where:

- The policy was for an amount which, plus profits, was expected to pay off the loan
- The premiums that will have to be paid from now onwards [A] are £6,935
- The premiums that ***should have been*** payable from now onwards [B] are £2,826
- So the extra premiums [A – B = C] are £4,109
- The current value of the extra premiums [D] is £3,013
- Notional past 'savings' were £2,500
- We consider that £250-worth of inconvenience was caused to the borrowers.

Ordinarily:

- We would require the lender to pay compensation of £3,013
- We would not deduct any of the notional past 'savings' from the compensation
- We would not award anything for inconvenience, because the disregarded 'savings' of £2,500 exceed the £250 we would otherwise have awarded.

Exceptionally, if the lender showed that £1,000 of the past 'savings' formed an identifiable and readily-realisable part of the borrowers' current assets:

- We would deduct £1,000 of the 'savings' from the compensation
- We would require the lender to pay net compensation of £2,013 (£3,013 – £1,000)
- We would not award anything for inconvenience, because the disregarded 'savings' of £1,500 exceed the £250 we would otherwise have awarded.

Exceptionally, if the lender showed that all the past 'savings' formed an identifiable and readily-realisable part of the borrowers' current assets:

- We would deduct all of the £2,500 'savings' from the compensation
- We would require the lender to pay net compensation of £513 (£3,013 – £2,500)
- We would award £250 additional compensation for inconvenience.

if the lender was less than 100% to blame

A typical case where we would probably consider the lender less than 100% to blame is where: the terms of the mortgage required the lender to see the policy, and it failed to do so; but the borrowers must have known that they had not taken out a policy.

In such cases, we would reduce the compensation proportionately. And it would not be fair to disregard any notional 'savings' that accrued after the point when borrowers must have known there was no policy, but kept quiet about it (for example, after discovering they were not paying premiums).

where the policy was taken out, but was not continued

The policy may have stopped from a variety of causes including:

- the insurance company stopped collecting the premiums
- a direct debit or standing order for the premiums failed, unknown to the borrowers
- the borrowers deliberately stopped paying the premiums
- the borrowers surrendered the policy.

We will consider whether the lender:

- knew, or should have known, that the policy stopped
- made the consequences clear to the borrowers
- is to blame for not having converted the mortgage to a repayment mortgage.

if the lender was not at all to blame

Typical cases where we would probably consider the lender not at all to blame for not converting the mortgage are where:

- The lender made it clear at the outset that: the mortgage was interest-only; it was the borrowers' responsibility to ensure they took out a policy or had some other way of paying off the mortgage; and the lender did not require to see the policy.
- The lender made it clear, when it discovered that the policy had stopped, that the mortgage was interest-only; and it was the borrowers' responsibility to ensure they took out a new policy or had some other way of paying off the mortgage.
- The borrowers could not afford to continue the policy premiums; the lender and borrowers agreed the mortgage should be interest-only; and the lender made it clear it was the borrowers' responsibility to ensure they took out a new policy, or arranged some other way of paying off the mortgage, once their financial position improved.
- It was not apparent to the lender that the policy had stopped.

In such cases, we would not award any compensation.

if the lender was 100% to blame

A typical case where we would probably consider the lender 100% to blame for not converting the mortgage is where: the lender required borrowers to take out a policy; it was not apparent to the borrowers that the premiums had stopped; but it was apparent to the lender that the policy had stopped.

Usually:

- we will tell the lender to write off the capital which would have been paid off (if the mortgage had been converted to repayment) since the date the lender should have known the policy had stopped.
- if it was not apparent to the borrowers that the premiums had stopped, we will not deduct the notional past 'savings' the borrowers made as a result of not paying the premiums.

Exceptionally, even if it was not apparent to the borrowers that the premiums had stopped, we will deduct the 'savings' (without interest):

- to the extent the lender can show that the borrowers still retain these 'savings' as identifiable and readily-realisable assets;
- unless the borrowers can show it would be unreasonable to do so in their particular circumstances.

Where appropriate, we will also award compensation for past distress or inconvenience; but only so far as it exceeds any notional past 'savings' we have disregarded. We will not usually award compensation for the future inconvenience of having to make increased payments.

example calculations

The following examples are based on a case where:

- the loan was an interest-only mortgage
- the capital was to be repaid by an endowment policy
- the endowment policy was taken out, but the lender discovered it had later lapsed
- the lender failed to convert the mortgage to repayment
- if the mortgage had been converted, £4,000 would have been paid off the capital
- notional past 'savings' were £3,500
- we consider that £250-worth of inconvenience was caused to the borrowers.

Ordinarily, we would:

- require the lender to write £4,000 off the capital
- not deduct any of the 'savings' from the capital written off
- not award anything for inconvenience, because the disregarded 'savings' of £3,500 exceed the £250 we would otherwise have awarded.

Exceptionally, if the lender showed that £1,000 of the past 'savings' formed an identifiable and readily-realisable part of the borrowers' current assets, we would:

- deduct £1,000 of the 'savings' from the capital written off
- require the lender to write off the remaining £3,000 from the capital
- not award anything for inconvenience, because the disregarded 'savings' of £2,500 exceed the £250 we would otherwise have awarded.

Again, exceptionally, if the lender showed that all the past 'savings' formed an identifiable and readily-realisable part of the borrowers' current assets, we would:

- deduct all of the £3,500 'savings' from the capital written off
- require the lender to write off the remaining £500 from the capital
- also award £250 for inconvenience.

exceptional cases

Exceptionally, we will modify the approach where we consider it reasonable in the circumstances of the particular case.
For example:

- For borrowers who are near or beyond retirement and cannot afford the future payments, even if the shortfall from the date the policy stopped is written off, it may be unreasonable to deduct retained past 'savings'.

- If the borrowers ran up arrears by failing to pay all the interest-only payments, this may demonstrate that they would not have paid the premiums (if they had realised they were not being paid) or the full repayments (if the mortgage had been converted to a repayment basis). In such cases, we are likely to reduce compensation accordingly.

if the lender was less than 100% to blame

Typical cases where we would probably consider the lender less than 100% to blame are where:

- The lender required the borrowers to take out a policy; it was apparent to the lender that the policy had stopped but the lender did not contact the borrowers; and it was apparent to the borrowers (then or later) that the premiums had stopped.

- The lender required the borrowers to take out a policy; it was apparent to the lender that the policy had stopped but the lender did not contact the borrowers; and the borrowers had deliberately stopped paying the premiums or surrendered the policy.

In such cases, we would reduce the compensation proportionately. If the borrowers knowingly stopped paying the premiums or surrendered the policy, we would expect them to bear almost all the loss.

It would not be fair to disregard any notional past 'savings' that accrued after the borrowers discovered they were not paying premiums (or knowingly stopped paying the premiums or surrendered the policy) but kept quiet.

advice for lenders

Lenders who wish to settle cases with borrowers along the lines we would adopt, but without our direct involvement, can contact our technical advice desk if they are unsure of how our approach would apply in particular circumstances.

phone 020 7964 1000
e-mail technical.advice@financial-ombudsman.org.uk

2 dual variable mortgage rates

As we write this edition of ***ombudsman news*** (mid-September) this is fast becoming a hot topic, featuring almost daily in the national press. It is too soon for us to comment fully on our approach, since cases are still under consideration. However, in view of some of the speculation and misunderstanding about where we are up to so far on this issue, we hope this note will be helpful.

background

Over the past year, several lenders have introduced lower variable mortgage rates for new borrowers. Most of their existing variable-rate borrowers have been transferred to the lower rate, or can apply to transfer to it. But the lenders have kept their previous, higher, variable mortgage rates for some existing borrowers – mainly those with discounted-rate or capped-rate deals. These borrowers are told they must remain tied to the higher rate until the discounted or capped rate comes to an end.

what has happened so far?

We have received a number of complaints about several different lenders. Some are still under investigation but in cases involving two of the lenders, one of our adjudicators has reached the preliminary conclusion that the borrowers were entitled to have their rates linked to the lower variable rate.

It is important to note that:

- For both lenders, the preliminary outcome of the cases turned on the interpretation of the borrowers' individual mortgage contracts – not on the principle of lenders having dual variable mortgage rates. Was the rate in those contracts linked to the higher or the lower rate?
- Both lenders have appealed against the adjudicator's preliminary conclusions. The lenders and borrowers will be able to submit additional evidence and arguments and the principal ombudsman will then review the cases. Until the principal ombudsman reaches his decision, we cannot say any more.

We hope to be able to comment more fully in the next banking and loans edition of ***ombudsman news***, in three months' time.

...we have received a number of complaints about several different lenders.

...the problem of downgraded interest is not confined to superseded accounts.

3 downgraded deposit accounts

We continue to receive complaints about cases where a firm:

- 'downgraded' a deposit or savings account, by cutting the interest rate more than can be justified by any general fall in interest rates; and
- did not send notification of the interest rate cut, at the time, to customers with the relevant account.

For accounts designed to operate mainly through branches, the Banking Code says it is enough if the firm:

- puts notices in branches and newspapers;
- provides a telephone helpline; and
- once a year, sends customers a summary of the interest rates on its accounts.

For accounts designed to operate by post, the Banking Code requires the firm to send customers notification of interest rate cuts, at the time of the cuts. We would prefer it if this requirement applied to all accounts. But we do not write the Code.

The Code also contains special provisions about accounts that are 'superseded' – because the account is no longer open to new customers, or the firm does not actively promote it. But what constitutes promotion of an account is open to dispute, and the problem of downgraded interest is not confined to superseded accounts.

recent developments

Recently we considered some test cases about a particular deposit account. One of our adjudicators upheld the complaints. The firm concerned decided to settle rather than to 'appeal' to an ombudsman. One of the customers showed the adjudicator's decision to the press, but some of the resulting reports rather missed the point.

As a result, we received a significant number of requests for clarification – particularly from firms. This article explains one of the key issues on which the test cases turned, but it is important to remember that the test cases did not reach the stage of an ombudsman's decision.

Contrary to some reports, the adjudicator's conclusions were not that interest rates must always be linked to Bank of England base rate, nor that a firm must send personal notification to customers if it cuts the rate for a valid reason, specified in the account terms. The adjudicator's conclusions were:

- The account terms listed various valid reasons why the interest rate might be reduced. If the firm had reduced the interest rate for one of those reasons, it would have been sufficient for it to have provided the notifications required by the Banking Code. However, the firm's actual reason was not one of those listed.

- This meant that, under the Unfair Terms in Consumer Contracts Regulations, the firm was required to inform the customer at the earliest opportunity – and 'inform' implied some direct communication. The firm did not send the customers any direct communication at the earliest opportunity.

- The interest variation clause allowed the firm to change interest rates in line with movements in general interest rates. Interest rates generally were moving down but the firm had cut the rate by vastly more. The firm should pay interest, up until the date the complainant discovered the position, at the rate it would have paid if it had maintained the differential between its rate and the Bank of England base rate, instead of increasing it.

unfair terms in Consumer Contracts Regulations

In February 2000, the Office of Fair Trading published its views about how the Unfair Terms in Consumer Contract Regulations apply to variable interest rates on mortgages and savings products where the customer is 'locked in' by a charge or notice period.

But the Regulations are not confined to cases where the customer is 'locked in'. In particular, they also deal with cases where the firm changes the interest rate without telling the customer. Account terms that allow this are likely to be unfair, unless the reason for the change was a valid one and was spelled out in the account terms.

So here is a summary of some ways in which the Regulations might affect deposit and savings accounts, and the notifications firms give to their customers. It covers more points than those on which the recent test cases turned. But it does not claim to cover every issue, or every factor that might be taken into account in deciding what is fair.

The Regulations implement European Directive 93/13/EEC and apply to consumer contracts entered into from 1 July 1995. Any written term must be in plain, intelligible language. If there is any doubt about the meaning, the interpretation most favourable to the consumer prevails. An 'unfair term' is not binding on the consumer.

An 'unfair term' is one that, contrary to the requirement of good faith, disadvantages the consumer because of a significant imbalance in the parties' rights and obligations. This is assessed in the light of the subject matter of the contract, and the circumstances when the contract was entered into.

The Regulations include a 'grey list' of terms that are likely to be unfair. These include terms that enable a supplier to alter the contract unilaterally (which is what a financial firm does when it alters a variable interest rate) without a valid reason that is specified in the contract. But this is subject to a qualification.

The Regulations say that this item on the 'grey list' does not prevent a financial firm reserving the right to vary interest rates, or charges [,] without notice ***where there is a valid reason*** – provided that the firm ***is required to inform*** the customer at the earliest opportunity and that the customer is free to close the account immediately.

The '[,]' in the previous paragraph indicates a comma that appears in the original French text of the European Directive, but does not appear in the Regulations. So there is a debate about whether a valid reason is required just for varying charges or also for varying interest rates.

But legislation based on European Directives is supposed to be interpreted in a way that is consistent with the purposes of the Directive. And many legal commentators consider that this provision ***does*** require the reason for varying an interest rate to be a valid one.

If the reason for the variation (even if valid) is not specified in the contract, then the firm must be subject to a requirement to inform the customer at the earliest opportunity. That could be interpreted as indicating a more specific form of notification than putting notices in branches and in newspapers – the Banking Code's minimum requirement for branch-based accounts.

in practice

So what could it mean in practice? Cases might turn on the following issues:

- If it did, was it actually used for one of those specified reasons? And if it was, was the reason a valid one?
- If it was used for a reason that was not specified, did the clause give the firm power to vary the interest rate for other (unspecified) reasons? If it did not, or if the clause was unclear, the firm probably had no power to change the rate.
- If the clause gave the firm power to vary the interest rate for other (unspecified) reasons, what was the actual reason? Was that a valid reason? Was the firm contractually bound to inform the customer promptly?
- If the firm was ***not*** bound to inform the customer promptly, a change for a reason not specified in the contract was probably unfair. If the firm ***was*** bound to inform the customer promptly, was the customer free to close the account without notice?

...the Consumer Contracts Regulations include a 'grey list' of terms that are likely to be unfair.

4 tax exempt special savings accounts (TESSAs)

Regular readers of ***ombudsman news*** will know that, over the past year, we have received thousands of enquiries from customers who were unhappy with the interest paid on their TESSAs. In September 2000 we published a briefing note that was intended to help firms and their customers resolve these complaints – by indicating the approach we were likely to take on complaints that reached us.

what has happened since then?

It is clear that firms looked at our briefing note very carefully, even though many disagreed with our approach. Some firms continued to argue that TESSAs were not superseded accounts for the purposes of the Banking Code, even though the Banking Code Standards Board said they were.

Some banks that, in the light of our briefing note, considered that they were likely to 'lose', settled individual complaints with their customers. Others that considered, in the light of our briefing note, that they were likely to 'win', asked us to adjudicate.

Because of the numbers involved, we grouped similar cases and chose representative 'test cases' for investigation. We made sure we covered all the options – seven in the case of one bank. In the test cases that have been decided so far, all those banks have indeed all 'won' – although we have more test cases to go. Things are a bit different for building societies. Fewer of them settled individual complaints following our briefing note, preferring us to investigate. Some said that the stakes were higher for them. They were smaller than banks, so the financial impact would be greater. And, as mutual organisations, they would also have to consider how to treat TESSA holders who had not complained.

Again, because of the numbers involved, we grouped similar cases and chose representative 'test cases' for investigation. Two societies 'won' at the preliminary conclusions stage. Two 'lost' at the preliminary conclusions stage and decided to settle. Seven 'lost' at the preliminary conclusions stage and 'appealed' to the ombudsman. Four of those have reached the ombudsman's final decision stage so far – one 'won' and three 'lost'.

One society 'won' on ***one*** of its range of TESSAs. Its press release about its 'win' was misinterpreted by some as indicating that it had 'won' in relation to ***all*** its TESSAs. In fact, we have yet to reach a final decision on the others.

...firms looked at our briefing note very carefully, even though many disagreed with our approach.

5 account (mal)administration

when a firm just gets things wrong

Many of the customers who call our customer contact division think that their bank or building society has done something wrong when, in fact, it has not. Resolving such misunderstandings at an early stage is an important part of our work.

But we see quite a few cases where the firm ***did*** get things wrong – and then did not sort things out quickly enough. There can be a variety of reasons for this. But unless the firm and the customer are prepared to settle at an early stage, we often have to look into things in quite a lot of detail to reach a fair view of the extent of the firm's liability.

Here are some recent examples of administrative problems, where firms got things wrong and we ended up doing an investigation. Some of the problems did not involve much money – but others had fairly major consequences.

...we see quite a few cases where the firm got things wrong – and then did not sort things out quickly enough.

case studies – account (mal)administration

- 09/01

policies surrendered and proceeds paid to ex-wife in error

Mr and Mrs J had a number of accounts, and a mortgage, with the firm. They separated – not amicably. They went to court, where it was agreed that Mr J would have sole ownership of the house. He would keep on paying the mortgage and the premiums for the two endowment policies taken out to support it. The firm knew about this agreement.

Mr J kept on paying the policy premiums but (by arrangement with the endowment policy provider) he did so yearly, not monthly. The firm did not know about this arrangement and misunderstood a letter it received from the policy provider, thinking that Mr J was in arrears with his premium payments.

Instead of writing to Mr J about the policies at ***his*** address – which it knew – the firm wrote to Mr and Mrs J jointly at ***her*** new address. It said that, if the premiums were not brought up to date within 21 days, it would surrender the policies and convert the mortgage to a repayment mortgage. Mrs J ignored the letter and did not tell Mr J about it – so he did not know what was happening.

...the problem was that his branch was in England – but the cheque had been drawn on a bank in Scotland.

A month later, the firm wrote once more – again to Mr and Mrs J at *her* address. The following month, having received no response, the firm converted the mortgage and surrendered the policies. It sent a cheque for the net surrender proceeds of £9,000 payable to Mr and Mrs J – again, to Mrs J's address.

Mr J realised that something had gone wrong when he saw that his mortgage payments had gone up. But he could not get the endowment policy provider to re-instate the policies because by then he had suffered two heart attacks. And it took him some months to get the money back from Mrs J – from whom, by then, he had obtained a divorce.

We decided that if the firm had written to Mr J at his correct address, it was unlikely that any of the later events would have happened. So, one error had led to another. The firm tried to blame Mrs J for not forwarding the letters. We did not accept that, in the circumstances, it was reasonable to expect her to do so. The firm knew that she was not entitled to the money and it could have done more to try to get the money back from her.

Because, in the end, it was too late to set up new policies for Mr J, we took the view that the firm should pay him what they were likely to be worth – less the surrender proceeds, but plus £1,500 for distress and inconvenience. That all came to £26,500.

- 09/02
customer wrongly told that a cheque he paid in had cleared

Mr A had to leave his job because he had been ill for some time. He posted his final pay cheque, for a total of £4,000, to his branch. The cheque was paid in to his account on a Friday and that same day he phoned the branch to check it had been received. He was told that it had.

The following Wednesday, Mr A phoned his branch again to make sure the cheque had cleared. He was told that the branch would not know until the following day. When he phoned back on the Thursday, he was told the cheque had cleared, so he arranged to withdraw £1,500 from a local branch to buy a car.

On the Friday the cheque came back unpaid, marked 'refer to drawer, please represent'. It came back unpaid for a second time the Friday after that. Mr A eventually got the money three weeks later.

The problem was that his branch was in England – but the cheque had been drawn on a bank in Scotland. These 'cross-border' transactions can take a day longer than usual to complete. But the firm's computer system was only geared up for 'normal' transactions – so the problem wasn't spotted. And when the

Scottish connection ***was*** finally made clear, the staff involved did not seem to know anything about possible delays with 'cross-border' transactions.

We were satisfied that if, at the outset, the firm had understood what might happen and had told Mr A he'd have to wait another day before drawing out the money to buy the car, he would have done so.

Before the complaint came to us, the firm had already refunded the £19 interest it had charged on Mr A's unexpected overdraft. We said it should also refund the charges of £64 – and pay Mr A another £100 for the inconvenience he had suffered.

n 09/03

firm credited a forged cheque to an account – then took the money back without asking

Mr and Mrs K paid a cheque for £5,000 into their account. A week later, after the firm told them the cheque had cleared, they used most of the money to pay off some debts.

Almost two weeks later, the cheque was returned unpaid – and declared to be a forgery. The firm debited Mr and Mrs K's account, causing it to become overdrawn. The couple said the firm was wrong to do that and they refused to repay the overdraft. The firm put the debt in the hands of recovery agents and registered it with the credit reference agencies.

The time taken for the cheque to be sent back was much longer than normal.

We said the firm had not acted reasonably by just accepting it back almost three weeks after it had been paid in. It should not have simply debited the cheque back without making any further enquiry. So we told the firm to re-calculate Mr and Mrs K's account as though the cheque had never been returned, and to remove the adverse credit entry.

n 09/04

joint cheque wrongly credited to wife's sole account

Mr D and his wife applied for a re-mortgage from the firm with whom he already had a loan. This was agreed on condition that the existing loan was re-paid. The couple arranged to do this using some of the money they would obtain from the re-mortgage.

When the re-mortgage was completed, Mr and Mrs D's solicitors sent them a cheque for the surplus amount – to be used to repay the loan. Mrs D paid the cheque into her sole account. A few days later, she and her husband separated.

Mr D said that it was not until after the separation that he knew the solicitors had issued the cheque – and by then it was too late to get the money back from his wife.

The firm knew what the money was to be used for, yet it allowed it to be paid in to the 'wrong' account. It argued that Mr D had received benefit from the money. We disagreed. We told the firm, first of all, to give him half of the value of the cheque. And because of its generally unhelpful attitude – and some manifestly incorrect advice, which delayed things unnecessarily – we added £400 for inconvenience, making compensation of almost £1,000 in total.

n 09/05

delay caused loss

Mr G repaid his mortgage with the firm. He then applied for another mortgage, through a mortgage broker, and received an offer from a different lender. One of the conditions of the new offer was a satisfactory reference from the firm, as his old lender. But the broker told Mr G that copies of statements should do instead – they would be quicker, cheaper, and easier to get hold of. This was important because the sellers wanted a quick exchange of contracts.

Mr G did not have all the statements so he asked the firm to let him have the necessary copies. The firm said this would take no more than five days, and would cost him £15. Three weeks later, and after chasing the firm on several occasions, Mr G was still waiting for his copy statements. A few days after that, the sellers pulled out of the deal, saying they had lost confidence in Mr G's ability to follow it through.

Two weeks later, Mr G got his statements. By then the property had been re-marketed at a higher price – up by £15,000. Mr G went back to the sellers and managed to negotiate a lower purchase price, although it was still £5,000 more than he had originally agreed to pay. He claimed this amount from the firm, together with costs of over £1,000.

We decided that Mr G would have had a ***very*** substantial chance of buying the property at the original price if the firm had let him have the copy statements within five days, as it had said it would do. So we were satisfied that he had lost out on at least £5,000. After questioning some of the costs, we eventually told the firm to pay Mr G £5,750.

n 09/06

how not to handle a re-mortgage application

Mr and Mrs B already had a mortgage with the firm. They applied to it for another one because they wanted to move house. They also decided to transfer their current account to the firm. Fairly quickly they got their mortgage offer – and new cheque books and cards. Two weeks later, the firm told them it had lost all Mr B's details because of a computer problem, so it would have to start all over again with the mortgage application.

At that point, Mrs B was out of the country on business. That delayed things quite a bit as her signature was needed on the new forms. The forms were eventually completed the following month. When he sent them back, Mr B asked the firm if it would waive the mortgage arrangement fee – in view of the problems they had encountered so far.

A month or so later, Mr B phoned the firm to ask how things were going. The firm said it had done nothing with the forms because it was waiting for him to pay the arrangement fee. By then, there were three weeks to go before contracts were due to be exchanged.

Mr and Mrs B decided they had lost faith in the firm's ability to administer their new mortgage. They went to another lender and got a mortgage completed in time. However, they had to pay an early repayment fee of over £2,000 on their old mortgage. They also discovered that the firm had wrongly bounced monthly premiums on their endowment policies but had not told them what it had done (Mr and Mrs B had transferred the direct debits when they first opened their new current account). The couple had always intended to surrender the policies when the old mortgage was repaid. But the effect of the bounced premiums was a reduction of almost £2,500 in the policies' surrender values.

Mr and Mrs B wanted the firm to make good their losses and to pay them significant compensation for all the unnecessary effort it had put them through and the time that had been wasted. The firm came up with an offer fairly quickly but the couple rejected it. Following our involvement, the firm increased its offer to £5,250, which was accepted.

n 09/07

cheques returned unpaid even though overdraft facilities agreed

Mr C ran a transport business. He was having cashflow problems and the firm where he held a business account was bouncing his cheques, so he went to see the firm, accompanied by his accountant. A few days after the meeting (while Mr C was away from home) the firm wrote to him confirming an overdraft facility of £110,000 for the following month. But shortly after that it bounced a number of Mr C's cheques.

Mr C said that at the meeting he had shown the firm a cashflow forecast which revealed a borrowing need of £134,000. He agreed that the firm had said no to that. But he said it ***had*** agreed to let the overdraft go up to £130,000 – not to the £110,000 quoted in the letter. Because of that, he had felt able to write the cheques that were later bounced.

Many of the cheques were bounced while Mr C was still away, including the most important one – his monthly payment to his diesel supplier. Because that payment was bounced, the supplier stopped Mr C's fuel card, seriously affecting his ability to continue trading.

The firm denied that it had agreed an overdraft figure of £130,000 but Mr C's accountant confirmed Mr C's recollections of what the firm had said. There were few written records available from the meeting. But the member of the firm who was at the meeting was senior enough to have agreed a facility of £130,000. And everyone knew how important the forthcoming payment to the diesel supplier was. So, on balance, we decided the firm ***had*** agreed to a temporary maximum overdraft of £130,000 – not £110,000.

Because the diesel payment was bounced, the supplier refused to let Mr C have any more fuel unless he paid for it in advance. That put a lot more strain on his cashflow – and inconvenienced him and his drivers. Sometimes they had to buy fuel from other suppliers for cash – which made it difficult for Mr C to claim back the VAT. Added to that, because of the lower overdraft facility, the firm's charges and interest had been higher than they should have been. We therefore told the firm to pay Mr C £8,000.

...they had lost faith in the firm's ability to administer their new mortgage.

6 disputed cash machine withdrawals

Five or so years ago, disputed cash machine withdrawals were a hot topic. More recently, this type of complaint has tailed off, but we do still get a regular flow of them. We therefore thought it would be useful to touch on a few of the problems which continue to crop up.

To begin with, however, it is important to get things in proportion. Millions of cash machine withdrawals are made every day. But we only ever receive complaints about a tiny percentage of them.

Many of the complaints we get are not about the operation of the machines themselves. They are about whether it is the firm or the customer who should bear the loss when a thief is able to use the card because the customer has written down the Personal Identification Number (PIN).

So, typically, the problems fall into two broad categories:

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When firms refuse to reimburse the disputed withdrawals, customers turn to us. Here are a few recent examples:

case studies – disputed cash machine withdrawals

n 09/08
faulty recollection

Mr H wrote to us about 26 cash withdrawals that were made from his account. He did not remember making any of them. They totalled £2,400, were spread over almost a year, and were made from six different cash machines – all of which were only a few miles apart, and fairly close to his home.

When he complained to us, we first of all examined the transaction listings – created when the withdrawals were made. It was clear from these listings that each withdrawal had been made using the card issued by the firm – not some duplicate or replica card. There had been no incorrect PIN entries and each withdrawal had been made successfully at the first attempt. Furthermore, there had been no 'technical malfunctions' at any of the cash machines at around the time the withdrawals were made.

Mr H insisted that he had not made the withdrawals. He said he had always had control of the card, had destroyed the original PIN notification and did not keep a written record of the PIN.

Mr H and the firm were bound by the card conditions. The firm was also bound by the Banking Code – which prevails over the card conditions if there is any conflict between the two. The firm did not allege that Mr H was fraudulent – which would have entitled the firm to rely on the card conditions and debit his account with all of the withdrawals.

But the firm said that each withdrawal had been made with Mr H's card, and Mr H's PIN. So, if he had not made them, he must have authorised someone else to do so. There was therefore no reason for it to give him any money back.

We concluded that if what Mr H said about always having control of the card was correct, then the card could not have been used without his consent. Even if he was wrong, an unauthorised third party would have had to: find out the PIN; remove the card from Mr H; make a withdrawal; return the card; and do all of this 26 times without Mr H noticing.

All of this seemed unlikely. We decided that Mr H (who was quite elderly) had made the withdrawals himself, or authorised someone else to do so, and had then forgotten. So we did not require the firm to give him any money back.

n 09/09
customer kept note of PIN

When Mr T's wallet was stolen, he reported the loss of his American Express and Visa cards, but forgot about his cash card.
By the time he remembered it and reported it to the firm – the following day – four withdrawals, each for £250, had been made. These withdrawals were made very close together – just before, and just after, midnight.

...no one doubted that he was the victim of fraud. But who was liable for the withdrawals?

The transaction listing showed that, before the first withdrawal was made, there had been an unsuccessful attempt when the wrong PIN was entered. And there was another unsuccessful attempt after the second withdrawal – because the daily withdrawal limit of £500 had, by then, been reached.

Mr T accepted that he had kept a written note of his PIN in his wallet, but said that it had been 'disguised'. No one doubted that he was the victim of fraud. But who was liable for the withdrawals? The Banking Code limits customers' liability to £50 for withdrawals made before a lost or stolen card has been reported missing provided (amongst other things) that a note of the PIN was not made on the card, or kept near it.

Because Mr T rarely used the card, and because the thief was able to make the withdrawals after only one failed attempt, we decided Mr T had kept a note of the PIN near to the card, in an undisguised or poorly disguised form. The firm was therefore entitled to debit his account with the four withdrawals.

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n 09/10

when was the card stopped?

Mrs E was very worried when, after she had reported her card stolen, the firm debited her account with four withdrawals totalling £350.

Her handbag had been stolen while she was out shopping at a local supermarket. She realised almost at once what had happened and, with the help of the supermarket staff, she phoned the firm to 'stop' her card. She recalls making the call at about 4.45pm.

The firm's records showed that the withdrawals were made that same day, between 4.58pm and 5.00pm. But the firm had told Mrs E that the 'stop' had not been put on her card until 6.20pm, although it did not explain why. And it refused to give her the money back because it said she had kept a written note of her PIN with her card.

After we got involved, the firm told us that its 'lost/stolen card report form' had been completed at 5.04pm. But when we asked the firm for its recording of the call Mrs E made from the supermarket, it said the tape was no longer available. That was worrying. The firm should not have destroyed the tape until the complaint had been sorted out, and it knew within six weeks of the withdrawals that Mrs E intended to get in touch with us if it did not sort out the problem itself.

Because the firm could not say exactly when it got the call – and there were discrepancies on the 'lost/stolen card report form', we could not be confident that the true time of the call was 5.04pm. We were more persuaded by Mrs E's recollection of the time when she reported the theft of the card, which was marginally before the withdrawals were made. We therefore told the firm to give Mrs E her money back.

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7 re-discovered old passbooks

background

Barely more than a generation ago, few banks and building societies had much in the way of computerised systems. So in many instances, people kept track of their accounts by means of a passbook. This was updated by the firm when transactions were made over the counter. As computerisation started to take hold, generally from the early 1970s onwards, many banks replaced these passbooks with account statements.

When all this happened, banks didn't tend to ask for the old books back. In fact, many people wanted to keep them – sometimes as a separate record of the account, sometimes for sentimental reasons. But after a time, these passbooks often found their way to the back of an old drawer or cupboard, not to see the light of day again for many years.

A sense of surprise and pleasure often accompanies the re-discovery of such books, when they appear to show a long-forgotten 'nest-egg'. That joy can quickly evaporate when the bank says it cannot find the account and that it must have been closed many years ago. But because of the passage of time, banks often cannot produce any records to show exactly what happened to the money. That is when people think about contacting us.

So, are banks really depriving people of these long-forgotten 'nest-eggs'– or were the accounts genuinely closed? And why can't firms ***prove*** what happened – even if it's 30 or more years ago?

our approach

It is important to remember that things are usually different for passbook-based accounts with building societies – or with banks that have recently converted from being building societies. This is because building societies went on offering passbook-based accounts for much longer.

Sometimes the wording inside the passbook will say the book ***should*** be produced when a withdrawal is made – often it will say that it ***must*** be produced. But despite this, the existence of the passbook is not conclusive evidence that the account still exists. This is because banks did not refuse people access to their money if, for example, their passbook had been mislaid. Withdrawals were often allowed without the passbook if the bank was satisfied about the customer's identity and the authenticity of the transaction.

When we look into this type of complaint we need, first, to examine the bank's earliest available register of ***active*** accounts, and its register of ***dormant*** accounts.

An ***active*** account is one that is still being used and its details are recorded under the account number. But accounts are seldom recorded centrally at a bank's head office; usually there are separate records for each branch.

A *dormant* account is one that is not being used, and where the firm has lost touch with the customer. After an account becomes dormant, it is transferred to a separate register of dormant accounts (there may be individual ones for each branch). It is recorded under the name of the account holder and, after a time, the account number may be re-used for someone else's active account.

A dormant account remains indefinitely in the register of dormant accounts – until the customer gets in touch with the bank to claim the money. The bank cannot claim the money for itself after a lapse of time.

The law does not require businesses to keep records indefinitely, and it is unlikely that the bank will have retained any other paperwork from the relevant period. So we are unlikely to find any concrete evidence concerning the closure of the account. And the law does not require banks to pay up just because it cannot produce evidence showing how and when the account was closed.

We have to decide what is most likely to have happened, in the light of the available evidence. And we often conclude that the most likely explanation is that the account was closed many years ago – in circumstances that the customer has long since forgotten.

Here are some recent case studies.

... we are unlikely to find any concrete evidence concerning the closure of the account.

case studies – rediscovered old passbooks

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two passbooks found

Mr and Mrs L sent us a passbook that showed they had opened a savings account in 1964. The account was used regularly until October 1968, and the final balance in the book was £248 0s 3d. The couple had asked the firm for the money – plus interest. The firm refused, saying it believed the account had been closed many years earlier.

There was no reason for the firm to have lost touch with Mr and Mrs L – they had lived at the same address since 1963. But after we started our investigation, a second passbook came to light. That started in December 1968, and had a balance of £254 2s 11d. It carried on until the end of 1969. Alongside the final balance of £10 17s 6d were the words 'balance to statement'.

The most likely explanation seemed to be that the first book was mislaid some time between October and December 1968. The second book replaced it, and carried on until the account was computerised in early 1970. The account had more than likely been closed some time after that – and Mr and Mrs L had forgotten that the two books, and the statements, all related to the same account.

n 09/12
compensation for poor complaint-handling

In early 2000, Mrs V was sorting out some old boxes in the garden shed when she came across a passbook. It was for a deposit account which she and her late husband had opened in 1965. The last entry in the book showed a balance of £132 13s 2d. Mrs V asked the firm for the money, plus interest, but it refused.

Mrs V said it was possible that the firm had lost contact with them, because they had moved house a few times. But the firm in question does have a central record of dormant accounts – although that revealed nothing. At our request, it also searched its records at a number of branches close to where Mr and Mrs V had lived – but again, nothing.

Quite often, after computerisation these old passbooks were marked up with their new computerised account numbers. But that had not happened with Mr and Mrs V's book. Taking everything into account, we felt the most likely explanation was that the account had been closed – without the passbook, and probably before computerisation – and that Mrs V's memory had faded with the passage of time.

We did, however, tell the firm that we thought its investigation of this complaint had been pretty poor. It had taken far too long to do things, and only made the further branch searches when we asked it to. We recommended that it should pay Mrs V £150 for the inconvenience we reckoned she had suffered as a result. It agreed to do so.

n 09/13
passbook used as a private record

Mr N had a passbook which showed that, in 1930, his grandfather had opened an account on his behalf. The actual firm had long since disappeared – swallowed up during later mergers – but the 'successor' firm is today one of the largest in the country.

The passbook suggested that the account had been used until November 1948. The last balance in the book was £329 6s 10d. Mr N asked today's firm to pay him the decimal equivalent of that balance, plus interest since 1948. It refused but did offer £350 as a gesture of goodwill. Mr N was not happy with that and referred the case to us. We examined all the papers and worked out, first of all, that in 1946 the account had been transferred from Mr N's grandfather's name to his mother's name. None of the entries in the book after that had been filled in like the earlier ones – and the entry dated 3 September 1946 was pretty clearly a

transfer to a current account. Mr N then

came up with some old records for that current account – which made it clear that the additional entries in the passbook were a private record which mirrored the current account transactions. Everything stopped in 1948.

So, we were satisfied that the passbook account itself had been closed back in 1946. We then thought about what might have happened to the current account. It did not appear in the firm's dormant account records – and because Mr N's own papers did not go beyond 1948, we took the view that that account, too, had been closed many years ago.

...we thought the firm's investigation of the complaint had been pretty poor.

8 firms' own procedures

answering our questions fully – and promptly

Most firms do comply fully, and promptly, with our requests for information. But, sadly, we do sometimes have problems getting some firms to release all the information we need to help us reach our decisions.

And we sometimes discover in the course of an investigation that if only the firm had dealt with things more efficiently – or taken more trouble to understand the exact reason for the complaint– it could all have been sorted out much sooner.

In one case we saw recently, we asked the firm to produce a statement from a member of staff. It said it could not do so because the events happened so long ago. We carried on with our investigation and eventually issued a report that went against the firm. Only then did the firm produce a statement made by the member of staff, contradicting the customer's version of events.

We asked the firm why it had not produced this evidence before. We interpreted its reply as indicating that it had not got in touch with the member of staff earlier because it did not expect to lose the case. Clearly, that is not acceptable. The consequence was that more time and effort was needed to sort out the complaint than should have been necessary.

In another case, it took the firm six weeks to reply to our request for information – in circumstances where we would expect it to take three weeks at most. And when we started to read what the firm had sent, we found it was largely incomplete and that what there was did not answer our questions.

When we raised the problem with the firm, we discovered it had simply sent our information request to the local management team, leaving it to them to gather the necessary papers. When they sent everything back to head office, no one there even looked at it – it was all just forwarded on to us.

We ended up finding in favour of the customer on the main issues of the complaint. And because, by the time we got to the end of it, the firm had delayed our investigation by at least two months, we added £200 to the compensation to reflect the inconvenience caused to the customer by those delays.

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Although the rules will change, the nature of the complaints is likely to stay much the same. Many of the relevant topics are covered in this issue of *ombudsman news*. We:

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report briefly on the present position concerning dual variable rate mortgages;

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