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Introduction



Liz Brown **Banking Ombudsman**

While the Banking Ombudsman does not operate on a basis of precedent, fairness requires the development of a consistent approach to common types of complaint. One of the purposes of this publication is to record the application of established approaches in different situations, and also to record new approaches as they develop. It is hoped that bank customers and their advisers will find it useful and that banks will, as they have done in the past, use it to guide their own approach to complaints and as training material for their staff.

The case notes, along with the annual report that accompanies them, are also one of the means by which I account to the public of New Zealand for the exercise of the functions entrusted to me. They should demonstrate the independence of my office and the fairness of our processes and decision-making.

Finally, the case notes are an indication not only of the wide range of issues that can arise in relation to banking services but of the increasing number that can be resolved quickly and satisfactorily by facilitating agreement between the bank and its customer.

The case notes that appear in this volume relate to complaints resolved during the year to 30 June 2008. In this period we experienced an increase in debt-related complaints, and some notes on the issues raised by these complaints will be found in the section on lending and debt recovery. We also experienced a large increase in complaints about investments, but the increase came late in the year and very few of the complaints had been resolved by 30 June. Only two of these complaints are recorded in case notes this year, but it is likely that more will be published in newsletters in the coming year.

1

Good banking practice

Paragraph 16 of the Banking Ombudsman's Terms of Reference requires her to have regard to general principles of good banking practice in making recommendations. While the Code of Banking Practice records good banking practices which banks have agreed to observe as a minimum standard, it does not, and indeed cannot, cover all possible practices in relation to which standards may be desirable. In the absence of any clearly applicable Code provision in relation to what constitutes good banking practice, the Banking Ombudsman is required to consult with the banking industry.

The Banking Ombudsman does not directly approach banks for responses to such surveys, but does so through the New Zealand Bankers' Association (NZBA).

The following summary briefly reports on the sometimes divergent approaches and practices of banks in relation to the questions under consideration. It should be noted here that banking practice is constantly evolving, especially in the areas of fraud and electronic transactions. For this reason the usefulness of the survey results may be limited to a fairly short time period.

During the year under review the Banking Ombudsman invited the members of the NZBA to respond to surveys on the following issues.

1. Banks' practice when opening new business accounts

The survey was conducted to help determine a complaint involving a breakdown in the relationship between the three directors of a company. After a dispute between the directors, each of whom had several signing authority over the same bank account, one director instructed the bank to freeze the account. The other two

directors then formed a new company and opened a new account with the same bank under a company name very similar to that on the original account. Funds due to the original company were directed into the new company's account.

Banks were given a summary of this scenario and were asked to respond to five questions. Seven banks responded.

The banks' responses to questions about how they would handle such a problem were not unanimous. While some banks considered that the bank in question had acted appropriately, one took a diametrically opposed point of view, with the remaining banks occupying the middle ground between these positions. Although some did not state their position with absolute clarity in relation to this specific case, most tended to confirm that the bank in question had acted in accordance with accepted banking practice.

Most banks confirmed that they would check the company's name against the Companies Office register, with three indicating that for them the checking process would stop there. If the Companies Office did not object to the name of the new company, a new account would be opened.

The remaining four banks would then check the name of the company, and sometimes those of the directors, against their existing customer databases. If these enquiries did not cause concern, they would open a new account.

The banks were also divided over the question of whether a new account should have been opened, if the bank in question knew of the dispute and could not rule out the possibility that this step was being taken to circumvent a stopped account or to commit a fraud.

Two banks said that the second account should be frozen until either the directors or a court had agreed on the ownership of the funds, while two others contended that it was incumbent on the directors to settle any such dispute amongst themselves.

2. Banks' policies for young people aged 18 to 23 inclusive

Banks were advised that the Banking Ombudsman was receiving a number of complaints of alleged maladministration involving loans granted to young people by banks. Although the circumstances of these complaints varied considerably, one recurring theme was that claims of maladministration are being made when young people are unable to maintain payments of loans granted by banks.

The Banking Ombudsman is aware of the obligation under the Human Rights Act 1993 not to discriminate on the grounds of age, but enquired of banks whether, within this context, they might have specific policies for processing credit applications from young persons.

Eight banks responded to the survey, with two disqualifying themselves for reasons associated with their customer base and their policies. One bank contended that decisions relating to the granting of credit to customers of any age cannot legitimately give rise to complaints of maladministration. It considered that the survey was enquiring into a bank's exercise of its commercial judgment, and therefore lay beyond the jurisdiction of the Banking Ombudsman.

The survey found that banks do not generally have specific policies relating to young persons, and that their divergent responses appeared largely to reflect variations in their policies and practices relating to all customers.

Only one bank indicated that it has specific policies in place for dealing with young persons applying for unsecured lending. This bank noted that it had tested a policy under which applicants for unsecured lending aged between 18 and 23 had to speak to a qualified bank officer before making their applications. Interestingly, the results of the test identified no material change in default rates arising from such advice. One bank noted that it generally assigns lower credit limits to this age group.

Five of the six banks do not have particular policies in place for dealing with young people who have applied for credit limit increases. The remaining bank indicated that its processes focus on the ability of certain customer categories (e.g. students) to service debt, without specifying what its current processes are.

No banks had a specific policy for applications from young people by phone or via the internet for personal loans, credit cards, and/or overdrafts. Similarly, no banks had a policy in place encouraging or requiring them to make personal contact with young people applying for credit in this way.

All but one of the banks offer unsecured lending to young persons through direct marketing. Of the banks that make such offers, one excludes students from credit card acquisition campaigns, while another may apply a minimum age limit if it has information that certain age groups are unable to service such debt; and one bank does not offer any pre-approved overdraft limits.

All but one of the banks offered credit limit increases to young persons by direct marketing, although one bank qualifies this policy. One bank does not offer overdraft limit increases to young persons by direct marketing, and noted that it is currently reviewing its practice of offering personal loan increases to young persons.

3. Merchants' rights and obligations when accepting card not present (CNP) transactions

This survey aimed to establish from the five banks providing credit card services to what extent they inform merchants of their rights and their obligations when accepting credit card transactions where the card is not present: i.e. internet, mail order or telephone transactions. These merchants are known as CNP (card not present) merchants.

Four of the five banks have either a separate contract or a separate form that CNP merchants are required to sign or acknowledge, including a warning that the merchant assumes all risk if a transaction is disputed or charged back. One bank does not provide its merchants with such a warning.

Banks provide merchants with different warnings of the risks associated with CNP transactions:

- a discussion when the contract or application is signed
- examples of chargeback fraud
- fraud brochures
- regular merchant bulletins
- occasional mail outs to merchants
- monthly or occasional newsletters.

All five banks provide written information about the chargeback period, and also advise their merchants that they may withdraw against funds they have deposited, usually after three or four working days.

Three banks have fraud detection systems that identify unusual activities, and that can trigger further investigation in certain circumstances.

The survey showed that, although many overseas banks check the unique three digit number on the reverse side of Visa and Mastercards, only one New Zealand bank provides this service – only to merchants accepting online transactions, and not for mail order or telephone transactions.

All banks provide information about fraud on their websites. Two banks require specific advice to be given to merchants before the card not present facility is enabled, while one bank monitors merchants who have been associated with a significant number of doubtful transactions.

4. Banks' monitoring of customer accounts for possible fraudulent or unusual activity

Six banks responded to a survey inviting them to provide information about whether, and if so, to what extent, they routinely monitor accounts for possible fraudulent or unusual activity. Possible examples of such activity include: multiple withdrawals up to the daily maximum withdrawal limit on an account over a period of some days; transactions being regularly declined; and large and unusual withdrawals over a short period of time.

All of the banks routinely engage in some monitoring of customers' accounts, although this varies in nature and extent from bank to bank, and is being continuously reviewed and changed in the light of changing technology and changing patterns of fraud.

When considering the very different responses of banks, it should be noted that their individual circumstances vary considerably, in terms of the size, customer base, and range and complexity of their operations.

The survey focused on the following three issues:

(a) the nature and extent of routine monitoring of New Zealand and overseas accounts and credit card transactions for possible fraudulent or unusual activity

Some banks monitor only for fraud, as distinct from unusual activity, in relation to domestic and overseas transactions. Other banks seek to identify unusual patterns of customer behaviour, with one bank having an online "multiple withdrawal alert" that advises when multiple withdrawals from an account occur on the same day. One bank pays special attention to unusual behaviour associated with the accounts of elderly customers. One bank does not specifically monitor customers' accounts, but instead monitors payment channels such as internet, telephone, card and paper. One bank reviews all accounts for suspicious activity not merely by electronic means, but also on the basis of reports from frontline bank staff based on their interaction with

customers. Another bank monitors only for money laundering, and not for fraud or suspicious activity. Yet another bank does not systematically monitor accounts, but seeks to identify irregular activity on the basis of its risk assessment of different types of transaction.

(b) examples of specific circumstances that may trigger action or enquiry, such as a spate of large credit card purchases over a brief period

Banks are continuously responding to ever changing patterns of fraud by refining and updating electronic "triggers" in their transaction record systems. One bank has a credit card detection tool that operates 24/7, highlighting unusual transactions such as the same card being used in different time zones at the same time. Another bank says that its staff are trained to identify "red flags" in interaction with customers, such as the relationship between a high volume of large cash transactions and a given customer's profile.

(c) whether banks whose monitoring of accounts is currently limited to certain types of transaction, e.g. credit card transactions, are considering the option of extending their monitoring to other types of transaction

The banks generally responded by indicating that they already monitor a range of transaction types in different ways. One bank is in the final stages of a large fraud detection tool project that will significantly enhance its detection processes, while another bank says that it monitors all business activity, depending on its risk assessment and any legal obligations.

Time limit for dishonouring cheques

During the year under review I asked the NZBA to provide advice on this issue about which there is considerable confusion amongst bank customers, and occasionally amongst bank staff. Although an approach to the NZBA about banking practice does not equate with a survey of all banks, it is useful to have a clear statement of the rules observed by banks, and the NZBA's statement is included for that reason.

In response to a request for clarification of the time limit for dishonouring cheques, the NZBA responded that the cheque payment system rules that are binding on all banks clearly "require the paying bank to pay or dishonour presented cheques (or images) on the day of receipt, but in any case, no later than Day 2."

The NZBA added the following, to clarify the meaning of Day 2: "Day 2 is defined as the business day following interchange, so for example, a cheque deposited to the payee's account on Monday, should be paid or dishonoured no later than Tuesday."

2

Account operation

Complaints about the day to day operation of transaction accounts are usually resolved quickly once they reach a bank's internal complaints department. However, complaints in this area can be complex, and a mistake by a bank officer, as in **case 1**, can lead to the most unfortunate consequences for the customer. Some elements in this case caused me to identify a possible systemic issue about the bank's training processes, and after the complaint was resolved, I enquired about the training given to new staff about the operation of joint accounts. I found that the bank had already reviewed its training programme in the light of the complaint and had made some changes that should prevent a recurrence of the problem.

A joint account was at issue again in **case 2**. This case also illustrates a common problem which occurs when a bank has made a mistake which should have been noticed by a customer taking reasonable steps to keep track of his or her financial affairs. While there is no duty at law to read bank statements, most banks have a condition in the terms of use for accounts requiring customers to check their statements and make contact if anything is wrong. In most circumstances, a customer can be expected to check a statement and notice anything unusual within a month or so of the arrival of the statement, but sometimes it is reasonable for a longer period to elapse. Once the bank in this case realised why Mr R had not read his statements, it moved quickly to accept responsibility for its earlier mistake.

Case 3 again involved a joint account, but on this occasion it was an account operated on behalf of an organisation. It is not unusual for banks to be caught between opposing parties in a dispute about the right to operate an organisation's account. While it is not the bank's function to resolve the dispute and its obligation is usually limited to safeguarding the organisation's funds until the parties have agreed or a court has determined the rights in the account, it should not freeze the account for longer than is necessary. Once it has reasonable grounds to believe the dispute has been resolved, it should, as in this case, allow normal operation to recommence.

I have remarked in previous years on confusion about the process for cancelling direct debits. Even among bank staff there is a persistent belief that a direct debit can only be cancelled by the initiator and not by the customer. This belief seems likely to have contributed to the problems in **case 4**. The Code of Banking Practice makes it quite clear that banks must act on customers' instructions to cancel direct debits.

The final case in this section, **case 5**, is a reminder of the care that must be taken to follow correct process when handling cash. While there was insufficient evidence to rule out the possibility of a mistake on the part of the customer, the bank officer's failure to count cash in front of the customer or in the presence of another member of the bank's staff meant that I could not rule out other reasons for the discrepancy.



Ms N was distressed to discover that the bank had given her abusive former partner statements on her personal account.

Case 1

Closure of joint accounts - relationship breakdown - customer sought personal account - incorrect advice from bank - advised to remove ex-partner's name from account to change it to a personal account - account details disclosed to abusive ex-partner - breach of confidentiality

Ms N and her former partner, Mr B, had a joint bank account. In September 2006 the relationship broke down. Ms N went to her bank to open a personal account and to look into closing the joint account. The bank officer incorrectly told Ms N that it was bank policy that customers could not have a personal account if they also held a joint account. The bank officer suggested that Ms N remove Mr B's name from the account and told her that doing so would change the account from a joint account to a personal account. On the bank's suggestion, Ms N deleted Mr B's name. Ms N was told that no one would have access to information about the account because it was a personal account.

In February 2007, Ms N discovered that Mr B had obtained copies of statements for the account up until September 2006. Ms N did not want Mr B to obtain her personal details as he had been abusive during the relationship. The bank advised that Mr B would not be able to access her personal account information. Ms N then requested a new account, and was given an account

with the same base number but a different suffix.

In May 2007 Ms N closed both accounts.

In December 2007 the bank told Ms N that it had provided Mr B with copies of statements for the two accounts from September 2006 to May 2007. The bank:

- said it had made an error in changing the joint account to a personal account
- said both accounts were joint accounts
- acknowledged it was at fault
- offered Ms N a letter of apology and \$500 compensation.

Ms N declined the offer and complained to my office. Ms N also wanted the return of the statements sent to Mr B.

After the complaint was taken up by my office, the bank made a new offer of \$2,000.

The bank accepted that it made major errors in the way it handled Ms N's request to remove Mr B from the joint account. There was no bank policy preventing a customer having separate joint and personal accounts, and it should not have removed Mr B's name from the joint account. The bank also accepted that it added to the stress of the break down of the relationship by releasing information to Mr B.

We explained to Ms N that my powers are compensatory only and that I could not require a bank to apologise, nor to recover statements from a customer.

Ms N then agreed to settle for a payment of \$2,000 and a written apology from the bank.



Mr R was too embarrassed about his illiteracy to tell the bank manager that he had not read his account statements.

Case 2

Current accounts - fraud - money withdrawn without authority - customer unable to read account statements - bank to refund stolen funds

Mr R had a joint account with his wife. When they separated, their bank was instructed to remove her access to the account, and it confirmed that this had been done. Unfortunately, her access had not been removed, and over the next three years she withdrew approximately \$10,000 from the account.

The withdrawals came to light when Mr R asked his new partner to check his bank statements for him. He was unable to do it for himself as he is functionally illiterate.

Mr R and his new partner went to the bank, and the manager agreed that the withdrawals had been made by the former wife

and that she should not have had access to the account. However, Mr R was too embarrassed about his illiteracy to tell the bank why he had not read his account statements and noticed the withdrawals. The bank manager considered that he should have noticed them, and offered a refund of only \$500. She did not tell Mr R about his right to have the complaint considered further through the bank's internal complaints process.

Fortunately, Mr R's new partner had heard about the Banking Ombudsman, and Mr R agreed that she should write to me with the full story. As soon as the bank realised there was an explanation for Mr R's failure to read the account statements, it refunded the full \$10,000.



Because opposing factions in a church were at loggerheads over the operation of its account, the bank stopped the account.

Case 3

Account operation - group account - dispute between account owners - funds frozen then released on advice from solicitor - funds removed - did bank act wrongly?

A dispute arose between opposing factions within a church, with both claiming the right to operate the church's bank account. As soon as it was advised of the dispute the bank placed a stop on the church account. At a later date, the bank was advised by solicitors acting on behalf of one side (side A) in the dispute that a new board of management had been appointed to manage the church affairs. The bank agreed to reactivate the account and new signing authorities were completed. Objections were then raised by solicitors acting on behalf of the other side in the dispute (side B). The bank reapplied the stop on the account but in the meantime substantial funds had been withdrawn. A complaint was made to my office by the representative of side B, who considered that his group had been disadvantaged. He sought repayment from the bank of the funds that been removed.

After investigating all the circumstances, in particular the letter from the solicitors acting for side A and the documents that supported it, I concluded that it would be difficult to find that the bank had acted wrongly in accepting the information it contained. It was from a reputable firm of solicitors and detailed the steps taken to resolve matters within the church. From the

bank's point of view, it accepted the assurance that the dispute was at an end. There was no reason to consult with any other party. Matters might have been different if the letter had come from one or more individual members of the church. Clearly it was in the best interests of the church to be able to access the funds in the account and the bank had no reason to continue the hold on the account.

When more than one person or group claims ownership of funds in an organisation's account, a bank can be placed in a difficult position. It is not for the bank to investigate the background to the dispute or to form any opinion about the competing claims except to satisfy itself that there is a genuine dispute. Its role is to safeguard the account but also to ensure that the hold on the account is not kept in place for longer than is strictly necessary.

I found that the bank did not act wrongly in removing the hold on the account and that there was no basis to consider a claim from side B's representative that the bank should reimburse side B for funds removed from the account by the authorised signatories. Side B's representative did not accept my findings, but decided to take no further action.



Ms A's bank had incorrectly advised her that she was not entitled to cancel a direct debit authority. It said that only the company holding the direct debit authority could do so.

Case 4

Difficulties with direct debit facility - set up, cancelled then reinstated - bank did not accept customer's instruction to cancel - debt incurred leading to collection costs and credit listing

Ms A opened a bank account specifically to repay a loan with a finance company. She arranged a direct debit authorising monthly payments. Payments were made for a number of months without incident but then the account was closed. The bank was unable to explain why the account was closed and then re-opened a number of weeks later, and Ms A did not know either about the closure or about the re-opening. When the account was re-opened the direct debit facility was not re-loaded on to the account. This resulted in two failed payments to the finance company and Ms A incurred debt collection costs of \$150.

Ms A contacted the bank to ask why the direct debit payments had not been made. She later said she also asked the bank to cancel the direct debit facility but, according to the bank, she asked for the facility to be re-instated. The following month's direct debit was paid, but a cheque paid into the account was then dishonoured and the account went into unauthorised overdraft. Ms A changed her address around this time but the bank was not notified of her new address. The bank statements and letters about the unarranged overdraft did not reach her. After a number of failed attempts to contact her, the bank closed the account, listed the debt and referred it to a debt collection agency for recovery.

After receiving a letter from the collection agency some months later, Ms A contacted the bank. She asked for an explanation of the debt. When she said she had cancelled the direct debit facility, the bank told her that direct debits cannot be cancelled by the customer, but that cancellation has to be initiated by the company holding the direct debit authority.

The Code of Banking Practice makes it quite clear that a customer has the right to advise his/her bank to alter or cancel a direct debit facility. I was concerned that despite numerous reminders to banks that customers are entitled to cancel a direct debit facility, incorrect advice was still being offered by bank staff. It raised the possibility that Ms A had indeed asked for the direct debit facility to be cancelled and had been ignored.

It was clear that the bank should refund to Ms A the collection costs she incurred when the direct debit facility was not reinstated after the account was inexplicably closed and re-opened. I also found that it was possible that Ms A had tried to cancel the direct debit without success. However, she had received value for the payment made by the bank as the payment was received by the finance company and applied to her loan account. I concluded that the best way to resolve matters would be for the bank to recall the debt from the collection agency, remove the debt listing and write off the entire debt. In exchange, Ms A would not pursue repayment of the collection costs she had incurred. The complaint was settled on this basis.



When Mr C claimed that his bank had miscounted his cash deposit it was discovered that bank staff had not complied with the standard procedure for counting cash deposits.

Case 5

Account operation - cash deposit - mistake in counting cash

Mr C took a cash deposit calculated by him to be \$7,000 to his bank to be paid into his account. He had notes in three different denominations, \$50, \$20 and \$10, contained in six zip lock plastic bags. He said he had carefully counted and checked the notes at home before coming to the bank.

Mr C handed over the notes and his completed deposit slip to the teller, who sorted the notes into separate piles according to denomination and counted some of the notes. Without any explanation, the teller then took the largest pile of notes, and walked about ten feet behind a pillar where he weighed the notes on a note scale. He returned to the counter and continued to calculate a total for the deposit. He then said that the total value of the notes was \$1,000 less than the amount on the deposit slip.

Mr C protested that this could not be right, since he had carefully checked the value. Another teller then was asked to come and check the notes and she agreed with the total arrived at by the original teller. By now there were several other people waiting, and Mr C reluctantly accepted the receipt which was given to him for the reduced amount. He later complained that the bank's counting process must have been deficient.

When investigating the complaint, my investigator reviewed a bank security video. This included separate video pictures taken from the rear of the banking chamber showing the notes being weighed on the note scale. Unfortunately the video recording (which is not designed to provide an audit trail of note counting) did not show the entire process. There were approximately 40 seconds unaccounted for when the camera was moving across the room in another direction.

I also reviewed the bank's written cash handling policy in order to check whether the teller had followed the bank's own cash handling standards.

The investigation showed that the bank had failed to follow two of its established procedures for checking cash, including specific bank policy that all the cash should be verified in the presence of two officers together, if the customer is not present. This did not happen.

I concluded that the bank's failure to follow its due process had disadvantaged Mr C, who should have had the opportunity to view the entire cash counting and checking process from beginning to end, or to have proper verification of it. Although I found deficiencies in the bank process, I did not find any evidence of dishonesty on the part of bank staff, or the customer.

I recommended that the bank should pay Mr C \$1,000, plus a small sum by way of compensation for inconvenience. Both the bank and Mr C accepted this, and the matter was settled.

3

Lending and debt recovery

The number of cases involving debt recovery has increased this year as economic conditions deteriorate. Another indicator of tightening credit criteria is the number of complaints about default listings, usually generated by customers who are unexpectedly declined credit because of adverse listings. While the discovery of a default listing by a bank should not come as a surprise to a customer, and banks are usually conscientious about compliance with Code of Banking Practice requirements to notify the customer before passing the debt to a collection agency, **cases 6 and 7** illustrate difficulties that can occur when joint accounts are involved and the bank has been dealing only with one party.

Customers are sometimes concerned about what they perceive to be a change in the bank's management style, finding less flexibility in their arrangements and perhaps the dishonour of transactions that at an earlier date they could have expected to be honoured. From the bank's point of view, this is usually a response to the customer's deteriorating financial circumstances. A bank is entitled to use its commercial judgement in deciding whether to continue to tolerate a default in the customer's obligations, but it should make it clear if it is no longer prepared to allow drawings in excess of arrangements or to extend further time for meeting

commitments. In **case 8** a transaction was dishonoured when the customer expected it to be honoured, but the bank had made it clear that it was concerned about his finances and that he could not expect the concessions that had been made previously.

Similarly in **case 9** there was a long history of a worsening relationship between the customer and the bank where the customer perceived a lack of support for his business plans but the bank saw increasing requests for credit when current performance was unsatisfactory.

Case 10 was again a case where the bank saw deterioration in the customers' financial position when the customers saw a lack of support for their plans. It also illustrates a fairly common misunderstanding that occurs when the debt recovery process reaches the point where all debt becomes due and payable, so that payment of arrears is no longer enough to satisfy the customer's obligations.

When customers are in default, banks should give reasonable assistance to enable them to understand their obligations and make repayments if at all possible. In **case 11** it eventually became clear that there was a debt to be repaid, but the bank's lack of assistance to customers struggling to understand their

position meant that some compensation was warranted. In **case 12**, on the other hand, the bank took immediate steps to help its customer once it became aware of his difficulties.

Case 13 is a good example of the problems that can arise when a customer goes overseas without either repaying or making arrangements for repayment of a bank loan. If customers want a family member or anyone else to look after their affairs, it is important to give that person proper authority to act and to tell the bank who to contact if there is a problem.

In **case 14**, the bank's error and its failure to acknowledge it or to take any steps to assist its customer in a very difficult situation made this one of the rare cases where I considered the bank should pay the maximum compensation for inconvenience as well as reimbursing a substantial loss.

A bank is normally entitled to recover from its customer any legal costs incurred in looking after its own interests under the agreement with the customer. In this way, a bank can incur considerable costs, knowing that it can simply pass them on to its customer. It may not take any account of the likely effects of those costs on the customer, or recognise that the customer

(who may already be in financial difficulties) has a real interest in keeping such costs down. For this reason there was a careful investigation in **case 15** before I could conclude that the bank was justified in taking specialist advice and arranging to be represented by a major law firm.

Cases 16 and 17 both involved forged signatures on loan documents, and in both cases the bank was less than helpful when the customer approached it about the unexpected debt. When there are allegations of forgery, the first step a bank should take is to determine, if possible, whether there is a forgery. If there is, then unless there are other reasons why the customer should accept responsibility for the debt, the bank cannot enforce the loan agreement against him or her.

Finally, there was no forgery in **case 18**, but the customer was again faced with an unexpected debt. While the discovery of a debt of this kind may well precipitate a relationship crisis, it is very unlikely to be the main cause of the breakdown of the relationship, and I could not accept the complainant's claim that the bank had caused the rift with her partner.

The number of cases involving debt recovery has increased this year as economic conditions deteriorate. Another indicator of tightening credit criteria is the number of complaints about default listings ...



Mr B's application for a personal loan was declined because of an unpaid debt incurred by his former wife on a credit card they had shared.

Case 6

Joint credit card debt - collection action - default listing - bankruptcy of one debtor - failure to notify other debtor before listing

Mr B was very concerned when his application for a personal loan was declined because of a default listing on his credit card. A credit check had shown a listing of an unpaid credit card debt owed to another bank. Mr B could not remember even having a relationship with that bank.

It turned out that Mr B and his former wife had jointly applied for a credit card account many years previously. The application had been accepted and a card issued to his former wife, but he had never had a card on the account. After they separated, his former wife continued to use the card and made all repayments until she ran into financial difficulties in 2006. At that point the debt began to mount up, and she was eventually declared bankrupt. The debt was then listed as a default against both her and Mr B.

Mr B did not find out about the debt until more than a year after his former wife's bankruptcy.

Mr B understood the legal position and was prepared to repay the debt. However, he was very concerned that it had not been brought to his attention earlier so that he could make payment arrangements and avoid a default listing. Although he was the only person of his name in the telephone directory for the area in which he had always lived and therefore was easily traceable, it seems that neither the bank nor the collection agency had made any attempt to contact him.

Mr B was told by his bank's complaint officer that where there was a joint account the bank only needed to contact one of the card holders and that, as his former wife was bankrupt, the debt was his.

My investigator contacted the bank, and after some discussion it was agreed that the bank would:

- recall the debt from the collection agency
- remove the default listing
- write off the collection charges
- reduce the debt by about 12%.

For his part, Mr B would repay the remainder of the debt by instalments.

The complaint was settled on that basis.



When Mrs C and her husband separated she wanted nothing more to do with him. Four years later her name was still on his account.

Case 7

Joint account (husband and wife) - failure to act on wife's request to remove name from account - account overdrawn and debt listed without her knowledge - speedy resolution once bank's complaints department involved

Some years ago, Mrs C had a joint bank account with her former husband. When they separated in 2004, the bank told Mrs C that her husband wanted her name removed from the joint account. Mrs C was happy with this, as she had a protection order against her husband and did not want anything more to do with him. Mrs C wrote to the bank and asked it to take her name off the account. She had nothing more to do with the account.

Early in 2008 Mrs C discovered that:

- her name was still on the account
- the account was overdrawn and the debt was with a collection agency.

To make matters worse, the collection agency was calling Mrs C to demand that she pay the debt, as it had not been able to contact her former husband.

She found the situation very stressful, especially as she was having treatment for cancer at the same time.

In March 2008, Mrs C contacted my office with an urgent complaint.

Mrs C said she had complained to the bank, but had been told by the branch that the account remained in the joint names of her and her former husband and that she was therefore liable for the debt.

My office contacted the bank's complaints department. After a quick investigation, the bank advised that it was going to:

- remove the listing against Mrs C's name at the credit reference agency
- advise Mrs C that she would not be liable for payment of the debt.

The bank's prompt action resulted in a satisfied customer and a quick settlement of the complaint.



When Mr H kept slipping deeper and deeper into overdraft, his bank eventually dishonoured various payments, including his insurance premiums.

Case 8

Lending - business loan - overdraft - unpaid debt - change of account management by the bank - lapsed insurance policy - insurance claim - bank's failure to honour direct debit - collection of debt

In 2001 Mr H applied for and was granted a loan package to finance the setting up of a business. Part of the loan package included a \$5,000 overdraft.

Over the next few years the overdraft was increased to \$10,000 along with an increase to the main business loan. All lending was approved by one of the bank's business managers, who by all accounts had a good working relationship with Mr H. In November 2005 this manager was transferred and a new business manager was appointed by the bank to handle Mr H's account. She became concerned about the level of Mr H's debt, and the relationship deteriorated.

Over the next three years Mr H's business struggled to meet all its commitments and on numerous occasions the overdraft limit was exceeded.

Extensive negotiations (and some periodic deposits by Mr H) failed to resolve the overdraft issue and as a result the bank started to dishonour payments made by Mr H. One such group of dishonours included the premiums on Mr H's insurance policy, which carried an accident and disability benefit.

Eventually, despite further concessions from the bank, the management of the account was transferred to the bank's specialised business service to try to manage the overdue debt.

In April 2006 Mr H was injured in an accident and, although payments were made by ACC, the claim on his insurance policy was declined. The cover had lapsed due to non payment of premiums.

By mid 2007 the outstanding debt had increased to more than \$23,000, and the bank commenced recovery proceedings.

In July 2007 Mr H paid the bank the outstanding amount due as at May 2007. However, with additional interest and other debts the bank was still owed another \$11,000.

Mr H complained to the bank, but it could not resolve the complaint to his satisfaction and he referred it to me.

Mr H asked me to consider two main complaints. Firstly that the bank should have honoured the direct debit for his insurance premiums even though the transaction would overdraw his account, and secondly that the fees charged during the collection process were unreasonable. Mr H also submitted that the bank had acted inappropriately by changing the manner in which the account was managed despite his belief that it would remain as managed by the original business banking manager. In addition to costs for legal fees and interest Mr H also claimed compensation for emotional stress and anxiety.

As Mr H's debt was continuing to increase, the case was investigated under our fast track process.

After investigation I concluded that the bank was entitled to change the management style of the account. Further, there was no obligation on the bank to indefinitely honour transactions overdrawing the accounts and although it may have honoured insurance premiums in the past, the bank had made it clear to Mr H that the situation had changed. In addition Mr H had had an opportunity to reinstate the insurance before it lapsed and before his injury. I recommended that the complaint be withdrawn.

The bank accepted the recommendation. However, Mr H was not satisfied and went on to express concerns that I had moved too swiftly to recommendation and had not allowed him enough time to consider the complaint fully.



Mr W was convinced that his bank had declined various applications for loans because some bank staff, and especially his business manager, were biased against him and his business.

Case 9

Lending - long history to complaint - bank refused to increase its lending - personality issues involved - suggestions of unfair treatment and bias in decision making process

Mr W had a longstanding business relationship with his bank. Over a number of years, his borrowing increased to allow him to continue to develop his business. His accounts were closely monitored, and the bank warned him on a number of occasions that its lending was at its maximum. Finally the bank declined an application for a considerable increase in lending to meet outstanding commitments. Mr W arranged to refinance all his lending, and his accountant formally told the bank about the new arrangements.

Before finalising arrangements with the new lender, Mr W approached the bank again, asking for a meeting to discuss his future requirements. After discussion with Mr W's accountant the bank declined to meet him because it was unwilling to advance the full amount Mr W needed. The refinance with the new lender went ahead.

Mr W wrote to my office with a long list of complaints against the bank, going back over a number of years. He complained that, over a long period, the bank would never lend him enough funds to allow him to develop his business as he wished, although he had ample security. He felt he had been disadvantaged by the attitude of a number of bank staff, in particular his business manager, who had openly displayed doubts about the long term viability of the business. Mr W believed his business manager's attitude towards him prejudiced the decisions the bank made about his lending applications.

It was clear that the root cause of Mr W's dissatisfaction was the limitation on the amount the bank was prepared to lend him. At the outset, I explained to Mr W that I had no power to investigate

a complaint about the exercise of a bank's commercial judgement in a lending or security situation. I could not consider any matter to do with the bank's professional assessment of his business operation or about the maximum amount of debt it considered Mr W was able to service. What I was able to consider was

- the way the bank conducted the administration around the decisions it made
- whether the bank took appropriate steps to ensure that the information upon which it made its decisions was adequate and accurate, and whether Mr W was kept informed of the bank's requirements.

The bank supplied a large volume of information which, once analysed, allowed me to form a clear picture of the relationship between Mr W and the bank over a number of years. Detailed examination of the papers revealed extensive consultation between the bank and Mr W and his accountant over funding requirements and budgets. Mr W dealt with different bank personnel at different times, and I could find nothing to substantiate his contention of unfair or prejudicial treatment. While the relationship between Mr W and his business manager was not an easy one, there was no evidence that personality issues or personal conflict had any bearing on the decisions the bank had made about the level of funding it was prepared to advance. In at least one instance, the business manager had recommended an increase in lending, but it had been refused at a more senior level.

There was no doubt that Mr W had a very genuine sense of grievance against the bank, but I was unable to substantiate any of his complaints. At the end of the investigation it was clear that he was still not prepared to accept that the bank was entitled to limit the maximum amount of lending it was prepared to provide.

My formal recommendation, which Mr W did not accept, was that his complaint should be withdrawn.



They thought the bank was going to apply funds to an overdraft, but instead it applied them to secured debt.

Case 10

Lending - default - breach of agreement - property law act notices - expiry date - mortgagee sale - application of proceeds of sale

Mr and Mrs G's primary business was renovating properties. Mr and Mrs G borrowed money from the bank to purchase properties, renovate them, and to cover their living costs while they worked on the properties.

The bank became increasingly concerned about Mr and Mrs G's debt levels, and eventually demanded repayment of their overdraft because it was significantly over the approved credit limit. When Mr and Mrs G failed to repay the overdraft, Property Law Act notices ("PLA notices") were served on them.

Mr and Mrs G wanted to sell one of their properties to remedy their default. As they were not able to sell the property before the expiry date of the PLA notices, they requested an extension of time from the bank. Mr and Mrs G believed that the bank gave them an extension of the expiry date of the PLA notices. However, the evidence suggested that the bank did not agree to an extension of the expiry date, but agreed to give Mr and Mrs G more time to sell the property themselves rather than having it sold by the bank. When the PLA notices expired, all money Mr and Mrs G owed to the bank became due and payable.

Mr and Mrs G sold the property and paid the net proceeds of the sale to the bank. They thought the bank was going to apply the excess funds to the overdrawn account. Instead, the bank applied the excess funds to other secured debt. The bank also demanded repayment of all money Mr and Mrs G owed to the bank.

Mr and Mrs G complained that the bank breached an agreement to pay the excess funds towards the overdraft. They also believed that it was morally wrong that the bank required them to refinance elsewhere or face mortgagee sales of their other properties. They said that the bank knew very well that they gave up their jobs when working on a renovation project and that their debt therefore increased during that time, but was repaid when the property was sold.

I found that:

- the bank was entitled to apply the surplus funds as it did, and that it acted in accordance with its contract with Mr and Mrs G. I was, therefore, unable to uphold Mr and Mrs G's complaint that the bank had broken an agreement
- the bank was acting within its rights to demand repayment of Mr and Mrs G's outstanding debts, and it was entitled to seek repayment of those debts from Mr and Mrs G
- it seemed that Mr and Mrs G had given up their jobs to work on an earlier renovation project, but in applying for the loan for that project they had declared income from employment to support their application. It was not at all clear that the bank either knew or approved of their later employment status. Moreover they did not take up paid employment again once the renovation project was complete and the property was sold.

Mr and Mrs G did not respond to my recommendation that they withdraw their complaint.



A bank incorrectly deposited funds into Mr and Mrs Z's transaction account, instead of into their credit card account. When their transaction account was overdrawn, they were referred to a debt collection agency.

Case 11

Debt listing - wrong account credited with funds - failure by customer to update contact details - bank's obligation to detail complaints process - bank branch refusal to discuss accounts with customer

Mr and Mrs Z opened a credit card account with their bank and made a deposit of \$1,000 to the account in anticipation of a trip to Australia.

Unknown to Mr and Mrs Z the bank officer made a mistake when they lodged the \$1,000 and credited it to their transaction account instead of to the credit card account. While Mr and Mrs Z were in Australia, they made transactions totalling \$839.57 on their credit card.

Mr and Mrs Z decided to stay in Australia and withdrew all their funds from the bank, leaving an overdrawn balance on their transaction account of just under their overdraft limit of \$500. Mr and Mrs Z did not advise the bank of their new contact address, and all statements sent to their last known address were returned to the bank. After several months and a number of unsuccessful attempts to trace Mr and Mrs Z, the bank closed both accounts and the debts were sent for collection. The debt relating to the overdraft on their transaction account was listed.

Some months later, Mr and Mrs Z discovered the debt listing against their names and immediately tried to contact their bank branch, without success. Telephone calls to the bank's call centre were transferred to branch staff who refused to talk with them because the accounts were closed. They were referred to the collection agent. They wrote to the branch manager disputing the credit card debt, but received no reply. It was only after they

contacted my office that Mr and Mrs Z found out that the listing against their names did not relate to the credit card debt which they were disputing, but to the overdraft on their other account with the bank.

Once it became clear that the credit card debt was incurred because of an error when the deposit of \$1,000 was paid into the wrong account, the bank agreed to reverse all the interest and collection costs charged to the credit card account and to pay Mr and Mrs Z \$300 to acknowledge the inconvenience caused by the mistake.

So far as the other debt was concerned, I found that the bank's decision to refer the debt for collection and have the debt listed was not unreasonable, given Mr and Mrs Z's failure to give the bank up to date contact details. I was not in a position to recommend that the debt be recalled from the collection agency or that the listing against their names should be removed.

However, I was most concerned about the lack of assistance provided at branch level when Mr and Mrs Z attempted to make contact to get information about the debt. They received neither assistance nor the information they sought, and at no point were they directed to the bank's internal complaints process or told about their right to complain to my office. The bank's repeated failure to give Mr and Mrs Z information on how to make a complaint was a breach of the Code of Banking Practice. The bank's failure to reply to Mr and Mrs Z's requests for information it held about them was a breach of its obligations under the Privacy Act.

Taking into account the frustration and inconvenience experienced by Mr and Mrs Z while trying to access information about the debt listed against them, I concluded that an award of compensation of \$1,500 for inconvenience was justifiable. This was accepted, both by the bank and by Mr and Mrs Z, and the complaint was settled on this basis.



When the bank discovered that Mr J, who had incurred a debt that he could not pay off, had been admitted to a psychiatric hospital and was unable to manage his affairs, it agreed to write off his debt.

Case 12

Lending - outstanding debt - bank agreed to write off debt on certain conditions - conditions not fulfilled due to illness - bank threatened further action - once full facts known, bank agreed to write off debt

Mr J took out an unsecured personal loan with a bank. He then developed a serious medical condition which meant that he was unable to work or to repay the debt. The bank held discussions with Mr J and his mother about repayment of the outstanding loan. It then agreed to write off the debt on condition that Mr J first obtained a summary instalment order or declared himself bankrupt. Mr J and the bank signed an agreement to this effect.

Time passed and Mr J did not take any action to obtain the summary instalment order. The bank finally wrote to him indicating that

it would commence recovery action if he did not take steps to implement the agreement. Mr J's mother contacted my office at this point. She felt the bank's letter was threatening and she could not understand why the bank was pursuing matters. Mr J's medical condition had become more serious. He had been admitted to a psychiatric hospital and was currently unable to manage his affairs.

My investigator contacted the bank. As soon as it was made aware of Mr J's current circumstances, the bank agreed to write off the debt without requiring Mr J to take any further action. The bank explained that it had wanted Mr J to take out a summary instalment order or declare himself bankrupt to ensure that he was not able to incur further debt. Mr J's mother was happy with the explanation she received and with the bank's agreement to write off the debt. With the co-operation of both bank and complainant, I was able to bring matters to a swift conclusion.



Ms T had left New Zealand without making an arrangement for managing her bank accounts.

Case 13

Account operation - collection action on overdue debt - failure to advise of consequences of debt referral - banks' responsibilities under Code of Banking Practice

Ms T took out a personal loan with a bank and arranged for the loan repayments to be paid by automatic payment from another account with the bank. Ms T then left New Zealand to take up an employment opportunity and asked her parents to look after her accounts while she was overseas. She did not tell the bank about her departure or make any arrangements to ensure that there were enough funds in her account to meet the loan repayments.

The loan fell into arrears because of insufficient funds to meet the automatic payments. The bank was unable to contact Ms T. It wrote to her on a number of occasions and left messages at the contact number it held for her. A formal demand was then sent to Ms T and when she did not respond, the outstanding balances on the loan account and funding account were referred to a collection agency.

Ms T's father complained to my office about the bank's decision to refer the debt to a collection agent without contacting him or his wife to advise that there was a problem with the accounts.

After a full investigation I concluded that Ms T had left New Zealand without making any arrangements with the bank to allow her parents to manage her accounts on her behalf. I noted that the last contact address for Ms T before she left the country was

her parents' address and that a number of letters had been sent to Ms T at that address. The bank had provided copies of the templates for the relevant letters and I had no reason to doubt that the letters, including the demand letter, had been sent. I was satisfied that the bank had taken all reasonable steps to contact Ms T before it made the decision to refer the debt for collection.

However, when I examined the demand letter and the other letters sent to Ms T, I noticed that none of the letters explained that a possible consequence of failing to respond to the bank's request for repayment of the loan was referral of the debt for collection. This failure was a breach of the Code of Banking Practice.

I concluded that Ms T failed in her obligation to repay her debt to the bank and that the bank was entitled to take appropriate recovery action. However, the bank had not fulfilled its obligation to inform Ms T of the possibility that the debt would be referred to a collection agent and the consequence of such a referral. Therefore, in this particular case, the bank's decision to refer the debt for collection was unreasonable.

I proposed that the bank should recall the debt and remove the debt listing. The bank submitted that it had provided me with the wrong template and that the demand letter sent to Ms T did in fact comply with the Code of Banking Practice. Because Ms T's father did not respond to my findings, the case was concluded without any further action being taken.



When the bank said that it would lend considerably less than the amount originally advised, the couple could no longer build the house designed for them.

Case 14

Lending - mortgage - mistake in calculations - secured finance required for purchase of section and house build - bank overstated amount customers could afford to borrow - mistake discovered after purchase of section - shortfall in funds needed to build - misrepresentation by bank - calculation of compensation - factors to be taken into account in assessing loss - contributory fault by customers - inconvenience

Ms P and Mr R, a young couple, owned a house they had built. They found a section they liked on which they wanted to build a larger and better house.

Ms P went to the bank to check how much they could afford to borrow to buy the section and to build a house. A loan application was completed. The bank officer did some calculations and told him the bank would lend up to \$435,000. Ms P thought that this sounded like a lot of money and questioned the amount with the bank officer. The bank officer told her that this figure was correct.

Ms P and Mr R decided to proceed. They sold their house, bought the section, moved in with Mr R's parents, and asked a draftsman to draw up plans for the new house.

A short time later Ms P and Mr R asked the bank for a small personal loan to cover some expenses. Ms P noticed that some of the figures on the loan application form filled in by the bank officer did not look right. It turned out that a mistake had been made and that the bank officer had used Mr R's gross income details (rather than his net income).

The bank then recalculated the figures it had given to Ms P for the amount it could lend to build the house. It told her that, in fact, it could only lend a maximum of \$325,000 – a \$110,000 difference

from the amount that she had been told about two months earlier. This meant that they did not have enough money to build the house they wanted on their section.

Ms P and Mr R complained without success to the bank, and then approached my office. They wanted the bank to compensate them by paying them \$110,000, the difference between the amount that they had been told they could borrow and the amount that the bank was actually prepared to lend to them. The bank denied that its officer had told Ms P that it would definitely lend \$435,000 and noted that no formal loan approval had been given. The bank no longer had the original housing loan application. This had been destroyed around the date of the draw-down of the personal loan.

I found that:

1. It was more probable than not that the bank had misrepresented to Ms P the amount of money she and Mr R could afford to borrow to build a house on the section that they wished to purchase.

I took into account:

- that the bank officer had used the wrong income figures for Mr R when completing the personal loan application. It was more likely than not that a similar error had been made in completing the housing loan application
- evidence from another bank that, based on Ms P's net income and Mr R's gross income, it would lend the couple a sum of \$430,000 – a very similar figure to the amount that Ms P said she had been told by her bank
- statements from friends and family of Ms P who confirmed that she had told them that the bank had advised her that it would lend up to \$435,000
- that the bank had destroyed the vital loan application before the complaint was made.

On the other hand, the bank had not produced any evidence in support of its position. It had simply said that the bank officer did not and could not have made a mistake.

2. Ms P and Mr R had relied on the bank officer's advice when they made the decision to sell their existing home and to purchase the new section.

3. In order to assess compensation, I had to look at how much it would cost to put Ms P and Mr R back in the position in which they would have been, had the misrepresentation not occurred. This meant looking at how much Ms P and Mr R would now have to pay to buy a similar house to their previous one, as well as the costs they had paid so far and future costs they would have to pay.

I calculated Ms P and Mr R's direct loss to be approximately \$69,000.

However, I found that there had been some contributory fault on the part of Ms P in:

- not obtaining formal written approval from the bank for the total new borrowing proposed
- not questioning the bank more closely about the affordability of a very large increase in total borrowing.

I assessed the level of contributory fault at 15%, reducing the amount of the direct loss to approximately \$58,500.

I also found that Ms P and Mr R had suffered inconvenience as a result of the bank's actions. The inconvenience included stress, embarrassment and disruption to financial planning. Their lives had been placed "on hold" for ten months after the discovery of the bank's mistake, adding to their stress and placing a strain on their relationship. Given the level and duration of the inconvenience, I awarded the maximum compensation sum available of \$6,000.

The case was eventually resolved on the basis I had recommended.

Ms P and Mr R had suffered inconvenience as a result of the bank's actions. The inconvenience included stress, embarrassment and disruption to financial planning.



When the bank passed its legal fees on to its customer, it was asked to justify its decision to seek expensive specialist advice.

Case 15

Lending - responsibilities of a mortgagor and mortgagee - bank's right to pass on legal costs to mortgagor - bank must ensure that costs are reasonably incurred

The bank held a first mortgage over the family home of Mr and Mrs M as security for lending by the bank to allow their brother and sister-in-law to purchase a property. The property to be purchased did not offer the bank enough security to support the amount of lending required.

The brother and sister-in-law were convicted of drug offences and the Crown applied for and obtained a restraining order over Mr and Mrs M's property under the Proceeds of Crime Act. The bank was notified of the application because it held a first mortgage over the property. The bank obtained specialist legal advice and was represented at the original hearing and several subsequent hearings over a two year period before the order finally expired.

All the legal fees paid by the bank were charged to the loan account and paid by Mr and Mrs M. They complained to my office that the legal fees were too high and that they had been incurred unnecessarily. They believed that if the police had decided to sell the property under the Proceeds of Crime Act, the bank, as first mortgagee, would have received payment of the amount of the loan.

I accepted that the terms and conditions of the mortgage allowed the bank to recover any costs, including legal costs, incurred by the bank in protecting its interests in the property. I asked the bank to justify its decision to seek specialist legal advice, not just for the original hearing, but also when later hearings took place to continue the restraining order.

After investigation I was satisfied with the bank's explanation that the complexity of the matter needed specialist legal skills. The costs incurred seemed reasonable for the amount of work done. While Mr and Mrs M suggested that the bank would have received payment first in any forced sale, the Proceeds of Crime Act is unclear on whether a bank's position as mortgagee is fully protected. I noted also that the bank had complied with its obligations to its customers by advising them of the costs to be charged before the costs were added to the loan account. I concluded that this was an unusual case and that the bank had good reason to seek expert legal advice to ensure its interests were fully protected. There was nothing to suggest that the costs incurred were excessive or were incurred unnecessarily.

Mr and Mrs M remained unhappy about the costs, but accepted that the bank was entitled to pass on the costs under the terms and conditions of the loan agreement.



Mr C discovered that his wife had forged his signature on a credit card application, and had run up a debt in their joint names. The bank refused to consider his complaint until he made a formal complaint to the police.

Case 16

Fraud - credit card - fraudulent application - liability - police complaint

Mr C discovered that his wife had forged his signature on a credit card application, and had incurred a significant debt in their joint names.

Mr C told the bank that he did not apply for the card, but the bank was not prepared to consider a fraud complaint until Mr C made a formal complaint to the police. It was suggested to Mr C that he should sort the matter out directly with his former wife.

Four years later, Mr C contacted the bank again because he could no longer afford to make repayments on the card. Again, the bank was not prepared to consider a fraud complaint because Mr C had not made a complaint to the police. By this time, it was too late for Mr C to make a police complaint.

When I investigated Mr C's complaint, the bank accepted that Mr C did not complete or sign the application form. I found that the bank was negligent because it did not take steps to validate the authenticity of the application form. In addition, I was satisfied that Mr C did not receive any benefit from the transactions made by his former wife.

Because Mr C did not apply for the account, he had no contractual liability for the debt. Accordingly, I found that the bank did not have the right to:

- demand repayment of the debt from Mr C
- refer the debt to a third party for collection
- list Mr C with a credit reference agency.

I also found that it is not always necessary for someone complaining of fraud to make a police complaint. In this case, the bank was in a position to form a view as to whether the application was fraudulent because it was in possession of the application form. I did not agree with the bank's submission that Mr C's failure to make a police complaint affected its ability to seek redress from his former wife. The bank had entered into a contract with her, and it could seek repayment of the debt from her by enforcing its contract.

Both Mr C and the bank accepted my proposed recommendation that the bank should reimburse Mr C the total amount of the repayments he had already made to the bank, nearly \$4,000.





When Mrs A complained that her ex husband had forged her name on a large loan, her bank advised that he had a power of attorney to sign on her behalf.

Case 17

Loans - lending to one spouse without consent or authority of other - wife's signature on loan document forged - forged loan void against wife - wife unable to recover amount of forged loan from former husband - defects in bank's processing of loan agreement - bank to reimburse wife for her half of the fraudulent loan and other expenses - substantial inconvenience due to bank's errors and delays - assessment of compensation for inconvenience

Mrs A and her former husband were building a house on a section they owned. While the house was being built, they separated. Mr A then obtained a loan of \$130,000 from the bank. He said he needed the money to complete the house. Mrs A knew nothing about the loan. The bank did not contact her about it.

Some time later Mrs A found out about the loan and saw that her signature on the loan agreement had been forged by someone.

She complained to the bank. The bank advised that the loan agreement had been signed on her behalf by Mr A, who said that he held a power of attorney for her. Therefore the bank could not be of any further assistance to her. Because of the bank's advice she was forced to concede in Family Court proceedings with Mr A that the loan was a legitimate matrimonial debt. This meant that she was responsible for paying half of the loan.

Because there were other funds available to finish the house, Mrs A believed that Mr A had used the loan proceeds for his own benefit. She remained very unhappy about the loan. Some years later she asked the bank for more information. After looking through its files, the bank found that it had never actually sighted any power of attorney from Mrs A when the loan was granted. It acknowledged that there were doubts about Mrs A's signature on the loan document.

Mrs A tried unsuccessfully through the Family Court to recover her half share of the loan from Mr A.

I then took up the investigation of Mrs A's complaint against the bank. I found that there was no doubt that Mrs A's signature had been forged on the loan document by either Mr A or the bank officer. It was also clear that Mrs A's signature was not signed by Mr A pursuant to any power of attorney.

It followed that the loan in question was invalid or void as far as Mrs A was concerned. The bank could not have sought repayment of the loan from Mrs A. As Mrs A had paid back half of the loan proceeds, she had suffered a loss of \$65,000.

I found that:

- it was poor banking practice for the bank to have allowed Mr A to take home the loan documents, purportedly to obtain Mrs A's signature
- the bank had failed to conduct any sort of investigation into the validity of the loan when it became aware, some years previously, that Mrs A knew nothing about it, and that her signature on the loan agreement may have been forged. The bank had also provided incorrect information at the time of the first round of matrimonial property proceedings between Mr and Mrs A, by claiming that Mrs A's signature had been signed by Mr A pursuant to a power of attorney
- the bank had provided little to no assistance to Mrs A when she re-opened her case against Mr A and sought to have the previous matrimonial property agreement set aside.

Because of a lack of information and financial records, it was very difficult to make any findings as to how the money from the loan had been spent. It was possible that some of the money was spent on building the house, but it was just as likely that the money was put away by Mr A to be used for his own purposes after separation.

I could not define Mrs A's loss precisely. However, I was satisfied that the bank's actions had significantly contributed to the unsatisfactory position in which she found herself. It had effectively deprived her of the opportunity to dispute the validity of the loan and its status as a matrimonial debt, or to uncover the truth about what actually happened to the loan proceeds.

I considered that it was fair in all the circumstances that the bank should pay a substantial contribution to the loss and costs claimed by Mrs A. It was reasonable to ask the bank to pay half of Mrs A's share of the loan, a sum of \$32,500. I accepted that in order to purchase a new property for herself, Mrs A had been required to borrow an extra \$65,000 that she would otherwise not have had to do. It was reasonable that the bank also paid half of the interest that Mrs A had to pay on the additional loan, a sum of \$16,750, and that it should make a contribution to the legal costs that Mrs A had incurred in pursuing Mr A through the Family Court, a sum of \$23,782.60. Finally, I had no hesitation in finding that the bank's actions over a considerable time of eight years had caused Mrs A enormous stress and inconvenience. I suggested the bank should pay Mrs A the maximum compensation available for inconvenience under my Terms of Reference - \$6,000.

This amounted to a total settlement of \$79,032.60. The bank and Mrs A agreed to settle on this basis.

The bank had provided little to no assistance to Mrs A when she re-opened her case against Mr A and sought to have the previous matrimonial property agreement set aside.



After separating from her husband, Ms C said that the bank's actions had caused her marriage breakdown and had a catastrophic effect on her and her children's lives.

Case 18

Loans - lending to one partner without authority or consent of other partner - bank blame for break down of relationship between partners - assessment of appropriate compensation for direct loss and inconvenience

Ms C and her former partner, Mr D, borrowed money from the bank to build a house on a section they owned. Ms C understood that the loan was for \$285,000.

Some months later Ms C and Mr D sold the property. Ms C then discovered that the amount owed to the bank was over \$316,000. She found that, a few months previously, an additional \$30,000 approximately had been made available by the bank without her knowledge.

Ms C accused Mr D of obtaining a further loan without her consent. Mr D said the bank had made a mistake but Ms C did not believe him. Ms C and Mr D then separated.

Because of the additional loan, some of which appeared to have gone into Mr D's business, Ms C received less than she was expecting from the sale of the house. Ms C complained to the bank. She said that the bank's actions had had a catastrophic effect on her and her children's lives. She blamed the bank for the ending of her relationship with Mr D and sought compensation of \$35,000.

The bank offered compensation of \$3,000 for the inconvenience caused to Ms C. This was not accepted and Ms C complained to me.

I met with Ms C. After some discussion and calculations, it became clear that, in fact, the difference between what Ms C received from the sale of the property and what she thought she would receive was only \$7,000.

We then discussed the bank's offer of compensation for inconvenience. Ms C accepted that, while the bank's actions had contributed to the stress and anguish she had suffered on her relationship break-up, the bank could not be held solely responsible for the situation. There had to have been other issues between Ms C and Mr D that contributed to their difficulties. Therefore Ms C accepted that the bank's offer of \$3,000 compensation for inconvenience was reasonable.

Following my meeting with Ms C, I advised the bank that Ms C's claim for direct loss had been reduced to \$7,000. After some deliberation, the bank agreed to offer Ms C \$7,000 as compensation for direct loss, in addition to the \$3,000 compensation for inconvenience.

Ms C accepted the bank's increased offer.

4 Cards

We continue to receive complaints that banks have not reimbursed customers their loss when a card has been stolen and used with the correct PIN to make transactions. However, it is now unusual to have to investigate a case where the issues are straightforward, and both **case 19** and **case 20** were ones where there was a question as to whether there had been an appropriate standard of care of the card and PIN.

In **case 20** there were questions about the care of the card, and also about the delay in reporting its loss. On both issues, the standard to be expected of the customer is the standard of care that a reasonable person would take in everyday life. There is no obligation to be aware of the precise location of the card at all times, especially if the cardholder has no reason to believe that the card is not in its usual place. Similarly, the obligation to report the loss of a card is an obligation to act within a reasonable time.

Case 21 is an example of a type of complaint we receive regularly but infrequently, where there seems to be no plausible explanation of the events. It was highly unlikely that the cardholder had made the disputed transactions, and almost as unlikely that they had been made by a member of his family. In such a case it is necessary to weigh carefully every bit of evidence to determine whether, on the balance of probabilities, the cardholder has acted in such a manner as to lose the protection provided by the contract under which the card was issued. In this case, where

every explanation for the use of the card seemed unlikely, there was insufficient evidence to make such a finding.

From time to time there is confusion between a bank's rights and obligations under its contract with its customer and its rights and obligations under its contract with an international credit card organisation such as Visa or Mastercard International. In **case 22**, the bank was unable to charge back the disputed transactions under the international rules, but this did not mean that the customer had no right to reimbursement under the terms of her contract with the bank.

In **case 23**, the bank may have had chargeback rights, but the investigation came to an unexpected end when the customer's suspicions of fraud turned out to be (possibly) unfounded.

The failure of a card to function properly when the customer is overseas can be a very distressing experience. We seem to have had a small increase in cases of this kind as New Zealand banks do not yet routinely issue cards with a chip rather than a magnetic stripe while chip-operated cards seem to have become the norm in Europe and some other popular destinations for New Zealand tourists. In **case 24**, the merchants may not have known how to process the transactions. However, it is also our experience that New Zealand banks will readily assist their customers in difficulties overseas, and it is not usually difficult for the customer to contact the bank.

Case 25 concerns a different aspect of card use. The rules about the calculation of interest on a credit card account are complex and if the outstanding balance is not paid in full by the due date, the result can be unexpectedly expensive.



Mr T's former flatmate had used his card to withdraw money from Mr T's account. When the case came to court, the flatmate pleaded guilty, but alleged that Mr T had told her his PIN.

Case 19

Eftpos card - unauthorised withdrawals - reasonable care of card and PIN - reparation - bank's liability - easily identifiable PIN - breach of conditions of use

Mr T's former flatmate used his Eftpos card to make unauthorised withdrawals totalling over \$8,700.

Mr T was ill and on medication when the offender made her unauthorised withdrawals. She was able to take the card and return it to Mr T's wallet, which was kept in his bedroom, while he was asleep. This meant that Mr T did not detect the unauthorised withdrawals at once.

The offender was charged over the unauthorised withdrawals, and pleaded guilty to using a document for pecuniary advantage. In court, she said that Mr T had told her his PIN and asked her to purchase methamphetamine. Mr T denied this, and submitted that the offender must have seen him entering his PIN.

The offender was ordered by the court to pay Mr T around \$5,400 reparation, which Mr T made no attempt to recover.

The evidence supported Mr T's explanation for the offender's knowledge of the PIN and her ability to take and return his card without detection. I consider that it is unreasonable to expect cardholders to keep their card with them at all times, and concluded that Mr T had kept the card in a reasonably secure place.

I also found that Mr T's PIN, 1233, was very close to being an easily identifiable combination of numbers, which would have been a breach of the conditions of use of the card, but fell just short of being an actual breach.

The bank was contractually liable to Mr T for his loss, less his customer liability of \$50. However, given Mr T's failure to seek recovery of the reparation and the fact that some years had passed since the order was made, I proposed to recommend that the bank only pay Mr T half of his loss, and that Mr T should assign his rights to the reparation to the bank. Mr T and the bank accepted my proposed recommendation.



When a conman used Mr S's credit card and PIN to steal money from his account, the bank refused to reimburse Mr S, arguing that he had not taken reasonable care.

Case 20

Credit card - card misplaced at home - unauthorised withdrawals - reasonable care of card and PIN

Mr S lived in a block of units. One day Mr S met someone who was waiting for a unit to become available where he lived, and invited that person to stay with him while he waited for his unit. Unbeknown to Mr S, the person was an experienced conman.

The conman watched Mr S enter his PIN at a crowded bar. The terminal he used did not have a guard to prevent PIN entry being seen. The conman subsequently used Mr S's credit card and PIN to obtain \$6,300 without his knowledge.

Mr S typically left his card in his wallet in one of his drawers. One day he was unable to find his wallet. He found it the next day in a different part of his home. Mr S did not notice that his card was missing from the wallet until he went to make a purchase three days later. Mr S reported his card missing approximately 45 minutes later, after he had walked home. The last fraudulent transaction occurred during those 45 minutes.

The bank declined to reimburse Mr S because it thought he had not taken reasonable care of his card and PIN, and he had delayed

in reporting the loss of the card.

I found that the bank had failed to put forward enough evidence to support its refusal to reimburse Mr S. In particular:

- (a) not being able to immediately locate one's wallet is not the same as having lost it. Mr S had no reason to believe that his card had been stolen when it seemed that he had merely misplaced his wallet at home, and therefore he had no obligation to report its loss. Banks issue credit cards with the expectation that people will use these cards in their daily lives, and will take ordinary everyday care of them
- (b) given that the conman was experienced, it would have been simple for him to have seen PIN entry, even in a darkened bar. The fact that Mr S in hindsight was able to identify how the PIN was obtained does not disqualify him from reimbursement
- (c) it was reasonable for Mr S to walk home before reporting to the bank that his card was missing.

I recommended that the bank reimburse Mr S for his loss, less \$50. The bank accepted my recommendation.



Mr H's card was used to make unauthorised withdrawals in between his own transactions, when he thought it was safe in his wallet all the time.

Case 21

Credit cards - unauthorised cash withdrawals - safety of card and PIN - use of card by friend or family member - delay in reporting unauthorised transactions - onus on bank to show breach of terms and conditions

Mr H had been a holder of a Visa credit card with the bank since 1995.

During a weekend in October 2007 the credit card was used by Mr H to purchase miscellaneous goods. During the same weekend the card was used on six occasions to withdraw cash totalling \$2,960. Mr H claimed these cash withdrawals were not done by him. However, the credit card used was in Mr H's wallet and was used by him before, between and after the alleged unauthorised cash transactions.

Mr H became aware of the cash transactions when checking his account on-line on the Sunday of the weekend concerned. He immediately called the bank's contact centre and reported the unauthorised transactions. The credit card was cancelled.

Mr H sought reimbursement from the bank. As a gesture of goodwill the bank offered to reimburse the sum of \$1,500, approximately half of the loss. Mr H declined to accept the bank's offer.

The bank submitted that, as Mr H was able to use his credit card at various times on the weekend, someone either within his family or a close friend was not only able to remove the card from the wallet, but also had knowledge of the PIN and as such Mr H had

failed to comply with the terms and conditions of use.

The bank suggested that the theft must have been carried out by a member of Mr H's family (his wife or one of his two teenage sons). As Mr H's wife was either in his company or close by during the whole weekend the suspicion fell onto Mr H's sons. Further investigation revealed that it was extremely unlikely either son had been in a position to access the card or had knowledge of the PIN.

In considering this complaint a number of factors were taken into account including Mr H's care of the card and of the PIN and the question of any delay in Mr H reporting the unauthorised transactions.

After weighing up all the evidence I found that the bank had failed to show a reasonable probability that Mr H had breached the card's terms and conditions of use. Despite the apparent evidence to the contrary it was possible that a member of or a regular visitor to the household obtained and used the card, having overlooked an earlier PIN entry without Mr H's knowledge, or that a member of or visitor to that household had passed the card and PIN to someone who used it.

The bank accepted my recommendation to reimburse Mr H for the full amount of the loss less the \$50 standard maximum customer liability plus \$35.91 interest.



Someone had made unauthorised transactions on Ms T's credit card. Her bank said that she had not complied with her obligation to keep her card secure at all times

Case 22

Credit card - unauthorised use - irrelevant that signatures looked authentic - infrequent use of card - not unreasonable not to notice card missing for periods - unreasonable delay in notifying bank - bank bound by its contract with the customer - Visa International's rules irrelevant in that context

Ms T complained to her bank that an unknown person had made several unauthorised transactions using her Visa card over a seven week period. All but two of the transactions were made without the card present. The transactions made with the card present were signed for rather than a PIN being used. Ms T said the Visa card had been in her wallet behind other cards at all times.

The bank told Ms T that it would only investigate the disputed transactions where the card was not present, and that she was liable for the transactions that occurred when the card was present. The bank explained that this was because it was Ms T's responsibility to ensure that her card was always kept secure. It said she had previously advised that the card was always in her possession, so she had verbally agreed to those terms.

The bank investigated the complaint. It determined that under the Visa International rules it could not charge back any of the disputed transactions and closed its file on the investigation. The reasons for declining were: (a) a disputed transaction was for domestic air travel that was booked in Ms T's name; (b) signatures provided in the course of two of the disputed transactions closely matched Ms T's signature.

Ms T's mother brought the complaint to me on behalf of Ms T in May 2007.

The pattern of the use of the card had the characteristics of an unauthorised user, with several declined attempts at use over the space of two days. There was no suggestion that Ms T was making

a fraudulent claim, so it was irrelevant that the signature on the sales vouchers looked like her signature. Ms T had also lodged a complaint with the police. It was unlikely she would have done this had she had been in any way involved in the transactions that she was disputing.

Regarding the care of her card, Ms T said that her Visa card was kept in the back of her wallet behind other cards. She had not noticed it missing at any time. Although it appeared that it had been taken from her wallet several times, probably by someone with whom she was living at the time, I found no evidence to suggest that she had failed to take reasonable care to safeguard the card. She used it infrequently and would not necessarily have noticed or had cause to notice if the card was missing from her wallet from time to time. She had no reason to believe that the people with whom she was living had criminal intentions, or that she should be suspicious of them.

The conditions of use for the card (the contract between the bank and Ms T) stated that the cardholder was responsible for "transactions authorised by you". This implies that cardholders are not liable for transactions involving sales vouchers not signed or authorised by them. As Ms T had neither signed nor authorised the manual transactions, the bank was obliged to refund her for those transactions. The bank was bound by its contract with its customer and Visa International's rules (which govern the chargeback process) were irrelevant in this context.

I was concerned about the fact that disputed transactions were for domestic air travel that had been booked in the name of Ms T. However, it was noted that Ms T's name had been mis-spelt on the booking and that the tickets were not used. I accepted that Ms T did not book or authorise the air travel.

Finally, I had to consider Ms T's delay in notifying the misuse of her card. Ms T had not advised the bank of her change of address at the time of the unauthorised activity on her card, and

(continued overleaf)



Mr B became suspicious about an overseas purchase, and arranged for his credit card to be cancelled, believing that the transaction would no longer go through.

case 22 continued

statements on her card account were being sent to her former New Zealand address where her mother lives. The unauthorised transactions occurred between 3 September and 26 October. Ms T's statements were sent on about the 13th of each month. Had she received and checked her September statement she would have noticed before the end of September the unauthorised transactions that had taken place on 3 September. Similarly, had she received and checked her October statement she would have noticed the unauthorised activity that took place on 10 and 11 October.

Ms T only used her card infrequently and had no cause at the time to suspect that there had been any unauthorised activity, so it was reasonable that she may not have always thought or been concerned to check statements each month. Allowing for a one week delay for the October statement to be sent to her in Australia she should have received it on or about 21/22 October. I found that by waiting until the end of October before noticing and advising the bank of the unauthorised transactions on her Visa account, Ms T had unreasonably delayed in notifying. She would have to bear the loss of the unauthorised transaction that took place on 26 October (\$669.09).

I proposed, and both parties agreed, that the bank should reimburse Ms T for the unauthorised transactions that occurred on her account between 3 September and 21 October inclusive, less the standard \$50 maximum customer liability sum, a total of \$1197.90.

Case 23

Credit cards - authorised transaction cannot be cancelled - chargeback process - goods accepted in lieu

Mr B purchased jewellery in Thailand and intended to collect the jewellery before returning home. After he made the purchase, he became suspicious that he had been drawn into a scam, and believed that the jewellery was not genuine. He contacted his family in New Zealand and they in turn contacted the bank, and arranged for his credit card to be cancelled. They also gave the bank Mr B's phone number in Thailand.

The bank called Mr B two days later. As a result of the contact, Mr B understood that the transaction had been cancelled. He then returned home from Thailand without the jewellery.

In fact the transaction had not been cancelled. Once authorised, a credit card transaction cannot be cancelled without the agreement of both the merchant and the cardholder. It seems the bank told Mr B that the transaction had not been processed, which is a different matter altogether.

Mr B believes the bank gave misleading information when it said that the transaction had not been processed – he thought this meant the transaction could be cancelled by the bank. The transaction was subsequently processed and the bank attempted, unsuccessfully, to charge back the transaction. During the chargeback process the bank obtained the jewellery from the merchant, and had it valued. The valuation was very close to the merchant's valuation and the jewellery was genuine.

Mr B accepted the jewellery from the bank in settlement of his complaint. While this was a satisfactory outcome, it is not clear whether the jewellery the bank obtained was the same jewellery that the merchant intended to give to Mr B.



Ms S cut short her overseas holiday because her credit card rarely worked. She claimed a substantial amount in compensation from her bank.

Case 24

Credit cards - use of card overseas - ruined holiday - card not accepted by overseas merchants - compensation for inconvenience - factors to be assessed - deduction for customer's failure to contact bank to make alternative arrangements

Ms S applied for and was issued with a Mastercard by the bank before her departure on an overseas trip in June 2007. The Mastercard was issued as a "sign only" card, and was not operable by use of a PIN or other electronic means.

While Ms S was overseas she was only able to use the card on four occasions. On other occasions the transactions were declined. As a result Ms S cut short her holiday and complained that the bank was aware or should have been aware that the type of card issued to her would encounter problems. She claimed approximately \$17,000 for numerous expenses incurred as a result of her inability to use the card.

Upon receipt of the complaint the bank apologised and initially made an offer of a gift as settlement. When this was declined, the bank conducted further investigations, again apologised, and made an offer of settlement of just over \$3,000, most of which was compensation for inconvenience. Ms S rejected the offer.

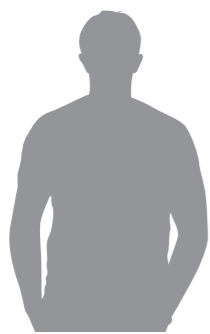
After investigation I found that there was no doubt Ms S had experienced difficulties using her Mastercard throughout Europe. The reason for the difficulties was not clear.

On balance, it was most likely that the problems were either caused by the merchants' machines being faulty or by the incorrect card verification code being entered. The bank was not responsible for any problems associated with the merchant machines, as it had no control over the machines used by the merchants or the maintenance of those machines.

During her time overseas Ms S had attempted to resolve the problem by going to the Mastercard web site and some of the local banks in the areas she was visiting. However, she had not tried to contact her bank in New Zealand to rectify the problem.

The bank provided a reverse charges telephone service for its customers overseas. If Ms S had used this service the bank could have made alternative arrangements such as transferring funds to her Eftpos account or providing an emergency cash advance to resolve the problem. However, as Ms S had made no effort to contact the bank in New Zealand these options were not made available to her.

Giving these findings I concluded, and Ms S accepted, that the settlement offer made by the bank was reasonable.



Mr D left an amount unpaid on his credit card after the due date. He felt that the bank had overcharged him by charging more than one month's interest on the outstanding amount.

Case 25

Credit card statement - amount unpaid after due date - interest calculation - contract terms and conditions

Mr D was accustomed to paying the full outstanding balance on his credit card statement by the due date. On one occasion, he paid only \$600 of the \$800 outstanding by the due date and paid the remaining \$200 early in the next month.

When he received his next monthly statement, the interest charged to the account was (according to his calculations) more than one month's interest on the balance of \$200 brought forward. He asked the bank for an explanation. It said that in such circumstances it was entitled to charge the account with interest on the unpaid balance which was outstanding for the number of days since each unpaid transaction had occurred. Mr D considered that he should only pay interest on the amount outstanding during the "current" monthly period and only for the number of days until he made the payment. He did not consider that he should have to pay interest for part of the previous monthly period. He said that the bank was "receiving interest it was not entitled to beyond the date when he had paid in full".

Mr D told the bank that he was not satisfied with its explanation and asked me to review the process.

I asked the bank to provide a copy of the credit card contract which is set out in the terms and conditions of use booklet given to each customer. In the booklet it said: "If payment in full is not made by the pay by date, interest on our current credit card interest rate for purchases, charges and interest will be charged on the daily outstanding balance from the transaction date until the amount is paid in full" (my emphasis). An investigator from my office explained the terms and conditions to Mr D, and confirmed that the interest had been calculated as described in the terms and conditions clause.

Mr D accepted the explanation and agreed that no further action need be taken. However, he also said that he still considered the bank's interest charging policy to be unfair to its customers

5

Cheques

All banks that are members of the Banking Ombudsman scheme now process cheques electronically, thus reducing the time needed for cheques to clear. This means that, because the window of opportunity for stopping a cheque is now much narrower, it is probably prudent for a customer making payment by cheque to think of it as irreversible in the same way that electronic payments are irreversible.

Cases 26 and 27 both concerned cheques that could not be stopped because the stop instruction was made too late, and both involved inaccurate advice about the clearance process. In **case 26** a bank officer erroneously told the customer that the cheque could be stopped, but as the cheque had already been paid and there was no action the customer could take to stop or reverse the payment, I could not find the bank responsible for

his loss. In **case 27**, however, the customer still had a chance to stop the cheque and would almost certainly have done so if the bank officer had given accurate information. The bank eventually recognised this and refunded the customer's loss.

Bank cheques are often regarded as similar to cash and are used in circumstances where certainty of payment is important. They differ from personal cheques in that they can only be stopped for a limited number of reasons, but there is a persistent misapprehension that they cannot be stopped at all. In **case 28** the bank cheque was properly stopped and should not have been paid. The payment started a chain of events that caused the customer a great deal of anxiety as well as financial stress, and the bank recognised this in its offer of settlement.

Case 29 was a case where the bank cheque ought not to have been stopped, though fortunately the customer was only subjected to some inconvenience as a result of the stopping.



Mr M contacted his bank late one day, instructing it to stop a cheque made out to a company that had just gone into liquidation. Unfortunately for Mr M, the cheque had already been presented and paid.

Case 26

Cheque - stop - dishonour - cut-off times - inter-bank agreements - misinformed about stopping a cheque

Mr M gave a company a cheque for around \$3,600. The company presented the cheque and the amount was debited from Mr M's account the next day.

The next working day Mr M discovered that the company was in liquidation. He called the bank at approximately 5.40 pm that day and asked it to stop the cheque. The bank told Mr M that it had placed a hold on the cheque. Mr M believed that the funds would be immediately credited back to his account.

Later that night, Mr M called the bank again to ask why his account had not been credited. Mr M was told that the cheque had already been paid and could not be stopped. He was dissatisfied with the

bank's explanation of events and complained to me.

I accepted that it was too late for the bank either to stop the cheque or to initiate a manual dishonour of the cheque because:

- a stop must be placed on a cheque before it is presented. In this case, the request to stop the cheque was made after it had been presented
- it was too late to initiate a manual dishonour of the cheque. Dishonour cut-off times and clearance times for cheques are determined by inter-bank agreements and banks' internal procedures, not by law. Under the bank's internal procedures, a manual dishonour of a cheque has to be initiated by 4 pm on the day after it is presented so that the bank has sufficient time to tell the collecting bank about the dishonour.

The bank did not cause Mr M's financial loss because the cheque had already been paid by the time Mr M asked for the cheque to be stopped.

It was unfortunate that the bank misinformed Mr M when he first enquired about the cheque. He was naturally disappointed and upset when he found the cheque could not be stopped. With this in mind, I recommended that Mr M accept the bank's earlier offer of \$1,000 compensation, which I considered to be very reasonable. Mr M did not accept my recommendation.



After Mr and Mrs L's bank told them that they could stop a cheque within three days of it being presented, they were upset to discover that this advice had been incorrect.

Case 27

Stopping cheques - limited time to stop payment - bank advised customer had three days to stop cheque after presented for payment - request to stop cheque made two days after it was presented - incorrect advice - cheque cleared

In November 2007, Mr and Mrs L gave a cheque for \$3,000 to their former accountants for payment of fees. The cheque was hand delivered on a Thursday with strict instructions not to bank it until the next day. The cheque was presented the next day, Friday.

The following Monday, because of a dispute with the former accountants, Mrs L contacted their bank to get urgent information about the process for stopping personal cheques. A bank staff member advised Mrs L that the cheque could be stopped and that they had three business days from when the cheque was presented in which to do so. Mrs L told the bank that she would discuss the matter with Mr L and that, if they decided to stop the cheque, they would do so the next day.

The next day, Tuesday, Mr L contacted the bank and instructed it to stop the cheque. The bank advised Mr L that the \$3,000 would be credited back to their account within a few business days.

One week later Mr and Mrs L contacted the bank, as the funds had not been credited to their account. They were told that the bank had stopped the wrong cheque, and that the cheque for \$3,000 had been cleared. Mr and Mrs L tried unsuccessfully to obtain important records from their former accountants and had to instruct new accountants to reconstruct their accounts.

The bank said that it gave incorrect advice about the timeframe for stopping cheques. It told Mr and Mrs L that:

- in exceptional circumstances only, the bank has 24 hours to stop cheques
- even if they had been given correct advice, it would not have been able to stop the cheque. This was because Mrs L first contacted the bank outside the 24 hour period for stopping cheques.

Mr and Mrs L were not satisfied with the bank's response and complained to me.

The bank confirmed it had given Mrs L incorrect advice about stopping cheques. Had Mrs L been correctly advised of the very limited opportunity to stop a cheque, she could have asked the bank to stop payment on the cheque on the Monday and it would almost certainly have been stopped.

In those circumstances, I considered it reasonable that the bank reimburse Mr and Mrs L \$4,500. This included compensation for inconvenience as well as the new accountants' fee for reconstructing the accounts.

After further negotiation between the bank and Mr and Mrs L, the complaint was resolved on this basis.



Ms P sent Ms C a bank cheque. About a month later she thought that the cheque had been lost, and instructed her bank to stop it.

Case 28

Bank cheques - stopping - limited circumstances in which payment may be refused - customer advised bank that cheque appeared to be lost - cheque stopped - funds returned to customer's account - cheque presented for payment three months later - bank paid bank cheque and froze customer's account

In August 2006, Ms P requested a bank cheque for the sum of \$65,000 to be made payable to Ms C. Ms P sent the cheque to Ms C but did not hear from her or receive a receipt for the cheque. Ms P thought the cheque had been lost, so on 5 September 2007 she requested the cheque be stopped. Ms P's bank stopped the cheque the following day and Ms P's account was credited with the sum of \$65,000.

Three months later, on 6 December 2006, Ms C deposited the cheque into her account. Ms C's bank allowed her access to the funds and Ms C paid her solicitor for a transaction he was conducting for her. However, the following day Ms P's bank dishonoured the cheque. Ms C's solicitor asked Ms P's bank why the cheque was dishonoured and was told that the bank had stopped the cheque after being advised by Ms P that it was lost. Ms P's bank checked with Ms P about the stopping of the cheque. She confirmed that she requested the stop because she was concerned the cheque was lost. Ms P's bank then advised Ms C's solicitor that it had stopped the cheque for a legitimate reason.

A few days later Ms C's solicitor contacted Ms P's bank to dispute the stopping of the cheque and to ask for the cheque to be honoured. Ms C's solicitor said that the issuing of bank cheques was regarded as equivalent to the payment of cash and recipients of bank cheques can safely rely on them.

In response to Ms C's solicitor's letter, Ms P's bank paid the cheque. Ms P's bank then placed a hold on the remaining funds in Ms P's account and asked her to reimburse it the sum of \$65,000.

It transpired that Ms P and Ms C had been involved in a dispute over a debt owed by Ms P to Ms C. Ms P had obtained the bank cheque to pay the funds to Ms C, but Ms C then said that the sum of \$65,000 would not totally extinguish the debt. The dispute was eventually settled on the agreement that Ms P would transfer a one-third share in her property to Ms C in satisfaction of the debt and would pay \$4,653.86 as a contribution to Ms C's legal costs. Settlement of the transfer occurred on 6 October 2006.

It therefore became apparent that Ms C had no entitlement to the funds in question. Ms P had satisfied the debt owed to her, apart from the \$4,653.86. There did not appear to be any legitimate reason for Ms P to hold on to the funds. Once these facts became clear, Ms P's bank asked Ms C's lawyer to return the balance of the funds that had been paid to Ms C, after the deduction of legal fees.

The lawyer was not very co-operative, but by March 2007 Ms P's bank had successfully recovered a large portion of the funds and released the hold on the remainder of Ms P's account. In the interim it had allowed her access to funds that were needed urgently.

Ms P then complained to her bank. She sought direct costs of \$3,133.75 and compensation of \$6,000. The bank did not dispute Ms P's claim for compensation and initially offered \$5,000 in compensation. It then increased its offer to \$6,000. The bank submitted that account should be taken of the fact that it had effectively paid the legal costs that Ms P was liable for under the agreement with Ms C.

Ms P rejected the bank's offer and complained to me.

In my view the bank was right to not dispute the claim. The cheque was stopped for a valid reason – the cheque appeared to be lost.

Bank cheques may only be stopped in limited circumstances. In accordance with clause 3.4(d) of the Code of Banking Practice, a bank is not obliged to stop a bank cheque, but may do so if the cheque has been lost, stolen or returned to the bank. However, bank cheques cannot be stopped simply because customers change their minds about a transaction after handing the cheque to another person or because a transaction between the parties has broken down through the supply of faulty goods or services.

The bank stopped the cheque for a valid reason and the customer relied on the bank having stopped the cheque. Ms P genuinely thought the cheque was lost and advised the bank of that fact. When the cheque was subsequently presented for payment the bank should, at the very least, have consulted Ms P before paying it. Had it done so, it would have become clear that Ms C was not entitled to the funds.

I accepted that, in assessing what was fair and reasonable compensation, regard had to be had to the fact that by allowing the solicitor to retain the \$4,653.86 but not deducting that amount from Ms P's account when it removed the hold on her account, the bank had effectively paid the legal costs owed by Ms P to Ms C. The sum of \$4,653.86, taken together with the offer of \$6,000, totalled more than the compensation that was claimed by Ms P.

I recommended that Ms P should accept the bank's offer of \$6,000 and the complaint was settled in this way.

The bank stopped the cheque for a valid reason and the customer relied on the bank having stopped the cheque.



Mr K learned the hard way that bank cheques may be stopped only for very specific reasons, and not simply because there has been a change of mind.

Case 29

Bank cheques - stopping - limited circumstances in which payment may be refused - bank cheque given to pay for car - finance owing on car - purchaser wanted to ensure clear title - arranged alternative payment for purchase price - requested cheque be stopped - cheque presented for payment - funds appeared in seller's account - funds reversed out three days later

In March 2007 Mr K sold his car privately for \$23,000, just before he was to relocate overseas. At the time of the sale the car was financed and \$20,084.91 was owing to the finance company. The purchaser gave Mr K a bank cheque for the purchase price on 10 March, a Saturday. Mr K deposited the cheque with his bank on 12 March. The funds appeared in Mr K's account that afternoon but were removed from the account on 15 March. Mr K was advised that the purchaser of the car had changed his mind about the bank cheque and had cancelled it on 11 March. Payment by an alternative method was made on 12 March.

Mr K complained that by cancelling the bank cheque because the purchaser had changed his mind about the purchase, the bank had acted in breach of the Code of Banking Practice. Mr K wanted the cheque re-issued.

The bank responded by advising Mr K that the purchaser of the vehicle had not changed his mind about the purchase. He had requested that the bank cheque be cancelled because he was concerned to ensure that the finance company was paid so that

he could obtain clear title.

The bank noted that on 12 March the purchaser contacted Mr K to advise that he had cancelled the bank cheque and to arrange for an alternative method of payment for the car. After communications between Mr K and the purchaser, a direct credit was made to the finance company, for the debt owing on the car, and a direct credit was made to Mr K, for the balance of the purchase price. The bank pointed out that re-issuing the bank cheque would result in unjust enrichment.

Mr K was unsatisfied with the bank's response, and brought his claim to me.

Bank cheques may only be stopped in limited circumstances and cannot be stopped because someone has changed their mind about a transaction after handing the cheque over for payment. The bank ought not to have stopped the cheque in this case.

However, Mr K was not out of pocket as a result of the stopped cheque. He received his money as cleared funds and was able to draw against it on 13 March. Mr K's bank had returned the funds to the bank that issued the cheque, after receiving confirmation that Mr K had received his monies by other means.

Whilst Mr K accepted that payment had been made by an alternative method he claimed that, because this occurred more than 48 hours after the car had been taken away, he had to deal with the worry that the car had in effect been taken without proper payment. He said that instead of spending his last few days in New Zealand with friends, he had spent the majority of the time on the phone to his bank and the bank that had issued the bank cheque, causing him unnecessary stress and heartache.

After further discussions with Mr K and the bank, my investigator facilitated a settlement. The bank agreed to compensate Mr K \$750 for inconvenience and provide him with a letter of apology.

6

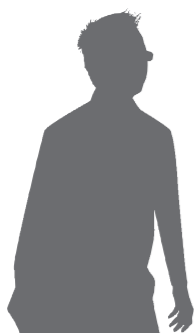
Foreign exchange and cross-border transactions

Most bank customers seldom make cross-border transactions or need to convert funds to other currencies, so in this area they are more than usually reliant on their bank's expertise to make sure that they have the information they need and that everything goes smoothly. Unfortunately banks and their staff do not always perform to customers' expectations. In **case 30** those expectations went beyond the bank's obligations under law or under its contract with its customer.

In cases **31** and **32**, on the other hand, the banks did have some responsibility when the customer's expectations were not met. Even an untrained bank officer should have questioned the need to send funds between New Zealand banks through an overseas bank (**case 31**), and it is, or should be, common knowledge among bank staff dealing with the transfer of funds to overseas destinations that banking systems in some countries are inefficient or even corrupt, and that delays are likely (**case 32**).

Travellers' cheques are not as common as they were before credit cards became acceptable world wide, and **case 33** demonstrates how a scam was able to succeed because neither the customer nor the bank noticed the warning signals that indicated a forgery.

Finally, **case 34** illustrates some of the difficulties that occur when exchange rates fluctuate over a short period of time and a transfer needs to be made urgently.



Mr T objected to the fact that his bank did not convert NZ dollars directly into yuan, but first into US dollars and then into yuan. He felt that this double handling was costing him money.

Case 30

Overseas funds transfer - dual currency conversion
- bank policy leads to additional costs

Mr T wanted to transfer funds to China on a regular basis by online money transfer. He found that his bank refused to convert his funds directly from New Zealand dollars into Chinese yuan. Instead it converted NZ dollars into US dollars. These were forwarded to a Chinese bank, which then converted them to yuan. Each conversion involved a charge and could involve an exchange rate loss. Mr T viewed this as double handling, and therefore as unfair to him.

The bank's response to his complaint did not satisfy Mr T and he complained to me.

I found that:

- United States dollars are far more widely accepted overseas than New Zealand dollars, and
- the bank had adopted a policy whereby cross-border internet transfers can only occur in United States dollars.

I found that the bank was not obliged to transfer Mr T's funds, and that there is no law requiring transfers to be conducted in a particular currency. The bank's policy requiring internet transfers in US dollars was a feature of the transfer process which should have been quite apparent to Mr T from the information the bank gave him. There was no breach of the bank's contract with Mr T, and no evidence that Mr T had been misled in any way about the nature of the service he had chosen to use.

My Terms of Reference state that I have no power to make a recommendation on a complaint that relates to a bank's practice or policy which does not itself give rise to a breach of any obligation or duty owed to a complainant. Since there had been no breach of any obligation or duty in this case, I found that Mr T's complaint could not be upheld.



It should have been apparent to the bank that a transfer of funds between banks in New Zealand did not need the assistance of a Scottish bank.

Case 31

Foreign currency term deposit - transfer of funds to another NZ bank account - error made in transfer process led to delay in receipt of funds - extra costs incurred

Mr P wished to transfer money from his foreign currency term deposit account with one New Zealand bank to his account with another New Zealand bank. It was critical for him that the money arrived on time so that a business transaction could take place. In January 2007 he went to his local branch to enquire whether the transfer could be conducted in the time available. He was given an assurance that it could be, and on 27 January 2007 he arranged for the transfer.

The bank officer assisting Mr P failed to follow the bank's correct processes, and the details of a Scottish bank were mistakenly entered into the recipient field on the telegraphic transfer form, instead of the New Zealand bank details. When the funds did not arrive into his New Zealand account on time, Mr P phoned the bank to find out where they were. He also sent a fax to the bank and was promised a reply but did not receive one.

The money had been sent to Scotland, and did not reach Mr P's intended account until 12 February 2007. By that time the Scottish bank had subtracted a transfer fee of approximately

\$90, and Mr P's business opportunity had passed.

Mr P complained to his bank, holding it responsible for the fee deducted by the Scottish bank. Furthermore, he said the bank had caused him to lose interest over the delay period and that the delay had caused him considerable embarrassment with his business colleagues.

The bank did not consider it was responsible. It said that Mr P had written the details of the Scottish bank on the transfer form. It believed that it had followed Mr P's instructions to send the funds to Scotland and said it had only become aware of the New Zealand account when it later spoke to Mr P on the telephone and he provided details of it.

I found that a bank officer had clearly noted down that Mr P wanted the funds to be transferred to a New Zealand account. I was unable to determine which party had written the details of the Scottish bank on the transfer form, but it should have been apparent to the bank officer that a transfer of funds between banks in New Zealand did not need the assistance of a Scottish bank. It was unacceptable that the funds were in Scotland for 10 days, while Mr P was contacting the bank and trying to locate them. This undue delay caused him embarrassment with his business colleagues, and affected his business reputation.

I considered that the bank ought to reimburse Mr P the fee charged by the Scottish bank. Additionally, I proposed that it should pay \$1,500 for the inconvenience it had caused and its failure to assist him when he inquired about the funds. The bank and Mr P accepted this proposal, and the case was closed.



The bank officer assured him that funds would reach the Indian account within three days.

Case 32

Funds sent to India by telegraphic transfer - delay in funds reaching final destination caused cancellation of contract - bank should have warned customer of possible delay

Mr D needed to send funds to India to pay for a house he had agreed to purchase. The funds had to reach the contractor in India within a few days to meet the conditions of the purchase and sale. When Mr D went to his bank to arrange a telegraphic transfer he explained the situation to the bank officer with whom he spoke. According to Mr D, the bank officer assured him that the funds would reach the Indian account within three days.

Mr D realised that time was short. He contacted the contractor to confirm that the funds had been sent and to ask for an extra few days to settle. The contractor agreed to an extension of two days. When the funds did not arrive within the extended timeframe, the contractor cancelled the contract, as he was entitled to do under the conditions of purchase and sale. The funds did not arrive until two days after the contract had been cancelled, eight days after they were sent from New Zealand.

Mr D claimed losses of approximately \$3,000 because of delays in having the funds returned from India and because of changes in the exchange rate.

The bank said that the funds were successfully and correctly transmitted to its correspondent bank in India. The bank felt it could not be held responsible for the delay in the funds being transferred within the banking system in India.

I suggested to the bank that it should have been aware of the difficulties with transmission of funds within India to their final destination and should have warned Mr D of possible delay. He was unaware of such difficulties, but they are well known within the banking community. Had Mr D been made aware of the possible delay, he could have made an informed choice on whether to proceed with the transaction.

Mr D indicated he was prepared to accept \$1,500, payable to a charity of his choice, to settle his complaint. The bank agreed to this and the complaint was resolved on this basis.



Ms C was taken in by a cunning scam, and forwarded overseas funds deposited into her account in the form of travellers' cheques back to their sender.

Case 33

Foreign exchange - travellers' cheques - fraud - overseas scam - bank mistakenly paid out on forged travellers' cheques - bank sought recovery of monies from customer - application of payment by mistake principles - fault on both sides - loss to be shared between bank and its customer

Ms C had advertised for a new flatmate. She received an approach from a woman living overseas who said that she would be visiting New Zealand on an exchange and was looking for a place to live. The flatmate said that she would send Ms C a month's rental in advance. Ms C later received some American Express travellers' cheques to the value of USD3,500. The cheques were worth more than the first month's rent. The flatmate contacted Ms C and said that her accountant had made a mistake in sending over all the cheques instead of just enough for one month's rental. She asked Ms C to cash the cheques and return the remaining money to her by money transfer.

Ms C then presented the cheques at her bank, and the converted funds (\$4,570) were deposited into her account. Later the same day Ms C withdrew \$4,013 in cash from her account and transferred the money via Intercash NZ back to the overseas flatmate.

The following day the bank dishonoured the cheques, as they were discovered to be counterfeit. It turned out that Ms C had been the victim of a scam. The dishonour of the cheques left Ms C's account overdrawn. The bank demanded that she repay the debt, but offered an overdraft facility free of interest and charges. Ms C was not happy and complained to me.

After investigation I concluded that the payment of the cheques to Ms C's account should be treated as a mistaken payment by the bank. The bank had converted the travellers' cheques to cash and had credited Ms C's account in the mistaken belief (shared by Ms C) that they were genuine.

I then applied the rules about payment by mistake with reference to section 94B of the Judicature Act 1908. There was no doubt that Ms C had altered her position by sending most of the money back overseas, leaving her with a large debt to the bank.

I concluded that Ms C had acted in good faith in cashing and depositing the cheques into her account. The story given by the fraudster seemed genuine, as was the offer to pay one month's rent in advance.

However, I was of the view that the fraudster's request that Ms C cash all of the cheques she had sent and immediately return most of the money by way of money transfer was rather suspicious. I found that Ms C had been careless in not making further enquiries at the time. She could have simply cashed enough of the cheques to pay the first month's rental, and could then have returned the other cheques (uncashed) to the fraudster.

In the circumstances, while Ms C had been careless, it was not fair that she should have to repay all the money. I took into account the fact that she had been taken in by a fairly sophisticated fraudster who had "scammed" many other people. I was also concerned that the bank officer who received the cheques did not check the watermark, security thread or holographic foil on the cheque, as suggested in the acceptance procedure detailed on the reverse of all American Express travellers' cheques.

I recommended that the loss be shared equally between Ms C and the bank, which would mean the bank writing off half the debt. The bank had already offered Ms C \$250 compensation for inconvenience for the manner in which it had first handled her complaint, and I concluded that the offer was reasonable. I recommended that it should be accepted.

Both Ms C and the bank agreed to accept my recommendation for settlement.



Mr G said that, if he had been advised that the exchange rate had dropped, he would not have agreed to the transfer on that day.

Case 34

Foreign exchange transaction - fluctuating exchange rate - cost of breaking fixed rate contract - did the customer sustain a loss?

Mr G contacted his bank to arrange the purchase of 400,000 Australian dollars funded from his New Zealand dollar account with the bank. A fixed rate contract to purchase A\$400,000 was arranged on a Friday. The following Monday Mr G contacted the bank again, and said he needed the funds in Australia the following day.

The New Zealand dollar had risen against the Australian dollar in the meantime, and Mr G asked the bank to cancel the fixed rate contract and get him the best rate then available. He was told there would be a cost for breaking the fixed rate contract.

The bank officer contacted the foreign exchange department to obtain the current rate of exchange between New Zealand and Australian dollars. She then contacted Mr G with the current rate and he confirmed his acceptance of it. When the bank officer contacted the foreign exchange dealer to confirm the rate and arrange the transfer of funds, she was told that the rate was no longer available. The Reserve Bank had intervened, and the exchange rate had dropped substantially.

The bank officer and the foreign exchange dealer calculated that, at the new exchange rate, Mr G would be worse off by more than \$NZ3,000 than if the funds were transferred at the rate previously

arranged, taking into account the cost of breaking the fixed rate contract. Time was short to arrange the transfer of the funds that day, as Mr G required, and the bank officer decided to transfer the funds at the fixed rate. She then emailed Mr G to explain what had happened and the decision she had made.

Mr G complained that the bank should have consulted him before completing the transaction. He expected the funds to be transferred at the rate quoted to him by the bank officer earlier and believed he had suffered a loss. He said that, if he had been advised that the rate had dropped, he would not have agreed to the transfer of the funds that day.

I found that Mr G had given a clear instruction that the funds had to be transferred on that particular day. When the bank officer made the decision to transfer the funds at the fixed rate, the deadline of 4pm to complete the transaction was approaching. A decision had to be made, and I was satisfied that the bank officer's decision to proceed with the transfer at the fixed rate was the correct one, taking into account Mr G's earlier direction that the transfer had to take place that day. Mr G had not suffered any loss because the rate first quoted was no longer available due to the drop in the exchange rate.

The bank acknowledged that its staff may not have clearly explained the market conditions on that particular day and the cost involved in breaking a fixed rate contract. The bank apologised to Mr G and offered him a small payment of compensation as a goodwill gesture. The complaint was settled on this basis.

7

Insurance

Many of the complaints that come to me are complaints about loan protection insurance, or about the absence of such insurance. We meet some very sad cases such as **case 35** which illustrate the advantages of loan protection insurance.

There is no obligation on a bank to ensure that a customer has life and/or loan protection insurance in place, and a customer may have good reasons for declining an offer of insurance. A bank may suggest to a customer that he or she should seriously consider taking out life and/or loan protection insurance, but it is the customer's choice whether or not to obtain insurance cover. Similarly in **case 36**, the customer was free to cancel the policy.

Loan protection insurance is often linked to a specific loan and cannot be transferred to another loan if the original loan is repaid. However when customers refinance they sometimes do not realise that technically they have repaid one loan and then taken out a new loan, so that a new insurance policy is required. The failure of the bank to explain this in **case 37**, compounded by its later mistakes, resulted in considerable anxiety and inconvenience.

A travel insurance policy can be part of the package of services attached to a credit card, and like all insurance policies, its details may be complex. While customers should check that the policy meets their needs, it is also important that the bank gives them the information they need, especially when making changes to the policy wording. In **case 38** the bank appeared unaware that changes to the policy wording had resulted in changes to the cover for adverse events that occur when the customer's travel is partly for business reasons.



Ms P contacted the bank, confident that Mr T had arranged life or loan protection insurance.

Case 35

Insurance - life/mortgage protection insurance - non-existence of insurance discovered after death of one partner - large loan to service - no duty on bank to ensure customer has life/mortgage protection insurance

Ms P's partner (Mr T) aged 31, died suddenly in April 2007. Ms P had just found out that she was expecting their first child. Ms P and the late Mr T had recently bought a new house with a loan of \$480,000. Mr T had handled most of the arrangements.

Ms P contacted the bank, confident that Mr T had arranged life or loan protection insurance with the bank when they took out the loan. To her dismay, the bank said that he did not have any insurance cover.

Ms P later complained to the bank. She asked why the bank had not discussed life or loan protection insurance with Mr T, or suggested that he take out insurance when taking on responsibility for such a large loan. Mr T was a cautious person and she was certain that he would have accepted life or loan protection insurance if it was offered to him.

The bank said that it was satisfied that Mr T had been made aware that life insurance and loan protection insurance cover was offered by the bank, but he had not requested any cover.

Following the birth of her baby, Ms P referred her complaint to me.

I accepted Ms P's advice that Mr T would have taken up the offer of insurance cover had it been raised with him and that it would have been preferable and probably good practice for the bank officer to have discussed insurance needs with him. However, in the absence of any legal duty on the bank to have such a discussion, I had no basis on which to make a finding against the bank. Therefore Ms P agreed to withdraw her complaint.

However, the bank agreed to see what it could do to assist Ms P over the next six months or so until she was able to return to work. The possibilities included a loan holiday, an interest only loan for a period of time, and/or the exercise of hardship options under the Credit Contracts and Consumer Finance Act 2003.

As a result of this complaint the bank changed its policy so that its customers now need to sign a declaration stating that they have agreed or declined to complete an insurance needs analysis, when they obtain a new loan from the bank.



Mr M was killed, leaving his wife with a young child and a housing loan. When Mrs M discovered that he had cancelled a loan insurance, she felt that the bank had acted incorrectly in not consulting her.

Case 36

Loan insurance - mortgage in joint names - husband died - wife attempted to activate insurance - claim declined - unknown to wife, husband had cancelled policy - policy owned by husband only - inappropriate for bank to discuss cancellation of policy with wife at time of cancellation as she was not a party to it

In April 2005, Mr and Mrs M purchased a new home. Refinancing and new loan insurance were organised through their bank at the time of the purchase.

Sadly, in April 2007, Mr M was killed in an accident, leaving Mrs M with a young child and a housing loan to service. Shortly afterwards, Mrs M contacted their bank to claim on the loan insurance. She was advised that the insurance had been cancelled in accordance with Mr M's instructions. Mrs M's lawyer investigated and discovered that Mr M had contacted their personal banker and cancelled both a life insurance policy and a loan insurance policy in August 2006. Mrs M was aware that Mr M had intended to cancel his life insurance policy because he was taking out a life insurance policy through a new employer. However, Mrs M was sure he had never intended to cancel the loan insurance. She further queried why the bank had cancelled the policy without requiring her signature or without at least confirming the cancellation with her.

Mrs M was unsatisfied with the bank's response to her queries, and brought her claim to me.

While Mrs M accepted that Mr M had cancelled his life insurance policy, she maintained that it did not make sense that Mr M would have cancelled the loan insurance. Mrs M's name was added to the property title when Mr and Mrs M refinanced. Mrs M was sure that her name was added to the new loan insurance policy documents at that time.

The bank advised my investigator that Mr M was the sole policy owner of the loan insurance. Following further investigation, including obtaining a recording of a call that Mr M made to the bank about cancelling the policies, it became clear that Mr M had intended to cancel the loan insurance and had given clear instructions to the bank to cancel both policies. It seemed that Mr M thought the life insurance provided by his employer would be enough protection for his needs. The bank stated that, as Mrs M was not a party to the policies, it would have been inappropriate to discuss Mr M's cancellation request with her.

Upon becoming aware of this further information, Mrs M contacted my office to say that she accepted that Mr M had intended to cancel the loan insurance, and did not wish to pursue matters further. Mrs M was insistent on conveying her heartfelt thanks to my investigator for all the work she had done. She said that without my investigator's assistance she would not have been able to accept the situation.



The bank did not explain that Mr G's mortgage repayment insurance was automatically cancelled when he refinanced.

Case 37

Insurance - mortgage repayment policy when loan refinanced - customer not advised or offered alternative cover - circumstances did not allow reinstatement of policy - bank offered alternative insurance - customer sought cash remedy

Mr G took out a loan in joint names with his (then) wife. He arranged and paid a single premium for mortgage repayment insurance (MRI) in his sole name which provided death only cover. Five years later Mr G and his wife had separated, and the secured property had been transferred to his name. He asked the bank to remove his former wife's name from the loan account and to change the loan to his sole name. The bank refinanced the loan and arranged a new loan with a 25 year term. The bank did not explain to Mr G that the MRI was specific to the existing loan, and that it was cancelled automatically when the loan was refinanced.

Several years passed before the bank discovered the MRI still existed although the loan to which it referred had been repaid. Arrangements were made to cancel the MRI, and a rebate on the premium was paid into Mr G's account with no explanation. It was only when Mr G was discussing insurance issues with the bank at a later stage that he discovered he had no insurance cover on his loan.

When the bank realised what had happened it offered to arrange a decreasing term insurance policy to cover the loan but, because he had received a refund of the premium he had paid for the MRI, the bank required him to contribute to the cost of the life cover. Mr G was not satisfied with the bank's offer. He felt unable to pay for the life cover and wanted the bank to recompense him for the errors it had made.

After investigation I concluded that the bank's error was not in terminating the original MRI but in failing to:

- tell Mr G that, if he refinanced his loan, he automatically terminated the insurance cover
- offer him either alternative insurance or a refund of the balance of the premium.

I was not able to identify any loss suffered by Mr G as a result of the bank's mistakes. The policy originally arranged provided death cover only, and the bank's offer to provide equivalent insurance effectively put him back in the position he was in before the loan was refinanced. I proposed to recommend that Mr G should accept the bank's offer to arrange decreasing life cover for the remaining term of the loan. I also proposed that the bank arrange an interest free loan to cover the cost of the new policy, on the basis that Mr G did not have to repay it until after the secured term loan was repaid in full. I noted that Mr G had been inconvenienced by the bank's errors and suggested a moderate payment of compensation to be deducted from the proposed interest free loan.

The bank accepted my recommendation, but Mr G remained adamant that he should receive substantial compensation from the bank. He decided not to accept my recommendation.



The change to the policy was a significant change, and the bank ought to have specially drawn attention to it.

Case 38

Travel insurance - claim declined - policy change - exclusion of business travel - change not notified

Ms F made a claim on her travel insurance policy after her handbag was stolen. Her claim was declined by the bank's insurer because one of the purposes of her travel was business related, and the policy was limited to personal travel.

The bank was of the view that the insurance claim was properly declined by the insurer. However, with a view to settling the complaint, the bank made an ex gratia offer to Ms F, which she declined.

Before April 2006, the insurance policy provided that claims arising from any business commitment were excluded from cover. During March 2006, the bank wrote to relevant policy holders and advised them that a new travel insurance policy was coming into effect. The letter provided a summary of important changes to the policy, but referred readers to the enclosed policy document for full details. The policy document (but not the letter) stated that travellers were not eligible for cover if one of the reasons for their overseas travel was a business activity.

I did not agree with the bank that the wording of the policy before April 2006 excluded all claims arising out of travel wholly or partly for business purposes. However, the wording of the policy from April 2006 onwards was clear – if one of the reasons for the overseas travel was business related, cover was excluded.

I found that the change to the policy was a significant change, and the bank ought to have specially drawn attention to it. By not specially drawing attention to it, it is arguable that the bank engaged in misleading conduct in breach of the Fair Trading Act 1986, and at the very least breached its obligations under the Code of Banking Practice to provide timely information to the customer. I was, therefore, of the view that the bank should reimburse Ms F for her loss as if her claim had been accepted by the insurer.

The bank accepted my view, and I then asked it to propose a settlement sum which would allow for the appropriate depreciation of items and the exchange rates that would have applied when the claim was lodged. Ms F accepted the bank's proposed sum of about \$4,600.

8

Investments

While we have received many complaints about one specific investment product this year, almost all of them were lodged in April, May and June and were still under investigation at the end of the year. A speedy facilitated settlement was possible in a few cases and **case 39** is an example of one of these.

Case 40 was not one of the complaints about the specific fixed interest investment, but it involved similar issues and illustrates one possible approach to the resolution of complaints about investments that have become inaccessible.



Mrs C was unable to carry out vital repairs to her home or to visit her country of origin.

Case 39

Investment - unit trusts - fixed interest fund - freeze on withdrawals from fund - suitability of investment for complainant's requirements - whether complainant was properly advised of risks associated with investment - facilitated settlement

In mid 2006, Mrs C received a lump sum of approximately \$125,000 from her late husband's retirement scheme.

Mrs C, her late husband and their three children had come to New Zealand as refugees. The money from Mr C's retirement scheme represented all of their savings.

After giving \$20,000 to each of her children, Mrs C decided to invest the balance of the money (\$60,000) with her bank. She met with the bank's investment adviser, who recommended that she put the money in a fixed interest unit trust investment fund. According to Mrs C, the adviser told her that she would earn a little more interest than if she had her money on term deposit. No mention was made of any risk attached to the investment.

Mrs C asked whether her children could also invest in the fund. On the basis of the advice she received, two of them later invested in it.

After a while, Mrs C noticed that her investment was not earning the interest that she had expected. At about the same time she

had major problems with a leaking roof to her home and an old hot water cylinder. She was also planning a trip to her country of origin to try to establish her pension rights there. She booked her travel and applied to withdraw her money from the fund, to pay for the overseas trip and the home repairs.

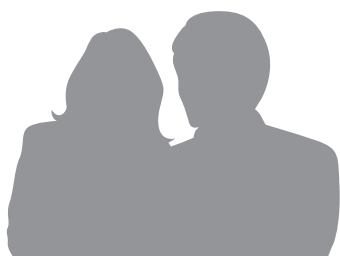
Unfortunately, a few days before Mrs C was due to receive her money, all withdrawals from the fund were suspended. Mrs C was devastated, as this meant that she was unable to carry out the vital repairs to her home or to visit her country of origin. She lost the deposit on her return airfares, as well as the opportunity to establish her pension rights, because she had only limited time to do so.

When the bank was notified of Mrs C's complaint, it accepted that she had been left in a very difficult situation because the investment fund had been "frozen".

After some negotiation, facilitated by my office, the bank offered to buy out Mrs C's interest in the investment fund, and that of her two children as well. It offered to:

- pay the amounts of the original capital sums invested by Mrs C and her children, less any interest payments they had received during the life of the investments
- refund the implementation fees
- pay Mrs C \$2,500 compensation for inconvenience, including severe stress.

When Mrs C accepted the bank's offer, her complaint was settled.



Mr and Mrs O simply wanted the bank to take over their frozen investment, with no strings attached.

Case 40

Investment advice - accessing funds - investment frozen - interest free loan - provisional settlement

In September 2006 Mr O sold a family home with a view to purchasing a section to build a new home on. As a result of the sale Mr O and his wife had \$350,000 in their savings account with the bank. Shortly after this deposit the bank approached Mr and Mrs O and suggested they talk to one of the bank's financial advisers to obtain a better interest rate than they were currently receiving.

The bank's representative advised them to move their funds into a stable capital portfolio which was split between four recognised mortgage funds. Mr and Mrs O told the adviser they required a low risk investment with funds available on 30 days' notice.

In February 2007 Mr and Mrs O found a suitable section and paid a deposit with an expected date of final settlement in late March 2008.

When this date was approaching they notified the bank that they needed to withdraw the funds, only to be informed that one of the mortgage funds had been frozen. This resulted in a shortfall of approximately \$100,000 in the funds which were needed to continue with the building of Mr and Mrs O's new home.

Two payments were received from the frozen fund, reducing the shortfall to \$88,000.

The bank offered Mr and Mrs O an interest free loan over a three

year period on the understanding it was secured by a second mortgage on Mr and Mrs O's property and that they assign all rights in the frozen investment to the bank. The bank's offer was made on the condition it was accepted as full and final settlement of their complaint.

Mr and Mrs O were concerned the frozen fund might not be fully accessible within two years, leaving them with a debt to the bank that they would be unable to repay when it fell due. This would also have been the case if there had been a shortfall in the funds after winding up the investment. They simply wanted the bank to take over the investment with no strings attached.

The matter was referred to me.

My investigator was then able to facilitate a resolution whereby the bank agreed that the offer was an interim settlement and that it would look favourably upon any requests for an extension to the interest free loan if the winding up of the mortgage fund had not been completed by the end of three years. The bank also agreed that I would not be precluded from considering the complaint further if necessary.

The complaint was provisionally settled on that basis.