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Introduction

This collection of case notes is over twice the size of the 2005/6 collection. In part this is due to the increasing volume of our caseload, but it also indicates the increasing complexity of the complaints investigated.

Case notes have been written on all the cases that involve issues that are new to us. **Cases 41 and 43** are good examples of this category. Also included are notes on many cases with a complex legal or factual background.

Not all the case notes are about cases that were fully investigated or where it was necessary to form an opinion on the merits of the complaint. **Cases 2 and 36**, for example, are included as illustrations of the speedy resolution that can be achieved through the facilitation process. Some cases are simply interesting on their own facts.

The case notes are intended for a wide audience. They may help consumer advisory organisations to find guidance on their clients' problems. They may be useful to banks in staff training exercises. Above all, the case notes and the annual report that they accompany are part of my accounting to the public of New Zealand for the trust they place in the Banking Ombudsman scheme when they bring their complaints to us for resolution. Here, I hope, they may find concrete examples of the Banking Ombudsman process in action and the fair and reasonable outcomes we endeavour to achieve.



Liz Brown
Banking Ombudsman

1

Good Banking Practice

None of the investigations conducted during the 2006/7 year have required me to consult the banking industry in order to establish principles of good banking practice. I have, however, sought clarification from the New Zealand Bankers' Association about the cheque clearance process.

There appears to be continued confusion on the part of some bank customers about:

- The time taken to clear a cheque
- When a cheque can be stopped
- When the cheque is debited to the drawer's account
- How soon a customer can expect to know if a cheque has been dishonoured

It should be noted that the consultation did not extend to the process for clearing foreign cheques.

It should also be noted that banks will sometimes permit a customer to draw on an uncleared cheque, especially a bank cheque. In such cases the bank is effectively allowing the customer access to the funds in the expectation of repayment if the cheque is dishonoured. The fact that funds have been made available is not of itself confirmation of clearance.

In the recent past there have been variations in the cheque clearance process, and accordingly in the time taken to clear a cheque, as banks moved from paper-based systems to electronic systems. Ongoing streamlining of the banks' systems means that the cheque pay or dishonour decision

time is now uniform for all banks which are members of the New Zealand Bankers' Association.

The process begins when the cheque is deposited for crediting to the payee's account. The cheque goes to a processing centre on the same day if it is a business day. The cheque details are then electronically interchanged between banks, and the drawer's account is debited with the amount of the cheque.

The following business day, the paying bank, that is, the bank on which the cheque is drawn, decides whether to pay or to dishonour the cheque. If the customer wishes to stop the cheque, he or she must therefore request the stop before the end of the second business day.

The process is usually complete by the end of the third business day, although there are some exceptions where processing of the dishonoured cheque may take another business day, and of course there can be delays if the process is disrupted by external factors such as power outages. Normally at this point, however, either the cleared cheque has been paid from the payer's account, or the cheque has been dishonoured and a notice sent to the payee.

If a payee deposits a cheque and requests a "special answer", the process can be much shorter. For this reason, while a customer may have an opportunity to stop a cheque either before or shortly after it is deposited, it is not safe to assume this to be the case.

2

Account Operation

The general operation of bank accounts leads to a wide range of complaints, most of which result from mistakes either on the part of the bank or on the part of the customer and can easily be resolved.

Occasionally we receive a complaint such as **case 1** where an apparently irreconcilable conflict between the bank's view and the customer's view is resolved once an investigation uncovers information that was not previously available. As well as uncovering factual information, investigation may also shed new light on the impact a bank's mistake has had on a customer. In **case 2** the bank's first reaction was to underestimate the very significant distress and embarrassment caused by its mistake. In other cases, as in **case 3**, there may be fault on the part of both the bank and the customer, and there needs to be a careful and impartial assessment to determine who should be responsible for the customer's loss.

A bank is entitled to suspend the operation of an account if it has good reason to suspect that funds in the account have been fraudulently obtained, but the fact that funds in an account are the proceeds of fraud does not necessarily mean that the account holder participated in the fraudulent activity. In **case 4**, although the account holder had acted foolishly and in breach of his obligations to the bank, he was entitled to some consideration and in particular to assistance in obtaining access to legitimate funds during the Christmas period.

Cases 5 and 6 both concern acknowledged mistakes on the part of a bank but some difficulty over finding a suitable remedy for the customer. One of the functions of my office can be to find an appropriate remedy for a complainant, as in **case 5**, or to assist a complainant to

take a more realistic view of the bank's obligations, as in **case 6**.

The remaining cases in this section illustrate difficulties that may arise when accounts are opened and/or operated for someone other than the account signatory. **Cases 7 and 8** concern accounts opened for children. It is not unusual to receive a complaint that a child has been able to access funds in an account when the intention was that they should be accumulated to provide for future educational or other needs. Similarly we receive the occasional complaint from children or young persons that they are not able to access funds in an account held in their name. Cases of the former type present some difficulty because the funds have been withdrawn and used by the person entitled to them. However, they have usually not been used for the purpose for which they were intended, and the owner of the funds may not be of an age to make sound decisions about spending the funds. In **case 7**, this problem was addressed by a refund of part of the funds.

Case 8 is not dissimilar in principle, although there was a much more complex factual situation, and the funds had clearly not gone to the intended beneficiary.

Case 9 again has a background in family arrangements, this time for the care of an elderly parent. It demonstrates the difficulty that a bank may face when it is instructed by the holder of a power of attorney to act in what it suspects may not be the best interests of its customer. As it transpired, the existence of the power of attorney was irrelevant in this case, but it seems likely that the outcome would have been little different if the customer had been acting pursuant to a power of attorney.

Ms K went to an ATM. After she had entered her PIN, the ATM appeared to shut down. Ms K's debit card was returned to her, but she did not receive any cash.

CASE 1 Mistaken identity of an ATM

Ms K went to an ATM to withdraw \$100. However, after she had entered her PIN, the ATM appeared to shut down. Ms K's debit card was returned to her, but she did not receive any cash. As the withdrawal had occurred on a public holiday, Ms K was unable to go directly to the bank branch.

Ms K phoned the bank and was told that, as it was a public holiday, the transaction should be corrected within 24 hours of the following working day. Ms K waited 24 hours, but no reimbursement appeared on her statement. On the next day Ms K visited the bank and submitted a written report about the incident. She heard nothing further from the bank, and went back to the branch. There appeared to be no record of the earlier contact, but the bank phoned her later that day to say that the ATM's bank (not Ms K's bank) had confirmed that the ATM had balanced, and that it was functioning normally.

Ms K was not satisfied with this response, and her bank said it would make further enquiries. When Ms K heard nothing further, she brought her complaint to my office.

My investigator discovered that there had been a misunderstanding between the bank and Ms K about which of two ATM machines Ms K had used on that day. Having failed to obtain the \$100 from the faulty machine, Ms K had made an electronic enquiry about her account at a second ATM from the same bank. It was this ATM that the bank had investigated (which is why no fault had been found with it).

At the malfunctioning ATM, an amount of \$100 was initially debited from Ms K's account, but this transaction was later reversed electronically. Ms K had used the same ATM two days earlier to successfully withdraw \$100, and had confused this transaction with the transaction she later complained about.

Ms K accepted this explanation and withdrew her complaint.

As a result of a bank error, a hold was placed on Mr C's account. He had invited his colleagues out for Christmas dinner. When he wanted to settle the account, his card was declined.

CASE 2

An ultimate embarrassment

As a result of a bank error, and unbeknown to Mr C, a hold was placed on his account. He had invited his employees, colleagues and friends out for Christmas dinner to celebrate his first year in business. Because it was Christmas, and because he had invited a number of people, the total cost of the dinner was considerable. When he wanted to settle the account, his card was declined. He telephoned the bank, but by that time it was quite late in the evening, and the staff member he spoke to was not authorised to remove the hold. Mr C was forced to ask his guests to pay for their own meal. He felt that the evening had been a total disaster. He was unable to sleep that night, and continued (in his words) "... thinking about the night and all the talking everyone will do behind my back even though they helped me out by paying for the bill."

Mr C went to the bank as soon as possible. He said that "... due to the stress I was in tears in front of the staff

and other customers. I got sympathy from the Customer Service Officer and given a tissue to wipe my tears but inside myself I was in very deep pain." The branch manager contacted Mr C and apologised for the error, but said he was unable to offer any compensation for the stress.

Mr C complained to the bank, and was offered \$100 in compensation for inconvenience. Mr C then complained to me, and my investigator contacted the bank again. The bank accepted that Mr C had experienced significant stress and embarrassment because of this incident, and immediately offered \$2,000 in compensation. Mr C accepted the proposed settlement, and the matter was resolved within fifteen days of being referred to my office.

They opened the account, using a false certificate to pass themselves off as directors of the company, and fraudulently included Ms X as an authorised signatory.

CASE 3

Substandard process opens the door to fraud

Mr A was the sole director and one of three shareholders of a company. In 2004 the company set up a bank account, transactions for which required the signatures of the other two shareholders, Mr B and Ms C. Mr B and an employee of the company, Ms X, opened the account, using a false undated and unstamped certificate to pass themselves off as directors of the company, and fraudulently included Ms X as an authorised signatory. The bank officer who opened the account for the company did not ask for or examine any other evidence that Mr B and Ms X were acting with the authority of the company.

In early 2005 Mr A sensed that something was wrong, and became worried about the account. It was closed in August of that year, with a trace of company transactions revealing that 25 cheques had been signed by Ms X. Mr A estimated that a significant proportion of company funds had been misdirected into accounts of individuals who were never owed money by the company.

In September 2005 Mr A complained formally to the bank about the unauthorised transfers. The bank's account operating instructions required at least one director of a company to authorise signatories to its account. Mr A – at that time known to the bank as the sole director of the company – had not been contacted by the bank when Ms X was added as a signatory.

Mr A came to me with his complaint in October 2005. He complained that the bank did not meet acceptable standards when it relied on the false document to grant access to the account. He said that, when the bank performed credit checks on the company, they clearly revealed that there was only one director, and that the signatories were not directors, as they claimed to be.

The bank had relied on the false document, effectively providing a cover under which the fraudulent activities could take place.

Mr A claimed that he had suffered a direct loss of \$28,062 and further consequential losses due to some debts not paid by the company. Additionally, the financial pressure had caused him stress and anxiety.

The bank said that there was no reason to doubt the validity of the certificate presented by Mr B and Ms X. It was not in the practice of collecting or sighting collateral evidence such as company constitutions, and had acted in good faith. It declined to take responsibility for the actions of Mr B and Ms X on the grounds that this was an internal matter for the company to deal with. The bank stated that Mr A should have been more vigilant about the company's funds. On one occasion Mr A had accepted a personal cheque from the company account with Ms X's signature on it. On top of that, he had not bothered to look at the account statements.

When examining the documents required by the bank to open the account, I noted that none of the forms associated with its account operating instructions had been completed wholly in accord with the bank's requirements. Taken individually, perhaps none of these shortcomings was significant. However, in combination they suggested that the account opening process was severely compromised. Effectively, identification safeguards designed to protect customers and to prevent the possible misuse of banking systems had been bypassed.

The bank had failed to obtain any evidence that the company was genuine or any corporate authority for the opening of the account. These factors compounded the

errors made at the form-filling stage, and made it more possible for fraudulent operations to take place on the account.

I found that the bank's procedures on this occasion did not conform with good banking practice, and were also below the standard expected by the bank itself. There is a basic obligation on a bank to protect a customer's property. It cannot be the customer's responsibility to judge whether front line staff are sufficiently knowledgeable or experienced to open a company account.

I did agree with the bank that Mr A should have been more attentive to the account's activities. It should have been obvious to him on several occasions that an unauthorised person was co-signing company cheques, as he had seen some of these cheques himself. Mr A became suspicious in early 2005, yet did not investigate matters until September of that year.

Mr A accepted that many of the fraudulent cheques were most probably paid in return for services to the company, but disputed seven cheques. One cheque was paid to Mr

B, and it was impossible to determine whether or not this amount was owed to him as a shareholder. I accepted that the other six cheques were paid to people who had not provided any benefit to the company.

I found that Mr A should be entirely reimbursed for one cheque, as he could not have been expected to have been aware of any unauthorised dealings at that time. I considered that Mr A had contributed to the loss arising from the other five cheques, as he should have been more vigilant about the account's activities. Accordingly, I concluded that the bank should reimburse 50% of the total amount of these five disputed cheques.

Mr A had suffered considerable stress and anxiety when funds were unavailable. He had also been required to devote considerable time to researching the events. I therefore proposed payment of \$2,000 compensation for inconvenience, amounting to total compensation of \$12,712. Both the bank and Mr A accepted my proposal.

Just before Christmas the bank placed a hold on Mr Q's account while it investigated a forged cheque that had been deposited into it. The bank did not advise Mr Q of this.

CASE 4

An obligation to give notice when an account is suspended

Mr Q had a current account with his bank. On 17 December 2005 a cheque for deposit to Mr Q's account was placed in a deposit box in an Auckland branch of the bank with the payee's name on the cheque changed to that of Mr Q. The alteration appeared to have been endorsed by the signatory to the cheque. The bank contacted the drawer and discovered that the cheque had been stolen. The alteration was accordingly a forgery.

The bank immediately placed a hold on Mr Q's account while it investigated the fraud, without advising Mr Q of this. Mr Q tried to access his account shortly afterwards, but was naturally unable to do so. On 23 December, the last business day before Christmas, Mr Q telephoned the bank, and was told that he could have access to his wages in his account only if he visited a branch and spoke directly to a staff member.

After Mr Q complained to the bank and police investigations had been conducted, the bank agreed to reinstate his account, but this was some six months later.

He brought a complaint to me, as he was not satisfied that having his account reopened was sufficient redress for the problems caused by its closure. Mr Q stated that the bank had caused him considerable stress, especially since his account had been closed just before the holiday period. He claimed that he had nothing to do with the deposit of the stolen cheque into his account, and that the bank had failed to conduct a thorough investigation into the forgery. His explanation was that he had allowed a friend to use his account (including his PIN and ATM card) to receive wages, and that this friend had tried to deposit the forged cheque.

The bank stated that it had no option but to suspend the account without delay, as it viewed Mr Q as an immediate security risk. It contended that it was following its normal banking practice, and was acting within its rights as outlined in its terms and conditions for personal banking.

I found that the bank had every reason to believe that Mr Q's account was being used to facilitate fraud. Although the account was suspended just before the holiday period, and this would have been very inconvenient for Mr Q, it was reasonable for the bank to limit access to his account. However, (and this was acknowledged by the bank) it should have advised Mr Q earlier of its decision to deny access to the account instead of waiting for Mr Q to enquire on his own behalf. It would have been appropriate for the bank to have contacted him when it first became suspicious, on Saturday 17 December, or at the latest on the following Monday, 19 December.

Although the bank should not have suspended the account without notice, Mr Q had breached the terms and conditions of his account by allowing his friend to use it. This breach contributed significantly to the fraudulent activity, and the bank would have been justified in suspending the account immediately on these grounds alone, if it had become aware of this breach. Consequently, I did not consider that any financial compensation by the bank was appropriate. I suggested to Mr Q that he withdraw his complaint.

A regular automatic payment to the Inland Revenue Department had been amended by her bank without her knowledge or consent.

CASE 5

A gift to the tax man

Mrs M was surprised to find on her bank statement that a regular automatic payment to the Inland Revenue Department, for about \$80, had been amended by her bank without her knowledge or consent, and had been increased to \$2,006. To her consternation, Mrs M noted that two such payments had been made. When she complained to the bank, it was unable to find any authority for changing the amount of the automatic payment. It promptly took steps to recover the funds, and to credit Mrs M's account. While the bank had also apologised orally to Mrs M, she was concerned that it may not have viewed this substantial error with the seriousness it deserved. She complained to the Banking Ombudsman.

My investigator requested the bank to provide all its records about the automatic payment, and confirmed that there was indeed no evidence to show who had requested the bank to change the amount. Fortunately no other transactions had been unpaid as a result of the bank's error, and therefore the customer's credit record had not been adversely affected.

I advised the bank of my concern that an error of this magnitude could occur, in contravention of the bank's own internal procedures for changes to automatic payments. The bank then responded to my proposal to provide Mrs M with a formal written apology, which she accepted.

An error by the bank in setting up automatic payments resulted in insufficient funds to meet the loan repayments and insurance premiums. Mr O and Mrs M had been charged overdraft interest and honour fees.

CASE 6

A reasonable offer of settlement

In 2004 Mr O and Mrs M arranged a housing loan with their bank. Due to an error by the bank in setting up automatic payments to fund their loan account, insufficient funds were transferred to the loan account to meet the loan repayments and insurance premiums. A considerable time passed before the error was detected, resulting in an overdraft of more than \$2,500. Mr O and Mrs M had also been charged overdraft interest and honour fees.

The bank acknowledged its mistake and agreed to refund the overdraft interest and honour fees charged. In addition, it offered a period of six months during which it would charge no interest on the loan, to enable Mr O and Mrs M to repay the overdraft, as well as \$500 in compensation for the stress and inconvenience suffered by them. Mr O and Mrs M were not satisfied with the bank's offer, and suggested that it should write off the entire overdraft.

After considering the information provided by Mr O and Mrs M, I decided not to investigate their complaint further. Paragraph 18(f) of my Terms of Reference says that I do not have to consider a complaint if, on the basis of my consideration of relevant facts, I am satisfied that the bank has made a reasonable offer of settlement. It seemed to me that the bank had indeed made a reasonable offer in this case.

I explained to Mr O and Mrs M that the bank had agreed to pay back all charges and other costs incurred because the automatic payment had not been set up properly. Therefore they had suffered no direct loss. The actual overdraft was not a direct loss, because it was made up of payments that they would have been making for their loan and insurances if the automatic payment had been set up correctly from the beginning. I noted also that the bank's offer of \$500 as compensation for the stress and inconvenience suffered by Mr O and Mrs M was in line with the amount of compensation I have suggested in the past for similar claims.

Mr O and Mrs M decided to accept the bank's offer, and the complaint was resolved on that basis.

Mr and Mrs I's 14 year old son had been able to withdraw \$3,000 from his account, without authorisation from his parents.

CASE 7

A child's trust account

Mr and Mrs I wished to open an account for their 14 year old son, and told the bank that they wanted to limit the amount he could withdraw from it. The bank advised them that a trust account would best suit their needs. The terms and conditions for the account clearly stated that for children under 15 years of age, unless the parent or guardian of the child provided the bank with an indemnity allowing the child to access the account, all deposit and withdrawal slips had to be signed by the child's parent or guardian. On the basis of this information, Mr and Mrs I opened a trust account, without providing an indemnity.

As a result of a bank error their son was subsequently able to withdraw \$3,000, without authorisation from either parent or a designated guardian. Mr and Mrs I complained to the bank, which offered compensation of \$250. Mr and

Mrs I did not accept the offer, considering it unrealistic and an insult. They then wrote to me. They accepted that their son was partially responsible for withdrawing the funds, but considered that the bank had contributed to the situation by failing to set up the trust account in accordance with the applicable terms and conditions.

My office notified the bank, which reconsidered the complaint. After some discussion with my office the bank offered \$1,500, being half the loss suffered. Mr and Mrs I accepted the offer, and the complaint was resolved on this basis.

Mr P paid large amounts into trust accounts for each of his three granddaughters. His daughter-in-law was able to withdraw \$15,000 from one of these accounts without Mr P's consent.

CASE 8

A matter of family trust

In this case the complaint was made by Mr P, an elderly man who wanted to provide for his three granddaughters' tertiary education.

He decided to set up three trust accounts, one for each granddaughter. By May 2005 each of the two older granddaughters had \$25,000 in her account, while the youngest had \$15,000 in hers.

The trust accounts were originally with the Public Trust, with Mr P as the sole trustee, but in 2004 Mr P decided to move the funds to a bank account with a fixed interest rate. All documentation relating to the trusts and the new bank account highlighted Mr P's wish to fund his granddaughters' tertiary education.

In May 2004 Mr P, in the company of his son and daughter-in-law who were the parents of all three granddaughters, met with a bank representative to open new bank accounts for the three trusts. The Public Trust had issued three cheques to be paid into the new accounts. Each cheque was crossed, with the words "not transferable" written between vertical parallel lines. Each cheque was issued to one granddaughter as follows: "Pay to the order of (name of granddaughter) Education Trust" [the name of the trust has been removed for reasons of confidentiality].

Although much of what happened in the meeting cannot be reconstructed with certainty, three ordinary bank accounts were opened, one for each granddaughter. They were not trust accounts. Mr P, and his son and his daughter-in-law were designated as the three signatories to the accounts, with the approval of any two being required for withdrawals. Withdrawals from the Public Trust accounts had been authorised by the sole trustee only on receipt of invoices for education expenses.

Early in 2005 Mr P's son and daughter-in-law found

themselves in financial difficulty. In April and May of that year the daughter-in-law made two withdrawals totalling \$15,000 from their youngest daughter's account, and subsequently closed it. This occurred without the knowledge of Mr P.

In February 2006 Mr P discovered that the account had been closed, with all funds having been withdrawn from it, and complained to the bank. When he was not satisfied with its explanation, he complained to my office.

The bank had explained that, although only one signature, that of the daughter-in-law, had been on the withdrawal slip, they had contacted the son, who stated that he had given power of attorney to his wife, and agreed with the action she was taking. The bank had no copy of this power of attorney, and no evidence that it had sighted it.

It was apparent that, as the three Public Trust cheques had been marked "not transferable", they could only be paid into three trust accounts (one for each granddaughter). This had not been noted by the bank representative who met with Mr P and his family.

After some discussion the bank accepted that it had made two errors leading to two unauthorised withdrawals totalling \$15,413.07. The first error was at the account opening stage, when each cheque should have been paid into a dedicated trust account. The second error occurred when the payments were made to the daughter-in-law on the basis of her signature alone.

This complaint was consequently settled when the bank refunded the trust account with \$15,413.07, in addition to the interest that would have accrued, indicating that it would seek to recover the funds from the son and daughter-in-law. The bank also paid Mr P \$500 for the inconvenience and stress that he had suffered.

Mrs F was an authorised signatory for the cheque account belonging to her elderly father, and also held, jointly with her sister, a power of attorney to manage his affairs.

CASE 9

Looking after the interests of an elderly customer

Mrs F was an authorised signatory for the cheque account belonging to her elderly father, Mr C, and also held, jointly with her sister, a power of attorney to manage his affairs. In February 2006 the proceeds of the sale of Mr C's property were paid into his cheque account.

Mrs F's husband, also a customer of the bank, mentioned to his relationship manager at a different branch of the same bank, that Mrs F intended to transfer funds from Mr C's cheque account to other accounts to meet legally binding commitments already arranged by Mr C. He confirmed that Mrs F held an enduring power of attorney for her father. A meeting between Mrs F and the bank was arranged for the following day.

The relationship manager had some concerns arising from the discussion with Mr F about the proposed transactions on Mr C's account, and went to her branch manager for advice. The latter was unaware that Mrs F was an authorised signatory on the account, but noted that Mr F had no authority over it. He decided that it was necessary to act to protect Mr C's account by putting a stop on the accounts.

A telephone call was made to Mrs F to advise her of the stop on the accounts and to cancel a proposed meeting with her, thus allowing the bank time to seek advice and consider its position. Subsequently the bank agreed to transfer the bulk of the funds from the cheque account to an investment account and to remove the stop on the cheque account to allow Mr C's everyday expenses to be met. It was only after the intervention of Mr C's lawyer that the balance of the funds was released.

When Mrs F asked the bank for an explanation it wrote directly to Mr C. Mrs F took exception to this, and complained that some of the information contained in the bank's letter to her father was wrong.

I acknowledged the bank's right and responsibility to take

action as deemed necessary to protect the interests of its customer, but was concerned that the action taken was not appropriate in the circumstances. The bank had emphasised that Mr F had no authority to act on Mr C's accounts; there was no suggestion that he intended to do so. The bank contended that Mrs F intended to act under the power of attorney (which required her and her sister to act jointly); again there was nothing to suggest she actually intended to do so, and she was entitled to operate the account without it.

If the bank was concerned that funds could be removed from the account overnight, it was right to put a temporary hold on it, although its decision to cancel the meeting with Mrs F on the following day was difficult to understand. The obvious course of action would have been to meet with the person authorised to make transactions on Mr C's accounts. If the bank still had concerns after the meeting, it would have been able to continue to block the account. It was possible that the bank's concerns could have been resolved or agreement reached on a way forward. Instead, the involvement of Mr C's solicitor was required before the funds were released.

While I accepted the bank's right to contact any of its customers directly to discuss and explain any concerns about the operation of an account, some of the information contained in the bank's letter to Mr C was inaccurate. Moreover, Mr C is elderly and infirm, and had asked his daughter, Mrs F, to manage the accounts on his behalf. The inaccurate information contained in the bank's letter would have been likely to confuse him and cause him unnecessary worry and stress of exactly the kind that the arrangements had been put in place to avoid.

I recommended that the bank meet a proportion of the legal costs incurred by Mr C and also compensate him for the stress caused by the inaccurate information in its letter to him. My recommendation was accepted.

3

Cards

We continue to receive numbers of complaints with a background in the fraudulent use of cards. The approach to this type of complaint is now well settled and the complaints are normally resolved quite quickly.

More complex situations can arise with the use of cards overseas, and this appears to be a growing area of business for us.

Case 10 is a good example of a case where there was some dispute about the standard of care to be expected of a customer when using a card. A customer's obligation is to take reasonable care of the card and PIN, and in assessing whether care is reasonable, I consider all the circumstances of the card use and take into account the normal relationship of trust that exists between family members.

Case 11 has certain similarities to **case 10** and again it seems possible that a family member was involved in the fraud. However, the offender was never identified and there was very little evidence on which to reach any firm conclusion.

Case 12 was again concerned with standards to be expected of a customer. When considering whether a customer acted reasonably in reporting the loss of a card, I need to consider not only the circumstances of the individual customer but the standard that could be expected of a reasonable customer in the same circumstances.

Case 13 illustrates some of the complexities that may arise when considering the fraudulent use of cards overseas. In this case the customer was very unfortunate

in that he was the victim of two separate frauds. Moreover, explanations for the use of the correct PIN in respect of one card could not be applied to the use of the different PIN for the other card. The net result was that there was sufficient uncertainty to give the complainant the benefit of the doubt regarding one card but not the other.

The use of cards overseas can cause problems that have nothing to do with fraud or other unauthorised use. In **case 14**, the complainant ran into difficulties because, for security reasons, banks will not generally send debit cards to customers overseas. In **case 15** the customer discovered she could not use her cards overseas in the same way as in New Zealand.

Case 16 highlights the difference between the use of a credit card to obtain a cash advance and its use for making purchases. The difference between the two is not always as obvious as it might appear to a customer.

The amount of credit that it is appropriate for a bank to offer its customers remains a contentious issue. In **case 17** the bank had not fully taken its customer's financial circumstances into consideration when raising the credit limit on his cards. One of the two banks involved has since changed its credit assessment criteria.

Finally, we continue to receive complaints from merchants who have fallen victim to overseas fraudsters using stolen credit cards or illegally obtained credit card numbers to make purchases. **Case 18** illustrates yet again that obtaining authorisation from the merchant's bank does not amount to obtaining a guarantee of payment.

Mrs P was shopping with her sixteen year old grandson when she used the card to make a purchase. She entered her PIN. Unbeknown to Mrs P, her grandson, who was 25cm taller than her, observed the entry of the PIN.

CASE 10

A tall grandson and a credit card

Mr and Mrs P had a credit card with a bank. In January 2007 Mrs P was shopping with her sixteen year old grandson when she used the card to make a purchase. She entered her PIN into the Eftpos key pad, which did not have a shield and was in a fixed position on the counter. Unbeknown to Mrs P, her grandson, who was 25cm taller than her, observed the entry of the PIN. On the following two days a number of unauthorised transactions totalling \$3,700 were made on the card. Mr and Mrs P soon realised that their card was missing, and immediately requested that it be stopped.

The couple made a claim to the bank for reimbursement of the unauthorised transactions. The bank denied the claim, on the grounds that adequate security protections had not been taken to prevent the disclosure of the PIN, thus breaching the card's terms and conditions of use. The bank offered a goodwill payment of \$738.15.

Mr and Mrs P did not believe that they had breached the terms and conditions of use. Mrs P stated that she was totally unaware that her grandson was standing behind her while she was keying in her PIN. She kept her card in her wallet in her bag. Her bag was usually kept in her bedroom when she was at home, and the couple did not have any reason to believe that their grandson, who had no history of dishonesty, would steal from them. The PIN was not written down anywhere, and was neither a sequential number nor easily identifiable in any other way.

I found that Mrs P's grandson had almost certainly "shoulder surfed" her PIN. The bank was essentially arguing that the fact that the PIN had become known to the thief was conclusive evidence that Mrs P had not taken reasonable care to shield the PIN entry. However,

I am of the view that, while a customer must take care to avoid disclosure when keying in a PIN, this will not always prevent it from being seen by someone who is determined to find out what it is. There is a limit to what customers can reasonably be expected to do to protect their PIN, particularly when using an unshielded Eftpos keypad. The standard of care required in such circumstances is reasonable care, not extreme care or the use of every possible precaution.

Mrs P had no reason to suspect either that her grandson was watching her PIN entry, or that he might steal from her. It is not unreasonable for people to trust close family members and friends, in the absence of evidence that they may be untrustworthy. Customers may not take the same precautions to shield the entry of their PIN in the presence of a close family member as they would around strangers. Given that the grandson was considerably taller than his grandmother, it would not have been difficult for him to overlook the PIN entry.

Accordingly, I found that Mrs P had not breached her card's terms and conditions of use. Mr and Mrs P were entitled to reimbursement of the amount of their loss, less the standard \$50 maximum customer liability sum, a total of \$3,650. Mr and Mrs P and the bank accepted my recommendation.

Mrs L complained to her bank that an unknown person had made several unauthorised ATM and Eftpos withdrawals from her account.

CASE 11

Speculation, but no certainty, about the fraudulent use of a card

Mrs L complained to her bank that an unknown person had made several unauthorised ATM and Eftpos withdrawals from her account. More than \$3,500 had been fraudulently withdrawn over a six week period. Mrs L said that she had never disclosed her PIN to anybody, and that her card had been in her bag at all times. She said that she could not know when funds first began to be taken from her account, as she had not received any bank statements.

The bank and the police investigated the complaint, and obtained video surveillance footage of one of the unauthorised transactions. It showed a youth resembling Mrs L's son withdrawing money from an ATM. Although the police concluded that Mrs L's card had been used by a family member, there was no evidence of this apart from the surveillance tape, which was not of good enough quality to make a positive identification.

The bank declined to reimburse Mrs L for the full amount she claimed to have lost. The reasons for declining were: (a) the disputed transactions were interspersed with her legitimate transactions; (b) some of the disputed transactions had been immediately preceded by balance enquiries; (c) all the transactions had been completed on the first use of the PIN; (d) Mrs L did not report her card as lost or stolen, and advised the bank that it had never left her possession; and (e) the bank had not received any reports about "card skimming" at any of its ATMs in Mrs L's area. Nonetheless, the bank offered Mrs L a goodwill payment of \$1,000, which she declined. The matter was referred to my office.

It was very difficult to determine how the offender came to know Mrs L's PIN. An offender usually obtains a PIN by observing the cardholder keying in the number, by being told the number, or by finding a written record of it. Mrs L said that her PIN neither related to any personal information nor was written down. However, I was a little surprised to

find that, when Mrs L was questioned after the unauthorised transactions had occurred, she could not recall her PIN. This suggested to me that she may have had difficulty in remembering her PIN and raised the possibility that she may have needed to write it down.

Regarding the care of her card, Mrs L said that she always kept it in her bag. She had not been aware of her card being missing at any time. Although it appeared that it had been taken from her bag several times, I found no evidence to suggest that she had failed to take reasonable care to safeguard it.

This was an unusual case, as the withdrawals occurred over an extended period of time. In nearly all cases that I investigate involving the unauthorised use of a card and PIN, the card is stolen, and the thief then immediately uses it to withdraw funds from the account.

From the information available it was clear that Mrs L did not make the disputed withdrawals herself. As the offender had ready access to Mrs L's card, removing it from her bag without her knowledge on several occasions, it would seem almost certain that the offender or an accomplice was known to Mrs L, and could have been a member of her family. A family member would have been in a position to intercept account statements

I could not determine how the offender found out Mrs L's PIN, although it seemed most likely that she had either been observed using her PIN or had noted it down in writing.

In the unique circumstances of the case, it seemed that the fairest solution was for the bank and Mrs L to share equal responsibility for Mrs L's loss. I therefore suggested that the bank should reimburse Mrs L \$1,750 for half of her loss. Mrs L and the bank accepted my findings.

A considerable sum of money set aside to settle the purchase of a new house, in an account used infrequently. Over the previous five weeks more than \$100,000 had been stolen.

CASE 12

A stolen card – a large loss – the importance of checking bank statements

Mr G and his partner had a considerable sum of money set aside in an account to settle the purchase of a new house. They were dismayed, upon opening a bank statement, to discover that over the previous five weeks more than \$100,000 had been stolen from the account using Mr G's debit card.

Upon investigation, it became apparent that some six weeks earlier Mr G had mistakenly used this card to pay for a hamburger. It was suspected that the person serving Mr G had kept his card, and had also managed to take note of his PIN. Because Mr G did not use this card very often, he did not notice that it was not in his wallet. Mr G and his partner were extremely upset, not only because a very large amount of money had been stolen, but also because they were now seriously short of funds to complete the settlement of the house they were buying.

The bank accepted that there was no evidence that Mr G had been negligent or reckless when using the card in question, and that his PIN had apparently been taken note of with criminal intent. However, the bank was concerned at the time that had elapsed before Mr G advised it that his card had been stolen. Although a bank statement had been sent to Mr G on 3 March, the loss had not been reported until 25 March. Therefore, the bank offered to refund the full amount stolen before 3 March and 50% of the loss incurred after that date – a total amount of approximately \$71,700.

Mr G was not happy with the bank's offer, and his case was referred to my office for resolution.

After considering all the evidence, I noted that Mr G's care of the PIN was not at issue. The bank accepted that he had not voluntarily or carelessly disclosed it. I also had to consider whether Mr G had taken proper care of his card, and made an allowance in the bank's favour of about 10% for his failure to

notice that the card had been left at the hamburger outlet.

Finally, I had to consider Mr G's delay in notifying the loss. He argued that there had been no unreasonable delay because he reported the loss as soon as he became aware of it, when he opened his bank statement on 25 March. However, there was a question about whether he could reasonably have been expected to check his bank statement before then. He had said that he did not open the statement as soon as he received it because he had overseas visitors, was very busy, and was frequently away from home. Because he was unaware that the account was being used, he saw no reason to check the bank statements.

Assuming that Mr G collected his bank statement from his post office box by 6 March, my preliminary view was that the two-week period after that date should have been more than enough for him to check the statement, at the latest by 20 March. I did not propose to recommend that the bank should refund any loss after that date. If 10% was deducted because Mr G had failed to ensure that his card was returned to him at the hamburger outlet, I was inclined, should this prove necessary, to recommend that the bank reimburse a sum of approximately \$79,150.

The bank then reconsidered its position. While it noted that, on my preliminary view, Mr G would have had to accept a loss of about \$22,800, it also recognised that he was a customer who had been a victim of criminal activity, and that a substantial amount had been misappropriated from his account. Accordingly the bank offered to bear 75% of Mr G's total liability. This would result in the bank reimbursing him for an amount of approximately \$96,250.

The complaint was settled on this basis. Mr G was very happy with the outcome.

Mr P travelled frequently overseas. While he was on holiday in Turkey his Visa and Eftpos cards were used to make two separate series of unauthorised withdrawals, totalling over \$5,000.

CASE 13

Card stolen while overseas – respective liabilities of bank and customer

Mr P travelled frequently overseas. While he was on holiday in Turkey in June 2006 his Visa and Eftpos cards were used to make two separate series of unauthorised withdrawals, totalling over \$5,000. The Visa card was used while in the possession of reception staff at the hotel in which Mr P was staying, when he understood it to be in the hotel safe. Shortly afterwards, he was assaulted in the street, and his Eftpos card was stolen and used.

The Visa transactions included one manual transaction of about \$1,800 (where the fraudster signed the voucher, rather than entering Mr P's PIN). Each card had a different PIN.

The bank took the view that Mr P must have used an unsuitable number for his PINs (such as his date of birth) and/or had the PINs written down. However, as a goodwill gesture, it offered to refund half of his loss, a sum of \$2,600. Mr P did not accept the bank's offer, and referred his complaint to me.

I first dealt with the Visa manual transaction. As it was clear that the signature on the voucher was not that of Mr P, I found that he could not be held liable for that transaction. The bank had unsuccessfully attempted to "charge back" the transaction to the merchant where

the card was used. In order to successfully charge back a manual transaction, Visa International requires the original card itself, to enable it to check the signature on the voucher against that on the card. However, because the card had been stolen and was no longer in Mr P's possession, it was impossible for the card to be checked against the signature.

The conditions of use for the Visa card (the contract between the bank and Mr P) stated that the cardholder was responsible for "cash advance and sales vouchers signed or authorised by you ...". This implied that cardholders were not liable for sales vouchers not signed or authorised by them. Therefore, as Mr P had neither signed for nor authorised the Visa manual transaction, the bank was obliged to refund to him the amount of approximately \$1,800. As the bank was bound by its contract with its customer, Visa International's rules were irrelevant in this context.

It was a complete mystery how the PINs for the cards became known to the criminals. Mr P said that none of the usual ways in which a fraudster learns a PIN applied in this case: he had not chosen an unsuitable PIN; he had not written down the PIN on or near the card; and he could not have been "shoulder surfed".

In the case of the Visa card, two invalid PIN entry attempts had been made, after which two hours elapsed before the first successful transaction, with the PIN being entered correctly. This left open the possibility that technology has now reached the point where a PIN can be deduced from the card, although not very quickly. While this was a possible explanation for the transactions made with the Visa card, it could not have been the case with the Eftpos card, where the first successful use of the card by the fraudster occurred within a few minutes after Mr P had been mugged. I could only conclude that information about the PIN must have been with the card, although this was not a likely explanation for the use of the credit card.

I concluded that there was insufficient evidence to satisfy me that Mr P had breached the conditions of use for the Visa card. He was accordingly entitled to reimbursement for the total loss on the card of \$3,700, including the manual transaction of \$1,800. However, because, on the balance of probabilities, it was quite likely that Mr P had breached the conditions of use relating to the Eftpos card, I found that the bank was not liable to reimburse him for the loss on that card.

In addition, I took the rather unusual step of recommending that the bank pay Mr P \$300 compensation for inconvenience. There had been deficiencies in the bank's internal investigation of Mr P's complaint, including delays in responding to his requests for the disclosure of various information, as well as its failure to supply him promptly with the complete list of all transactions, including details of the unsuccessful attempts at use of the cards. The process used by the bank had also been unfair in certain respects. These deficiencies had undoubtedly added to the stress Mr P was already experiencing as a result of the theft of his funds.

The complaint was settled on the basis I had proposed.

An ATM card issued by a New Zealand bank expired. The customer living in Sydney was told it was not the bank's policy to send replacement ATM cards internationally.

CASE 14

No mailing overseas for ATM cards

Mr C was issued with an ATM card by a New Zealand bank in April 2002, but spent most of his time living in Australia. He used his card in New Zealand and Australia without incident until April 2005, when he was surprised to find that his card was declined while he was on holiday in Australia. When he returned home to Sydney and contacted the bank, he was told that the card had expired, and that it was not the bank's policy to send a replacement ATM card internationally.

Mr C complained to the bank in December 2005, stating that he had not been informed of this policy when he obtained the card in 2002. He requested the bank to pay for half of a return airfare to New Zealand so that he could obtain a new card. He informed the bank that he would soon be coming to New Zealand to attend a family wedding, and that the bank ought to pay for his ticket back to Sydney (an amount of approximately \$300).

When he arrived in Auckland in January 2006 he went to a local branch and collected his replacement card. Bank staff told him that the bank would not pay for his flight home because he was coming to New Zealand in any case. He subsequently posted an invoice for the cost of the flight to the bank, stating that he expected it to be paid within 21 days. Two weeks later the bank wrote to Mr C, saying that it would not be reimbursing him for the flight.

Mr C brought his complaint to me in April 2006. He said that the bank was aware that he was residing in Australia because his statements were sent to his home address there. He claimed that the bank ought, when issuing the card, to have informed him of its policy against posting ATM cards internationally. He explained that the main

purpose of his visit to New Zealand in January 2006 was to sign his replacement card, and that he was not obliged to attend the family wedding there. Instead, there was to be a "reconfirmation of vows" ceremony in Sydney that he would have attended.

The bank apologised for its failure to explain the policy to Mr C, but considered that it had acted appropriately in the circumstances. It had made every effort to ensure that Mr C obtained his replacement card while in Auckland on holiday. Arrangements had been made for Mr C to collect the card on a Saturday from any New Zealand branch that he requested.

Although Mr C claimed that the primary purpose of his trip to New Zealand was to collect the card, I found this unlikely. If that had been his main purpose, I would have expected him to return to New Zealand shortly after his card expired in April 2005. Instead, he waited nine months to collect it. It did not appear that he was greatly inconvenienced by not having the replacement card during this period.

As Mr C's postal address was in Australia, I would have expected the bank to inform him that his card was due to expire well before the expiry date. The bank should also have advised him that it would be unable to send a replacement card to Australia. This would have prevented the unpleasant surprise that Mr C faced while on holiday. However, the admitted failings on the bank's part did not alter his situation. He would still have had to return to New Zealand. Accordingly, I found that the bank was not obliged to refund Mr C for the cost of the airfare. The parties accepted my findings.

Mrs D's bank reassured her that she would be able to use her debit card at Eftpos facilities overseas.

CASE 15 Which of your bank cards will work overseas?

Before leaving for a trip to Europe, Mrs D asked her bank for advice about the use of her debit and credit cards overseas. She had been aware of recent publicity about New Zealanders experiencing problems with overseas Eftpos facilities.

The bank's staff member recommended that Mrs D ensure that her Visa card had credit funds of \$1,000 before she went; that a sum of \$1,700 in her current account could be accessed by her debit card to obtain cash from ATMs and Eftpos outlets; and that she also take some overseas cash.

When Mrs D's daughter questioned this advice, Mrs D once again checked with her bank, and was reassured that she would be able to use her debit card at Eftpos facilities overseas.

To Mrs D's dismay, when she reached England, she discovered that she was unable to use either of her cards. It was later discovered that the cash she had been withdrawing on her travels had been coming out of her Visa account and not out of her current account. Moreover, the Visa card had reached its limit. When Mrs D called her bank, she was told that there was "no way" she could make Eftpos transactions in the countries she had visited. The bank arranged to transfer the \$1,700 still in her current account to her Visa account, to provide sufficient funds until she returned to New Zealand.

Upon her return home, Mrs D complained to the bank. She said that, as a result of the misinformation, she had spent more than she had intended on her holiday. Moreover, the

shock of being unable to access any money for a period of time in England had been very stressful, and had spoiled her holiday. She had also not been aware that debit card transactions made overseas incurred a charge.

The bank advised my investigator that customers are able to use debit cards while overseas, but that such activity is in the main restricted to accessing cash via ATMs. Debit cards can not usually be used for Eftpos transactions. The bank apologised for any wrong advice it had given Mrs D, and offered to refund the interest charged to her credit card account while she was overseas, as well as her ATM charges, a \$25 "over the limit" charge on her Visa account, and a \$100 goodwill gesture, amounting to a total of approximately \$320.

Mrs D was not satisfied, and approached my office. After meeting with Mrs D and further discussions with the bank, my investigator facilitated a settlement. The bank agreed to refund the Visa card interest and charges as had previously been agreed, and in addition to pay compensation of \$500 for inconvenience, making a total settlement sum of approximately \$720. The bank also agreed to transfer the remaining balance of Mrs D's Visa account to a low interest Mastercard account, to enable her to repay the debt more quickly. In addition it arranged to provide her with a specialist customer service officer who would be able to talk about her foreign exchange needs and arrangements when she next decided to travel overseas.

Mrs D was very happy with the settlement and the bank's offer of assistance.

Mr S discovered that he had been charged a staff-assisted cash advance fee for using his credit cards. The banks had not treated the transactions as normal credit card purchases.

CASE 16

Sales transactions or cash advances when buying a car

Mr S wanted to buy a car. He gave the car dealer a part payment in cash and asked whether he could pay the balance on his credit cards. The car dealer agreed, and drove Mr S and his wife to bank A. Mr S asked the bank whether he could make two normal sales transactions with his two credit cards (the first was held with bank A, while the other was with bank B). This would have provided him with various benefits, including an interest-free period in which to pay back the amounts. However, the bank processed the transactions as cash advances. Mr S signed the cash advance form and bought the car.

A week later Mr S discovered that the two banks whose credit cards he had used had charged a staff-assisted cash advance fee for the two transactions. The banks had not treated the transactions as normal credit card purchases, and had charged interest from the date of the transactions.

Mr S complained to bank A, contending that its staff member had misled him. He said that he would not have used the credit cards if he had known that the transactions would be processed as cash advances. Bank A dismissed the complaint, pointing out that Mr S had signed a cash advance withdrawal form. The bank considered that it had not misinformed him. It offered \$35 as reimbursement for the interest charged on its cash advance (but not on the interest charged by bank B). Mr S was not satisfied with the offer, and brought the complaint to me.

After the complaint was taken up by my office, the bank made a new offer of \$100 and apologised for the misunderstanding. Mr S accepted this offer.

Upon the death of her elderly father, Ms W discovered, to her dismay, that he had been allowed to incur large credit card debts with two banks.

CASE 17

A case of inappropriate credit card lending

Upon the death of her elderly father (Mr D), Ms W discovered, to her dismay, that he had been allowed to incur large credit card debts with two banks. At the time Mr D's income was limited to National Superannuation and a small private pension. When the debts escalated out of control to a total of over \$40,000, and the bank started to threaten Mr D with debt recovery action, Mr D told his wife that he was in financial difficulty.

Mr and Mrs D arranged a reverse mortgage over their previously debt free house to repay both credit card debts.

A few months later Mr D died. Ms W complained to my office about the banks' actions in allowing Mr D to have such high credit card limits in his financial position. She was sure that the stress placed on her late father as a result of the large debts beyond his ability to repay had hastened his death.

The complaints were referred to both banks.

When bank A was unable to settle the complaint, I commenced my investigation. Bank A accepted that it had increased the credit limit on Mr D's card from time to time, based on the fact that he was paying at least the minimum monthly repayment due each month. However, payment of the minimum monthly payment on a \$5,000 credit limit is an entirely different proposition from payment of the minimum monthly payment on a \$10,000 or \$20,000 credit limit.

Bank A accepted that it did not fully take into account Mr D's financial situation and thus may have breached its obligations under the Code of Banking Practice, which provide that a bank may increase a credit limit only when the information available to it leads it to believe that the customer will be able to meet the terms of the credit facility.

Bank A offered to refund all interest and fees charged above the original credit limit of \$10,000, amounting to a total of \$5,300.

After further negotiation between bank A and Ms W, with the assistance of my investigator, the bank increased its offer to refund all interest charged above a credit limit of \$5,000, amounting to a sum of approximately \$8,345. The bank also offered to pay compensation of \$2,000 to Mrs D for inconvenience, that is the anxiety she had suffered from learning of her husband's financial difficulties and having to arrange a mortgage over her home. Rounded up, the offer amounted to a total of \$10,500. Ms W accepted the increased offer.

Bank A advised that it has since changed its credit assessment criteria to take into account repayments made in comparison to the potential new limit of a card.

Bank B was able to negotiate a satisfactory settlement directly with Ms W. The combined settlements enabled Mrs D to repay approximately half the amount owing on her mortgage.

Mr Y telephoned his bank to inquire whether some credit card numbers were valid. The bank gave him an authorisation number for the transaction, which turned out to be fraudulent

CASE 18 Authorisation is not a guarantee of payment

Mr Y owned a clothing company. In April 2006 he received an order from a foreign purchaser wanting to buy a large quantity of T-shirts, using two credit cards. As the purchaser was not physically present at the point of sale, Mr Y telephoned his bank to inquire whether the credit card numbers were valid.

If vendors have suspicions about a cardholder, they may give bank call centres a specific code word. The bank then asks the vendor a series of questions to which only "yes" or "no" answers may be given. After speaking to Mr Y, who had given the code word, the bank gave him an authorisation number for the transaction, and confirmed that sufficient funds were available on the credit card. On the basis of this information, Mr Y proceeded to complete the sale.

The transaction turned out to be fraudulent, as the holders of the credit card accounts denied making the purchases. The bank then advised Mr Y that it would be charging the losses back to his account. He complained to the bank, contending that it should have cautioned him about the risks involved in accepting overseas credit card transactions. He requested the bank to return the funds to him, as he had proceeded with the sale only after the bank had confirmed his authorisation request.

The bank said that the authorisation did not guarantee that the credit card had not been fraudulently used. Furthermore, a code authorisation merely checks whether

the card has been reported lost or stolen at the time of the vendor's query, and whether sufficient credit is available for the transaction. The bank said that, under its contract with Mr Y, a signed authority from the purchaser did not guarantee payment, and that a valid payment depended on the card issuing bank's approval of the transaction.

As a goodwill gesture the bank offered to refund 50% of the transaction. Mr Y declined the offer, as he believed that the bank had given him misleading information about the code authorisation, or had at the very least neglected to inform him of the risks involved. He drew his complaint to the attention of my office.

The bank declined to change its position. It accepted that its staff member possibly did not understand why Mr Y had requested a code authorisation. Mr Y had not told the bank that the cardholder was not present, and the bank argued that, had it known that this was the case, it would have asked Mr Y for more detailed information. Moreover, the bank said that, had Mr Y described the background to his concerns, it would have advised him not to accept a credit card payment for the transaction.

The bank's contract with Mr Y and the other facts obtained during the investigation appeared to support the bank's position in this case. Mr Y decided to accept the bank's offer of 50% of the chargeback transaction. The file was closed.

4

Cheques

Once again I have received a number of complaints from customers who did not know how to cross a cheque to ensure payment to the intended payee.

The investigation summarised in case notes **19 and 20** explains the law in this respect and some of the duties of both paying and collecting banks. It is noteworthy that in **case 20**, bank Y had set itself a higher standard than required by law or by the Code of Banking Practice and was unfortunately let down by staff who had failed to follow the bank's own standards.

Case 21 was again a complaint about the disbursement of cheque funds in a way the drawer of the cheque had not intended. In this case, however, the real focus of the complaint was on the actions of the collecting bank in splitting the cheque proceeds between two accounts, whereas the complaint was actually made against the paying bank.

In **case 22** the collecting bank and the paying bank were the same, but again the customer was unable to recover funds fraudulently taken from his account on the basis of a cheque merely crossed with two parallel lines.

Case 23 is a vivid illustration of the effect of different cheque crossings. The customer had made out a number of cheques to a named payee, all of which had been paid to the account of another payee. He had no difficulty in recovering the funds represented by cheques crossed "not transferable", but the remaining payments were irrecoverable.

Another twist to the story of cheque payments is found in **case 24**. In this case, the payment made by "not transferable" cheque was received by the payee for whom it was intended even though it was paid into an account in a somewhat different name.

Case notes **25 and 26** concern cheques that were crossed "not transferable" but which still reached accounts for which they were not intended. **Case 26** is about cheques made out to the bank itself but paid into the accounts of customers of the bank. I note that this practice is no longer acceptable in some overseas jurisdictions because of the opportunities it presents for fraud. New Zealand banks may wish to consider whether they should follow suit.

Mr S wrote out a cheque for \$40,000. The cheque was not crossed, but the words “or bearer” were crossed out. The cheque was posted, but was stolen from the mail.

CASE 19

Uncrossed cheques – responsibility of the paying bank

Mr S is a customer of bank X who wrote out a cheque for \$40,000 in favour of ABC Ltd. The cheque was not crossed, but the words “or bearer” were crossed out. The cheque was posted to ABC Ltd, but was stolen from the mail.

The cheque was presented for payment at bank Y. The thief altered the name of the payee to include his own name, misspelt, and added some extra words to make it appear as though he had a connection with the payee. The funds were paid into the thief’s account with bank Y and were promptly withdrawn, after which the account was closed.

When Mr S went to collect the goods from ABC Ltd, he was advised that they had not received his cheque, and that the goods had not been paid for. Mr S lodged a complaint with my office against both bank X and bank Y.

In cheque law terminology bank X was the paying bank, which held Mr S’s account from which the funds were paid. Bank Y was the collecting bank through which the thief presented the cheque for collection.

By means of a cheque, account holders formally instruct their banks to pay an amount of money to a third party, and to debit their accounts accordingly. However, this instruction does not exist in a vacuum, but is surrounded by legal constructs established by practice and by relevant legislation (specifically the Bills of Exchange Act 1908 and the Cheques Act 1960).

Mr S believed that, by crossing out the words “or bearer”, he was instructing bank X to pay the funds to ABC Ltd and no one else. While this may have been his sincere belief, it is not supported by the above-mentioned legislation.

The law distinguishes between a bearer cheque and an order cheque. If it is a bearer cheque, then, in the absence of crossings, banks may pay it to anyone in possession of it. If the words “or bearer” have been crossed out, as in this case, it is known as an order cheque, and may be paid to the payee named on the cheque or as directed by the named payee, i.e. ‘to the order of ...’. Such a direction or order usually takes the form of an endorsement, that is, an instruction written on the cheque directing the bank to pay either another named payee or the bearer of the cheque. It should be carefully noted that, if the name of the payee to an order cheque is subsequently changed by a third party to that of another payee, banks are acting within the law if they pay the third party. The only legally valid way for Mr S to ensure that no one other than ABC Ltd would receive the value of his cheque would have been for him to cross the cheque and write the words “Not transferable” or “Account payee only” on it.

Section 2(1) of the Cheques Act specifically addresses situations when an order cheque has not been endorsed, and provides that a banker acting in good faith and in the ordinary course of business who pays a cheque which is not endorsed, does not incur any liability simply because of this.

The only question left for me to consider was whether bank X paid the cheque in good faith and in the ordinary course of business. Section 91 of the Bills of Exchange Act provides that something is done in good faith when it is done honestly, irrespective of whether it is done negligently. In this case there was no indication of any dishonesty on the part of bank X.

The cheque received by bank X carried the name of the thief. I did not consider it material that there was a possible spelling mistake in the thief's name, or that his name was in brackets. If the alteration to the cheque had been more obvious, it could have been argued that the bank should have been alerted to the possibility that the cheque had been stolen. In this case the alteration was a clever one, and the handwriting closely matched the handwriting on the cheque.

Mr S also suggested that, given the high value of the cheque, bank X ought to have taken greater care to ensure that the person receiving the funds was the intended payee. Some banks may contact the customer before paying unusually high value cheques. However this is neither standard practice, nor is it not required by the Code of Banking Practice, and the law does not place any obligation on banks to treat high value cheques any differently from cheques of a lower value.

I was satisfied that in the circumstances of this complaint section 2(1) of the Cheques Act provided bank X with protection against an action in conversion by Mr S.

In this case I asked bank X for information about how it communicates to its customers information about the various cheque crossings. Bank X referred to its terms and conditions, as well as to the information contained on the inside cover of Mr S's chequebook. I had serious concerns about the adequacy and accuracy of this information, but as there was no suggestion that Mr S had relied on either to guide him in writing his cheque, I was satisfied that these deficiencies were not material to this complaint. On my suggestion, the bank reviewed and amended the standard information inside its chequebooks.

As I was satisfied that bank X had acted in accordance with the law, I could not uphold this complaint. I proposed to recommend that the complaint be withdrawn. Mr S agreed to do so, but asked that I continue to investigate his complaint into bank Y.

(see case note 20 overleaf)

Although bank Y instructed its staff to be extra vigilant, they had overlooked discrepancies in the name on the cheque.

CASE 20

The continuing saga: the responsibilities of the collecting bank

I then turned my attention to the collecting bank, bank Y, where the thief's account was held. Bank Y owed Mr S certain obligations as the collecting bank, even though he was not its customer. It is important to note that, when the cheque was presented for collection to bank Y, it was deposited through a fast deposit box.

I again assessed this complaint in terms of the Bills of Exchange Act 1908 and the Cheques Act 1960. Section 2(1) of the Cheques Act required bank Y to act in good faith and in the ordinary course of business when collecting the cheque. I was satisfied that bank Y had acted in good faith, but had concerns about whether it could be said to have been acting in the ordinary course of business. I asked bank Y for a copy of its instructions to staff when processing cheques for collection.

I found that bank Y instructed its staff processing cheques deposited through fast deposit boxes to be extra vigilant in comparing the payee's name on the cheque with the name of the account the cheque was to be deposited into. Although the name on the cheque was similar to the name of the account, the similarity was not great, and the names were far from identical. I considered that an extra

vigilant staff member should have had suspicions aroused by this discrepancy, and would on closer examination have noticed other questionable aspects of the cheque, including the misspelling of part of the payee's name, the payment of a business cheque into a personal account, and the high value of the cheque itself. The failure to notice the discrepancy in the names led me to conclude that, in this instance, bank Y had not collected the cheque in the ordinary course of business, and could not be protected by the legislation. It had not followed the process it had set for itself.

I proposed to recommend that bank Y refund to Mr S the full amount of the value of the cheque. Bank Y accepted my proposal, and as a gesture of goodwill included reimbursement of the interest he had paid on the additional amount he had had to borrow from his own bank to pay for the goods. Mr S also accepted my proposal, and was extremely happy with the outcome.

Mr Z wrote out a personal cheque for \$220,000 in favour of U Trust. He crossed out the printed words “or bearer” and drew two parallel lines across the top left hand corner of the cheque. Nothing was written between the parallel lines.

CASE 21 Unauthorised splitting of cheque proceeds

Mr Z wrote out a personal cheque for \$220,000 in favour of U Trust. He crossed out the printed words “or bearer” and drew two parallel lines across the top left hand corner of the cheque. Nothing was written between the parallel lines.

When the cheque was deposited with another bank, it was split into two amounts at the request of the bearer. \$200,000 was paid to a Mr and Mrs X, with only \$20,000 being paid to U Trust. Mr Z was perplexed as to how this could have occurred. He attempted to retrieve the \$200,000 from Mr and Mrs X, but was unsuccessful. He then complained to his bank (the paying bank), claiming reimbursement for this lost money. After Mr Z's bank refused to uphold his complaint, he brought it to my office.

In my initial assessment I concluded that section 2(1) of the Cheques Act 1960 protected the paying bank from liability in this case. There was no indication that the paying bank had acted dishonestly or in bad faith. Furthermore, I found that it had acted in its ordinary course of business. The paying bank could not reasonably have been expected to know the details of the account(s) into which the cheque was paid. Only the collecting bank could have possessed such information.

When Mr Z objected to my interpretation of section 2(1), I proceeded to make a formal recommendation. He believed that section 2(1) applied only when the paying bank was the same as the collecting bank. He contended that the collecting bank was negligent in splitting the cheque into two amounts and paying the funds into an account other than that of the payee. He argued that, as his bank held a copy of the U Trust deed, it should have been aware that this made unanimous agreement between all trustees a precondition for any transfers or expenditures involving its account.

Mr Z was of the opinion that the paying bank had not acted in the ordinary course of business, saying that it is not possible to split a cheque, regardless of whether it is endorsed or not. Additionally, he argued that the paying bank lacked the authority either to transfer the \$200,000 separately from the \$20,000 or to debit his account for such a transaction. He claimed that the paying bank knowingly assisted the transfer of funds to the collecting bank, and in this way contributed to his loss. He stated that it was irrelevant that the paying bank had acted in good faith, as it owed him a contractual duty to follow his instructions, as well as a duty of care in tort, and fiduciary obligations.

It is true that a paying bank may debit an account only in accordance with the instructions of the account-holder. I concluded that the manner in which Mr Z wrote the cheque merely ordered the paying bank to pay \$220,000 into a bank account. The paying bank had simply followed this instruction.

I concluded that my initial assessment had to stand. The paying bank had followed the instruction written on the cheque. The paying bank could not have been aware of the name of the accounts into which the collecting bank paid the funds. Even though the cheque was not endorsed as payable to Mr and Mrs X, the paying bank was acting in good faith and in the ordinary course of business. Thus, it qualified for the defence under section 2(1) of the Cheques Act 1960. The collecting bank may have acted negligently, but I was not investigating a complaint about that bank. As I was unable to find fault on the paying bank's part, I dismissed the complaint. Mr Z and the paying bank accepted my findings, and the case was closed.

Mr W crossed the cheque with two parallel lines, and added neither the words “Not transferable” nor “Account payee only”; nor crossed out the words “or bearer”.

CASE 22 Another cheque with inadequate crossing

Mr W wrote out a cheque for a substantial sum in favour of a business, XYZ Ltd. He crossed the cheque with two parallel lines, and added neither the words “Not transferable” nor “Account payee only”; nor crossed out the words “or bearer”. He believed that he had in this way ensured that the cheque could only be paid into the account of XYZ Ltd.

Unfortunately, the cheque was stolen from a post box, and a third party (Mr A) then deposited the cheque into an account in his own name. Once the cheque was cleared, the funds were withdrawn from that account, which was closed.

When Mr W saw that his account had been debited for the amount of the cheque, he believed that his debt to XYZ Ltd had been paid, and thought no more about it until XYZ Ltd requested him to pay the outstanding amount. Mr W's bank traced the cheque, and discovered that the funds had been deposited into Mr A's account and then withdrawn.

Mr W complained to his bank. He considered that it had been remiss in allowing the cheque to be deposited into an account other than that of the named payee, especially considering its high value. He claimed reimbursement.

The bank declined Mr W's claim for reimbursement on the grounds that it had followed his instructions on the cheque. It considered that the instructions inside the front cover of its chequebooks adequately warned its customers how to protect themselves from theft. After consideration I agreed that the bank's warnings were adequate. The bank also advised that the value of the cheque had no effect on its processing procedures.

In this complaint the bank was both the collecting bank (the bank where Mr A presented the cheque) and the paying bank (the bank where Mr W's account was held). I considered the bank's role as paying and collecting bank in turn.

I formed the view that, as the cheque was a bearer cheque, the collecting bank could have correctly accepted the

cheque into the account of either: (a) the named payee, XYZ Ltd; or (b) any other bearer, including Mr A.

Mr W had not deleted the words “or bearer”; so section 5(3) of the Cheques Act did not require the cheque to be endorsed with the name of Mr A. In such circumstances, any person bearing the cheque would be entitled to pay it into his or her account. In accepting the cheque into Mr A's account the bank was therefore acting in accordance with the instruction on the cheque.

I also considered whether the bank had acted negligently in accepting the cheque, and concluded that there was nothing on the face of the cheque to alert the bank to the possibility that it might have been stolen. Although Mr W suggested that, given the high value of the cheque, the bank ought to have contacted him to confirm whether the transaction was as he had intended, I was satisfied that it is not standard practice for banks to do so. Such action is also not required by the Code of Banking Practice.

I then turned my attention to the role of the bank as paying bank. Section 91 of the Bills of Exchange Act provides protection to a bank in such circumstances as long as it is acting honestly and in good faith. Therefore, if the bank did not know, and had no reason to suspect, that the bearer, Mr A, had stolen the cheque, it was legally entitled to credit the funds to his account. If Mr W wished to limit the transferability of his cheque, he could have taken advantage of the protection provided to him in section 7B of the Cheques Act by crossing the cheque and adding the words “Not transferable” or “Account payee only”. As he did not do so, the bank could reasonably assume that he did not object to the cheque being transferred from the named payee, XYZ Ltd, to another party.

I was consequently unable to find that the bank was responsible for Mr W's loss. Both the bank and Mr W accepted my proposal that the complaint be withdrawn.

Mr V complained to the bank about cheques made out to company A and accepted for payment into company B's account. They had been crossed "not transferable".

CASE 23 A mix of transferable and non-transferable cheques

Mr V was the victim of a fraud. While he believed that he had a contract with a reputable company (company A) for the construction of a house, in fact his contract was with a fraudster, Mr H, who held himself out as a representative of the company. Progress payments were made by Mr V with cheques made out to variations of company A's name. All cheques were accepted by the bank for payment into an account in name of company B. Before the house was complete Mr V was informed by Mr H that company B was insolvent, and unable to fulfil its obligations. At this point Mr V discovered the fraud. He complained to the bank about the cheques made out to company A that had been accepted for payment into company B's account. Mr V sought repayment of \$45,000 from the bank as compensation for extra costs incurred in completing the work required on the house.

The bank acknowledged that two of the cheques had been crossed "not transferable", and should not have been accepted for payment into company B's account. It offered to refund the amount of these cheques, totalling just over \$10,000, to Mr V.

The other cheques had been crossed with two parallel lines and "or bearer" had been deleted, and were therefore examples of what is known as order cheques. In the absence of adequate crossings as specified in the Cheques Act 1960, an order cheque may be paid to the

payee named on the cheque or as directed by the named payee. When an order cheque is not endorsed by the named payee, as in this case, section 2(1) of the Cheques Act provides that a banker acting in good faith and in the ordinary course of business does not incur any liability simply because the cheque is not endorsed.

Mr V suggested that, by accepting the "not transferable" cheques, the bank was sending him a message that company B was reputable. He contended that the bank should have referred these cheques back to him, thus alerting him to the fraud. However, if the bank had indeed picked up discrepancies in the cheques, it would have referred back to company B, and not to Mr V, who was not its customer. The bank was not in breach of any obligation or duty owed to Mr V.

I accepted the bank's submission that it was not a party to the contract between Mr V and company B, and could not be held responsible for losses he incurred as a result of its default on the contract. There was no direct link between the bank's acceptance of the cheques and the losses incurred by Mr V.

I recommended that Mr V should accept the bank's offer to refund the amount of the two "not transferable" cheques, and the complaint was settled in this way.

A cheque was made payable to “Murquay” and marked “not transferable” both in handwriting and in printing. The cheque was then deposited into an account named “City Windows Limited t/a Murquay Window Centre”.

CASE 24 Murky dealings with a builder ¹

Mr H wished to build a conservatory on his property. On 4 December 2005 a builder from Murquay Window Centre (MWC) gave him a quote and a business brochure that was simply headed “Murquay”. At the end of the brochure it was stated that MWC was a franchise of Award Construction. Mr H trusted Award Construction, and decided to accept the builder’s quote.

In December 2005 Mr H gave the builder a cheque for \$10,000, as a deposit on the construction. The cheque was made payable to “Murquay” and was marked as “not transferable” both in handwriting and in printing on the cheque itself. The cheque was deposited by the builder into an account named “City Windows Limited t/a Murquay Window Centre”.

The conservatory was never built. When Mr H asked for the return of his money, he received no response from MWC. In June 2006 Mr H wrote to the bank asking how a cheque to “Murquay” marked as “not transferable” could have been paid into an account in the name of City Windows Ltd (CWL). Mr H advised the bank that, in his estimation, it was liable for the mistreatment of his cheque. In July 2006 CWL was placed in liquidation.

The bank replied to Mr H three months later, saying that it had deposited the cheque into the correct account, as Murquay was a trading name used by CWL. Mr H did not accept the bank’s response, and brought his complaint to me.

Mr H claimed that the cheque should have been paid into an account in the name of Murquay. He claimed that the bank had acted unlawfully and in breach of banking practice when it deposited the cheque into an account in the name of CWL. He said that neither the quote nor the builder’s card made any reference to CWL.

The bank claimed that its treatment of the cheque was consistent with the “not transferable” crossing, as the name of the payee on the cheque matched part of the account name. It stated that any purported misrepresentation relating to the ownership structure of MWC was not relevant to its handling of the cheque.

I considered section 7B (2) of the Cheques Act 1960, which declares that the effect of crossing a cheque as “not transferable” is that the cheque is valid only between the parties to it. If the person or entity in whose favour a cheque is drawn is the person or entity holding the account into which the cheque is deposited, there is a valid transaction. This section does not require the name of the payee on the cheque to have identical spelling to the name of the payee’s account, but merely stipulates that the payee must be the same legal entity.

I found that the named payee, “Murquay” (and any derivations from it), was clearly a trading name for the account holder “City Windows Ltd t/a Murquay Window Centre”. “Murquay” was the same legal entity as MWC. Accordingly, I was unable to find that the bank was liable for Mr H’s loss.

Mr H also submitted that he had intended the money to pay Award Construction, rather than MWC. However, I found it difficult to see how a person reading the brochure could have understood that MWC was owned by Award Construction. The brochure merely stated that a franchising relationship existed between the two parties. I suggested that, if Mr H believed that he had been misled by the builder about the structure of the MWC franchise, that was a matter for him to take up with the builder.

¹Names used in this case note are fictitious and not the names of the persons or organisations involved in the complaint.

A solicitor had paid four cheques made payable to Mrs E and crossed “account payee only” into his solicitor’s trust account, and was refusing to release any of the funds until a dispute about expenses was resolved.

CASE 25 Cheques paid to professional trust accounts

Mr E complained to my office on behalf of his mother, who was in dispute with her solicitor. The solicitor had paid four cheques made payable to Mrs E and crossed “account payee only” into his solicitor’s trust account with a bank, and was refusing to release any of the funds until a dispute about unpaid legal expenses was resolved.

I asked the bank to detail its policy on the collection of “account payee only” or “not transferable” cheques into solicitors’ trust accounts. I pointed out that my current approach, established in a number of earlier cases, was that it was acceptable practice for an “account payee only” cheque to be paid into a sub-account of a solicitor’s trust account, so long as the sub-account was in name of the payee specified on the cheque and had been opened with authorisation from that payee. It was not acceptable

for an “account payee only” cheque to be paid into a solicitor’s general trust account, as this would be a breach of the bank’s obligation to pay such a cheque only into an account in name of the payee specified on the face of the cheque.

The bank reconsidered its position, and agreed to refund to Mrs E the full amount of the four cheques paid into the solicitor’s trust account, so long as she agreed that, if she subsequently retrieved any of these funds from the solicitor, she would refund any amounts received to the bank. The bank also agreed to refund the expenses incurred by Mr E in determining what became of the original cheques. The complaint was settled on this basis.

Mr B complained that the bank had allowed the “not transferable” cheques to be paid into Mr A’s bank accounts.

CASE 26

Cheques payable to a bank

An accountant, Mr A, worked for an accountancy firm which held its customers’ funds in a trust account with a bank. The trust account funds included funds belonging to Mr B.

Mr A took three cheques drawn on the firm’s trust account to the bank and paid them into separate accounts, to each of which he was a signatory, with the same bank. Each cheque was crossed “not transferable”; and the payee was named as the bank. The cheques totalled several thousand dollars and were correctly signed by authorised signatories. Mr A was later convicted of a separate fraud offence and the cheque deposits were identified during an investigation into this fraud.

Mr B complained that the bank had allowed the “not transferable” cheques to be paid into Mr A’s bank accounts.

The bank responded by saying that the cheques were signed in accordance with the account mandate. The cheques were drawn on the firm’s trust account and the account held funds belonging to a number of clients. The

bank considered that neither the bank nor Mr B would be able to identify any of the three cheques as representing his own funds in the account. Therefore he had not suffered any direct financial loss from the bank’s actions.

Moreover, the bank argued that its obligations were to its customer, the firm, rather than to Mr B, who was not its customer.

While I had considerable sympathy for Mr B’s situation, I may only investigate a complaint made by someone who has been provided with a banking service by the bank concerned. In this instance, the cheques were not made out to Mr B, and were not drawn on his account. It was also not possible for me to confirm whether any of his funds had been withdrawn from the trust account, as I did not have authority to investigate the firm’s accounts. I was accordingly obliged to tell Mr B that I could not investigate his complaint.

5

Lending

A small cluster of cases this year have involved a mistake on the part of a bank in advising customers about the regular repayments required in respect of a home loan. We very occasionally encountered complaints of this kind in the past, and it is not clear why so many complaints, involving more than one bank, have arisen this year. As can be seen from **case 27**, even when responsibility for the mistake has been determined it can be a difficult exercise to find a resolution which will allow the customers to stay in the home they have bought and at the same time bring the loan repayments down to an affordable level. **Case 28** involved a similar factual background but is also a good illustration of my office working with a bank to find a fair solution to a customer's complaint.

Case 29 involves a deficiency in a bank's advice in a rather different context. While I will not normally investigate the level of a bank's standard fees or charges I may investigate the administration of those fees. In this case it was reasonably clear that the customer had not been told there would be an exit fee, effectively a penalty, for cancelling loan arrangements.

The next set of cases in this section all have a background in family relationships and illustrate some of the difficulties that can arise when one family member wishes to help another financially. In **case 30** there was no problem within the family, but the family understanding about property ownership was different from the legal situation. In such circumstances clear communication with the bank

is essential.

When a family member is having difficulty obtaining a home loan or a personal loan, other family members will sometimes offer to help by giving a guarantee. It is becoming more common for banks to refuse the offer of a guarantee but to suggest that the parties become joint borrowers. In the event of a default, both borrowers are immediately liable for any resulting debts.

When a bank is lending to joint borrowers and is aware that one of the borrowers will not benefit from the loan it should advise that borrower to seek independent legal advice in the same way as it should do so for a party offering a guarantee. In **case 31** the bank was not fully aware of the background and was entitled to assume that the solicitor was acting for parties with a common interest but in **case 32** the bank did know that the loan was solely for the benefit of the customer's daughter and should have made sure that its customer was properly advised about the implications of the documents she was to sign.

Case 33 also had a background of family difficulty and is another example of a practice on which I have previously passed adverse comment. While neither the law nor the Code of Banking Practice place an obligation on a bank in this respect, I do not consider it good practice for a bank to allow loan documents to be taken away by one spouse or partner for signature by the other spouse or partner without satisfying itself that both parties are at least aware of the loan application.

(continued overleaf)

Clause 5.1(j)(iv) of the Code of Banking Practice asks customers in financial difficulty to contact their bank immediately so that their particular situation can be considered. It notes that the sooner a customer contacts the bank, the better position the bank will be in to assist him or her. A customer who is not in default of loan arrangements may also have rights under the Credit Contracts and Consumer Finance Act. Nonetheless in both **cases 34 and 35** customers in very difficult circumstances did not receive the assistance that should have been available to them. In both cases the complaint was resolved once it reached the attention of senior management at the bank, but if it had not been for the assistance of the Banking Ombudsman, it is unlikely that there would have been a resolution. In both cases, by the time the complainants came to my office they had no faith left in the bank's ability to resolve their difficulties. In **case 36**, on the other hand, a quick resolution was possible once the bank understood the customer's difficulties.

Even customers who have caused or contributed to their own difficulties are entitled to be treated reasonably by their banks. In **case 37** the customer had not repaid a debt and had not kept to a repayment arrangement. Even so, it was not reasonable for the bank to take the entire amount of the debt from his account, without warning, some two years later and just before Christmas.

The remaining cases in this section all involved an adverse credit listing made against the customer. A listing of this kind can make it very difficult to obtain any further credit. However, it is not appropriate for a bank to cancel or recall a listing unless it is one that should not have been made in the first place. In **case 38** there were some deficiencies in the bank's administration and the complainant was entitled to a small amount of compensation for inconvenience, but the listing was appropriate and remained in place. In **case 39**, on the other hand, it was quite clear that the customer had reason to believe the debt had been repaid and did not intentionally default. This was an appropriate case for the removal of a listing.

Finally, **case 40** is a clear example of a bank fulfilling its obligations to give warnings about the possibility of a listing with a credit agency and eventually making the listing. Although the customer was in difficult financial circumstances, there was no suggestion that he was unaware of the debt or that the proper process had not been followed.

Mr and Mrs T signed a loan agreement specifying monthly repayments. Six months later the bank discovered a significant error, and requested them to pay \$373.20 more.

CASE 27

A mistake in the calculation of loan repayments

Mr and Mrs T wished to purchase a section on which to build their home. They met with the bank and obtained a loan to finance the section purchase. Shortly afterwards they entered into a contract for the construction of their new home, and about six weeks later they applied for a loan to finance the construction. The application was successful, and Mr and Mrs T signed a loan agreement specifying monthly repayments of \$1,444.72. When they queried this figure with the bank, it was confirmed as correct. It was not until approximately six months later that the bank discovered a significant error in the original loan documentation, as a consequence of which the monthly repayments should have been \$1,814.92, or \$373.20 more than was actually being paid.

A complaint was lodged with the bank, but when Mr and Mrs T were not satisfied with its response the complaint was referred to me. During my investigation the bank accepted that it had made an error with the loan documentation. However, it considered that the correct information would have been disclosed to Mr and Mrs T when they first met with the bank.

The bank was prepared to amalgamate Mr and Mrs T's housing loan with another high interest loan they had taken to purchase a car, and also to extend the term of the loan, with a low fixed interest rate for five years. It also offered a payment of \$4,000 in compensation for inconvenience suffered as a result of the bank's actions, and all legal costs incurred to date. Because this offer did not bring the loan repayments down to the original monthly amount of \$1,444.72, Mr and Mrs T remained dissatisfied, and my investigation continued.

The bank could have sought relief under the Contractual Mistakes Act 1977, which would have entitled it to substitute the accurate repayment figures for the inaccurate ones in the loan agreement. This would have been unaffordable for Mr and Mrs T. Alternatively if Mr and Mrs T had, as they wished, continued to pay the lesser amount of \$1,444.72 over the 25-year term of the loan, their payments would

not have covered all the interest due, and the amount owed would have increased. Neither solution appeared satisfactory for both parties.

During the initial meetings between Mr and Mrs T and the bank officer the correct loan repayment amount of \$1,814.92 had been mentioned, but the incorrect amount had then been written into the loan agreement. When Mr and Mrs T embarked on the building process, before they saw the loan agreement with the inaccurate figures, they were satisfied that they could afford to service the debt. It was only later, after they had purchased a car financed by a loan, that the error in the home loan agreement was discovered. Had Mr and Mrs T's loan repayment amounts been correct from the outset, they would probably not have decided to buy a car, or would have bought a less expensive car. Moreover, once the bank became aware of the problem, it took six months to come through with a satisfactory settlement offer. Mr and Mrs T had clearly suffered considerable stress, as well as disruption to their financial planning. I also bore in mind that Mr and Mrs T had benefited from the money advanced to them because, after all, they had the enjoyment of the home and car. Taking all this into consideration, I concluded that the bank's offer was reasonable.

Following my initial assessment further negotiations, correspondence and meetings took place involving my office, the bank and Mr and Mrs T. It was finally agreed that, in addition to compensation for the legal fees and inconvenience, the car and house loans would be amalgamated and would be repaid over a 25-year term at an interest rate of 7.45% fixed for the first five years. The new monthly loan repayments were about \$1,918. This was higher than the amount in the loan agreement, but included repayments of \$400 on the car loan at a reduced interest rate. The bank was prepared to reduce the payments further by extending the term of the loan, but Mr and Mrs T decided to repay the loan over the shorter 25-year term because this saved them a considerable amount of interest.

Mr and Mrs K arranged a loan from their bank. They were told that the monthly instalments would be \$290. Three months later they were told that, because of a mistake, the monthly instalments would be \$484.

CASE 28

A slow start to resolution but a speedy conclusion – case 10,000

Mr and Mrs K arranged an unsecured personal loan from their bank, to be repaid over five years. Before drawing down the loan they enquired about the monthly repayments, and were told by the bank officer that the monthly instalments would be \$290.

About three months after obtaining the loan Mr and Mrs K were contacted by the bank and were told that a mistake had been made in the calculation of the monthly instalments, which were actually \$484. They tried to find out from the bank how the mistake had occurred, but received no satisfactory response.

Mr and Mrs K struggled to meet the monthly repayments of \$484, and felt that they were being unfairly treated by the bank for a mistake not of their making. After some months with no resolution of their concerns by their branch, they contacted the local Citizens' Advice Bureau, which referred them to my office. Their branch had not advised them of their bank's complaints process. It had also not informed them that, as their complaint had been unresolved for more than three months, they were entitled to take it up with me.

As soon as my staff alerted the complaints section of the bank to Mr and Mrs K's complaint by, it made

considerable efforts to resolve their concerns. After substantial discussion and negotiation, the bank came up with a repayment package acceptable to Mr and Mrs K. This involved amalgamating their credit card debt with their unsecured loan facility and arranging a new credit card facility that better suited their requirements. The bank also offered to write off several months' interest on their combined debts and to restructure their total loan facility at a substantially lower rate of interest than the normal rate for unsecured lending. The revised monthly repayments were acceptable to Mr and Mrs K, and the complaint was settled on that basis.

This case is a good illustration of how, with goodwill and cooperation from both bank and complainant, the facilitation process can work to resolve complex issues. It also highlights the need for banks to prioritise the training of frontline branch staff about their own complaints processes, including recourse to the Banking Ombudsman as a last resort.

This was the 10,000th case to be investigated by the Office of the Banking Ombudsman since its inception in July 1992.

Mr S signed a loan agreement, fixing the interest, to purchase an investment property, even though the purchase was still conditional. The purchase did not go through. The bank then charged him nearly \$6,000 as an exit fee.

CASE 29

The cost of not proceeding with a loan

Mr S approached the bank for finance to purchase an investment property. Interest rates were expected to rise and, after discussion with the bank, and even though the property purchase was still conditional, he signed a loan offer letter fixing the interest rate for two years. The bank knew that the property purchase was conditional.

A couple of weeks later Mr S advised the bank that he would not go through with the purchase. The bank then charged him nearly \$6,000 as an exit fee, being the bank's estimate of the cost to it of breaking the agreement in the loan offer. The bank based this charge on a statement in the loan offer that all costs and expenses associated with the establishment and maintenance of the facility would be the responsibility of the borrower. The bank also said that the staff member advising Mr S had orally informed him that, should the contract not proceed, a cost would be associated with this. Mr S disagreed, and said that he had no idea that the cancellation of the fixed interest rate contract carried a penalty. He complained to the bank, but was unable to resolve the matter to his satisfaction and referred the complaint to me.

I formed the view that the bank had not adequately informed Mr S that an exit fee would be charged if the agreement set out in the loan offer was broken. The agreement stated that the borrower was obliged to pay all costs associated with the establishment and maintenance of the facility, but did not specify that any costs would be payable if it was terminated. I was also satisfied that, if Mr S had been told that a penalty might apply under such circumstances, he would probably have been reluctant to fix the interest rate for a two year period. Moreover, emails between Mr S and the bank after the contract was broken seemed to confirm that he had not been previously warned of the exit fee.

I proposed, and both parties agreed, that the bank should reimburse the exit fee charged in this case.

She discovered that both properties had been used as security. Her mother was unable to sell her property without discharging the mortgage.

CASE 30 Uncertainty about a customer's instructions

When Mrs and Mr L first purchased their home, Mrs L's parents agreed to transfer the title in their own house to their daughter and son-in-law. This enabled Mrs and Mr L to use the equity in what had been the parents' home as a deposit for the purchase of their own first home. While the parents' house was owned, in a legal sense, by Mrs and Mr L, the understanding within the family was that it was owned by Mrs L's parents. The title would be transferred back to the parents when Mrs and Mr L had built up enough equity in their home to support their total borrowings.

In 2004 Mrs and Mr L decided to refinance with another bank. Mrs L is quite sure that, when they discussed their intentions with the new bank, they made it clear to the bank officer that they only intended to offer their own home as security for their borrowings, and that her mother's property, previously used as security, was no longer available for that purpose. Our examination of the bank file identified no note or record corroborating this claim. According to Mrs L, when they met with their solicitor to sign the loan documentation, they emphasised to her also that the security was to be only over their own home.

When Mrs L's mother subsequently decided to sell her house, she discovered that, when the loan was refinanced, both properties had been used as security for the lending.

Mrs L was distraught, as her mother was unable to sell her property without discharging the mortgage – something which caused serious difficulties in the relationship between mother and daughter.

The bank pointed out that the registered valuation obtained in 2004 for the house owned by Mrs and Mr L was insufficient to support the level of lending obtained without the additional security of the second property. The bank also noted that the loan documentation confirming the two properties as security for the loan had been signed by both Mrs and Mr L in the presence of their solicitor, who gave the bank a certificate confirming that the details of the loan had been fully disclosed to them.

A meeting was held with Mrs L, who remained convinced that the bank had acted against her specific instructions when arranging a mortgage over the second property. It was explained that, in the absence of verifiable and independent evidence of what had been said or agreed at the meeting with the bank officer, it was difficult if not impossible to determine what actually took place. Perhaps most importantly, it was an uncontested fact that Mrs L co-signed the loan documentation in the presence of her solicitor, without attaching any conditions. Mrs L remained dissatisfied with the outcome of my investigation, but accepted that nothing further could be achieved, and agreed to withdraw her complaint.

Mr J was misled by his sister about the obligations he was entering into when he agreed to help her with the purchase of a property in 2000. He thought he was acting as a guarantor for part of the loan.

CASE 31

A family arrangement and a case of misplaced trust

Mr J was misled by his sister about the obligations he was entering into when he agreed to help her with the purchase of a property in 2000. Although he thought he was acting as a guarantor for part of the loan, he and his sister were in fact joint borrowers with shared responsibility for the loan. Legally speaking, if either one of the joint borrowers defaulted on the loan repayments, the other would be personally liable for the whole balance outstanding.

When Mr J's sister defaulted on the loan repayments and the house was eventually sold, the bank initially attempted to recover the loan shortfall from both Mr J and his sister. Mr J contacted my office because he was dissatisfied with the bank's response to points that he had raised in this context. Specifically, he had asked the bank to explain why it had opened a joint account for him and his sister without verifying his identity, why he was not advised to obtain independent legal advice (as would be the case for the guarantor of a second loan), and why the bank was pursuing him for the full amount of the debt, while apparently taking no action to trace his sister. He also denied ever having met the solicitor who signed the solicitor's certificate confirming that he had attended her office and had signed the documentation.

After investigation I found that the bank had not acted in accordance with its obligation under the Financial Transactions Reporting Act 1996 to verify the identity of any person seeking a banking facility, when it accepted Mr J's signature on a signed account application form

submitted by a mortgage broker, together with a loan application form. What I had to determine was whether the bank's failure in this regard had caused Mr J any loss. I concluded that the loss sustained by Mr J was the result of his sister's misrepresentation of the obligations imposed by the documents presented to him for signature and by her subsequent failure to meet the loan repayments, rather than a result of the bank's failure to verify his identity.

I also found that the bank was entitled to rely upon the solicitor's certificate that the loan documentation was correctly executed, and that full disclosure had been made to both borrowers. If the certificate was wrongly given, Mr J's remedy lay against the solicitor, not the bank. As far as the bank was aware, the solicitor who signed the certificate was the solicitor acting for both joint borrowers. Only if the bank had been aware that the obligations being entered into by Mr J were third party obligations from which he was receiving no benefit would it have been necessary for the bank to advise him to seek independent legal advice.

While sympathetic to the difficult position Mr J found himself in as a result of his sister's misrepresentations, I found that he had to accept responsibility for unquestioningly signing documentation submitted to him for signature by his sister. As the bank was unable to trace her present whereabouts, it was legally entitled to seek full repayment from him.

I recommended that the complaint be withdrawn.

Ms R's daughter, A, was experiencing financial difficulties. Ms R agreed to assist A in obtaining a personal loan from Ms R's bank in order to pay A's debts. The loan was approved, with Ms R signing the loan agreement.

CASE 32

The importance of understanding documents that you sign

Ms R's daughter, A, was experiencing financial difficulties. Ms R agreed to assist A in obtaining a personal loan from Ms R's bank in order to pay A's debts. The loan was approved, with Ms R signing the loan agreement. A was a co-borrower. Ms R already had a home loan with the bank, which held a mortgage over her house. The bank then paid the loan funds to A.

About a year later A stopped paying off the loan. The bank then told Ms R that she would have to start paying the loan to avoid recovery action being taken against her, including a possible mortgagee sale of her house.

Ms R's solicitor complained on her behalf, firstly to the bank and then to me. He said that Ms R was not able to read very well, and would not have understood what she was doing when she signed the joint loan agreement. The solicitor noted that Ms R had not received any independent legal advice at that time.

Ms R said that she thought that she was "going guarantor" for A. She had thought that A would pay the loan and that, if she failed to do so, the bank would pursue A for the money up to the stage of court proceedings and bankruptcy, if necessary. Ms R said she had believed that she would be asked to pay only if the bank was unable to recover the loan payments from A. Even then, Ms R said, she did not realise that her house could be sold if she also failed to make the payments.

I considered that, when Ms R entered into the loan agreement as a co-borrower, providing her property as

security for the loan, but receiving no personal benefit from it, she was a "provider of other security"; in terms of clause 3.6(a) of the Code of Banking Practice. By failing to advise Ms R that she should seek independent legal advice before signing the loan agreement, the bank had accordingly breached its obligation to her under the Code of Banking Practice, and may also have engaged in misleading conduct under the Fair Trading Act 1986.

On the other hand, the bank contended that, as Ms R was identified as a co-borrower on the loan agreement, she was jointly liable for the loan, and the term "provider of other security" accordingly did not apply to a customer in her position. The bank argued that clause 3.6 in the Code was intended solely to cover a situation when a non-customer provides security for another person's loan.

It is my view that, in accordance with the spirit of the Code, the term "provider of other security" should be given a wide and liberal interpretation. I believed that the safeguards provided in clause 3.6 were clearly intended to apply to any person (irrespective of whether they are a customer of the lending bank) providing security for a loan when, on the basis of the facts known to the bank, they derive no direct benefit from it. In this case the bank knew that Ms R was not receiving any personal benefit from the loan in question. The bank had failed to advise Ms R to seek independent legal advice when she signed the loan agreement as a co-borrower, and accordingly it had breached its obligation under the Code.

I had proposed to recommend that Ms R should immediately stop making the loan payments, and that she should only be asked to start paying them again if the bank was unsuccessful in pursuing A. I initially expected the bank to take all available courses of recovery action against A, to the extent of bankruptcy if necessary. However, I accepted the bank's further argument that to pursue A to bankruptcy would be asking it to go beyond its usual debt recovery process. The bank said that its standard recovery action would be to serve A with a demand to pay the loan. If she then either defaulted or did not recommence the loan payments, it would refer the debt for recovery action. A would also receive an adverse credit listing.

I accepted that I should not require the bank to take unusual steps in pursuit of A, the principal debtor. The bank would accordingly proceed to seek repayment of the loan from A in accordance with its standard approach. It would ask Ms R to start paying the loan again only if it was unsuccessful in having A resume the loan payments. The bank also said

that it would treat the loan as unsecured, meaning that it would not enforce the sale of Ms R's home.

I also considered that the bank should pay Ms R compensation for inconvenience for the anxiety it had caused her when she discovered that she could be asked to start paying the loan immediately when A stopped her payments. She had been more than a little shaken by the bank's advice that her own house was at risk in the event of total default. Ms R had also suffered stress and anxiety from having to find the funds to service A's loan over a period of some months, losing the use of that money herself during that period. I recommended that the bank pay compensation for inconvenience in an amount of \$2,000. I also recommended that the bank reimburse Ms R for the legal costs that she had incurred of approximately \$840.

The complaint was settled on this basis.

Mr H found a note from his wife asking for a separation. Their bank told him that their current account was close to its limit, and that the home loan had been increased by over \$20,000. He knew nothing of this.

CASE 33

The importance of reading loan documents – direct or consequential loss

Mr H and his former wife Mrs H had a joint loan account with the bank, secured by a mortgage over their jointly owned property. One day Mr H arrived home to discover a note from his wife asking for a separation and requesting him to settle their relationship property as soon as possible.

The next day Mr H visited the branch and was told that the balance of the current account was close to its overdraft limit, and that the home loan amount had been increased by over \$20,000. Mr H was alarmed, as he had believed that the property was nearly debt-free.

It turned out that, over a five year period, Mrs H had applied for several increases to the loan. Mrs H had given the bank various reasons for the increases, including buying a car and paying off credit card debt. Bank staff gave Mrs H loan documents to take home for Mr H to sign to authorise the increases.

Mr H could not confirm whether he had signed the loan documents, as he said that his wife often gave him documents to sign when he was very tired or had been drinking. Mr H said he was never personally contacted by the bank about these loans. He believed that Mrs H had told bank staff that he worked long hours and could not come to the branch.

Mr H also contended that the delay caused by the bank's investigation of the problem had contributed to Mrs H receiving a bigger relationship property settlement than she would have received if settlement had taken place immediately after separation. Shortly after the separation, their jointly owned house increased in value and Mrs H claimed her share of the increase.

The bank declined Mr H's request for compensation, saying that it was usual practice to allow customers to take loan documents away from the bank for signature, unless the bank was aware of a separation or a dispute over the account. The bank said that at the time of the loan increases it had no

evidence to believe this was the case with Mr and Mrs H.

Mr H complained to my office and after investigation, I found that:

- a) it is poor but not unusual practice for a bank to allow loan documents to be sent home with one spouse to obtain the signature of the other spouse;
- b) Mr H should accept responsibility for signing documents without first reading them carefully and understanding their contents;
- c) there was insufficient evidence to suggest that the additional loans arranged by Mrs H had caused Mr H a direct loss. They seemed to have been used to benefit both partners to the marriage;
- d) the increased costs incurred by Mr H in negotiating a relationship property settlement were consequential, not direct, losses; and
- e) the bank's practices had caused Mr H some inconvenience.

I recommended that the bank pay Mr H the sum of \$500 in compensation for inconvenience. The bank agreed, but Mr H was not satisfied. He wanted the amount of the additional loans refunded, as well as the loss he claimed to have suffered from the increased amount he was required to pay to Mrs H for her share of the relationship property.

I had some sympathy with Mr H's position, especially as he suspected that Mrs H had used the proceeds of the loans for her own purposes. However, that was an issue that he could more appropriately have pursued during relationship property negotiations or before the Family Court.

As the bank did not act improperly or in breach of any obligation owed to Mr H, I found that it was not responsible for repaying the funds taken by Mrs H.

Mr H then accepted my recommendation.

After a car accident Ms F suffered from memory lapses and could be easily confused. She took out a home loan, was declined a loan restructure and fell into arrears.

CASE 34 A deepening debt spiral and insensitive treatment of a disabled customer

Ms F was driving home from the beach with her children when her car was hit by a drunk driver and she suffered severe injuries. After a long period of rehabilitation she was able to resume part time work, but she still suffered from physical disabilities and also had some cognitive disability. This meant that she suffered from memory lapses and could be more easily confused than the average person.

During her period of rehabilitation, Ms F took out a home loan. Staff at the local branch of her bank knew about her disability and in the early days of the relationship, she felt she was well treated and appropriate allowances were made for her difficulties.

Towards the end of 2004 Ms F was told that she should purchase a special disability aid that had to be imported from Australia. ACC would reimburse her for the purchase, once made, but she foresaw difficulties in covering the initial cost of the purchase. She went to her bank to ask for assistance. The staff member she consulted suggested that she should restructure her loan to reduce the weekly repayment amount. She helped Ms F fill in an application for the restructure and sent it away for approval.

The application was declined. Neither Ms F nor the bank staff member could understand why it was declined and they agreed to resubmit it with further information. Shortly afterwards the staff member left the bank's employment.

Ms F heard nothing further about her application for a loan restructure. She bought the disability aid and over the next few weeks fell slightly behind with her loan repayments. She was then contacted by the bank's collection department who advised her she was \$160 in arrears. She was also told that because she was in arrears the bank would not accept her application for restructuring.

Over the next few months the situation deteriorated substantially. By mid year she was some \$9,000 in arrears.

The bank had stopped her access to telephone banking and had stopped her card so that all transactions had to be made manually at a branch. This was difficult for her because she had limited mobility and also because her memory problems meant that she needed to seek frequent balances on her accounts. Finally, Ms F received a formal demand for repayment of the arrears. With some difficulty, she arranged to cash in her ACC entitlement for the next five years. This was deposited with the bank and Ms F was advised that the arrears were now clear. On calling at the local branch shortly afterwards, she was told that she was in fact ahead with her loan repayments.

Very shortly afterwards, Ms F received a further letter from the bank explaining that it had made a mistake and a further \$3,000 was required. This meant that once again she was in an arrears position, and the bank would not assist her with any refinancing or other means of reducing her loan commitments. In desperation she approached a family member for a loan and paid the further sum demanded.

As soon as she could, Mrs F refinanced with another bank. She also complained to me. After meeting with her I discussed the case with a senior manager at the bank, who agreed that it had not treated Ms F well and that an apology was due. He suggested a letter of apology and some compensation for inconvenience.

Ms F was somewhat suspicious of the bank's offer and doubted the sincerity of the apology. However she considered she had reached the point where she now needed to put her problems with the bank behind her and move on. At a meeting between Ms F and the senior manager who had written to her, she explained the effect the bank's behaviour had had on her. The senior manager apologized in person for the bank's failings. After this Ms F felt able to accept the apology and the offer of compensation and the case was settled on that basis.

Mr and Mrs D had a personal loan with their bank. Unfortunately Mrs D had to stop working to care for their son who was unwell. The ongoing medical costs put further strain on their finances, and they soon fell into arrears.

CASE 35 Too little and too late in responding to a plea for help

Mr and Mrs D had a personal loan with their bank. Unfortunately Mrs D had to stop working in order to care for their son who was unwell, and under the care of specialists for a severe condition. The ongoing medical costs put further strain on their finances, and they soon fell into arrears.

In February 2006 Mr D contacted the bank to advise that their financial circumstances had changed for the worse. The attitude of the bank staff member to whom he spoke caused Mr D to lodge a formal complaint with the bank. He claimed that the bank failed to show any compassion, and was discourteous.

When the bank responded to the complaint, there was an apology and an expression of sympathy for their position. A few days later the national credit manager phoned and told Mr D that the bank wanted to help out as much as possible.

Mr D went into his local branch and signed a "statement of financial position" detailing his income, debts, etc. A month later the bank had not contacted the couple, and no progress had been made, so when the couple received two new credit cards, they were confused. Mr D emailed the credit manager in an attempt to find out what was going on, but received no response.

A month later the couple received a bank statement declaring that their loan account had been closed at Mr D's request, although Mr D had not made any such request. A phone call was made to the credit manager, who told them that their account was not in fact closed, and that their application for hardship had been approved. This meant that all of their credit card debts with the bank had been consolidated with the personal loan at an overall lower interest rate.

The couple reviewed the new interest rate, and calculated that it was only fractionally lower than the previous one. Mr D telephoned the credit manager, and expressed his concern that, despite the bank's acceptance that they were suffering hardship, their interest costs were only

marginally lower. A meeting was arranged between the couple and their local branch manager, but still no progress was made. The local manager said that she would phone the credit manager and try to clarify the situation. A few days later Mrs D's EFTPOS card was declined while she was shopping. Later that day she discovered that her overdraft facility had been cancelled, and that they had been charged \$80 in dishonour fees. No notification of this cancellation had been given.

The local branch manager contacted them, and asked whether Mrs D could possibly obtain a part-time job, or whether their landlord could help reduce the rent. Mr D told her that this was not possible, and that they had already considered every available option before they had contacted the bank. Once again, the bank requested them to provide information on their debts and income. Mr D duly provided this information for a second time.

Another email was sent to the credit manager, enquiring about the situation. A few days later, in June 2006, the couple received a letter from the credit manager informing them that there was nothing more that the bank could do, and that all further lending and overdraft facilities had been stopped.

The couple brought their complaint to me. The bank acknowledged that it had not handled the matter as well as it could have. It was apologetic about its apparent lack of compassion, and accepted that its poor communication with the couple over the five month period was inexcusable. These inadequacies had contributed to the couple's already stressful situation.

After discussions with the bank, Mr and Mrs D were asked to suggest the maximum fortnightly amount that they could afford to repay. The offer was accepted by the bank, which agreed to charge interest at the floating home loan interest rate, rather than the higher unsecured personal loan rate. The dispute was settled on this basis.

Mr and Mrs S changed banks, and transferred all accounts and insurance policies to their new bank. The cancellation of the previous bank's insurance policies was by telephone, and the direct debit was not cancelled.

CASE 36 Not quite the end of a banking relationship

In 2005 Mr and Mrs S obtained a bank loan to purchase a business. The loan was conditional on their transferring all existing bank accounts and insurance policies to the bank providing the loan.

They did so, and took that to mark the end of their relationship with their original bank. Unfortunately, their cancellation of that bank's insurance policies was by telephone, and the associated direct debit arrangement was not cancelled. Consequently their "closed" credit card account went into debit, as unpaid direct debits for ongoing insurance premiums mounted throughout 2006.

Both Mr and Mrs S are reading disabled, and simply disregarded warnings from their former bank because they

believed that all their links with it had been severed in October 2005. The discovery that their debt had been listed with a collection agency came as an unpleasant surprise.

When the bank realised why Mr and Mrs S had not understood what had gone wrong, it agreed to forego charges and interest on the debt, and to reduce the Mr and Mrs S's remaining liability by 50%. The bank also ensured that their debt listing with a collection agency was removed.

Mr and Mrs S welcomed the bank's forgiveness of part of the outstanding debt, and were particularly pleased to recover their good credit rating.

Mr V had a long outstanding credit card debt with a bank. When the bank noted that he had enough funds in his cheque account to repay the debt, it debited the account without telling him.

CASE 37 No money for Christmas

Mr V had an outstanding credit card debt with a bank. In December 2006 the bank noted that he had enough funds in his cheque account to repay the long standing debt. It debited the account with the amount of the debt, without informing Mr V of its intention to do so. He complained that the bank should not have removed the funds without any warning, leaving him short of money to pay his rent and to meet other Christmas related expenses. Mr V felt that the bank should have contacted him earlier to set up a convenient payment arrangement.

According to the bank the last payment to the credit card account had been made by Mr V four years previously, in December 2002. After further attempts to contact him had proved unsuccessful, the bank referred the debt to a collection agent in August 2003. Mr V did not honour a subsequent agreement with the agent, and in 2004 the debt was referred back to the bank. The bank's intention was always to recover the debt, but it made no further contact with Mr V, although it continued to monitor his cheque account.

Given the lengthy period that had elapsed since the bank's last contact with Mr V, I had some concerns about its recovery process. While acknowledging that the bank was legally entitled to exercise its right to set off the existing debt against the funds in Mr V's account, a more reasonable approach would have been for the bank to freeze the funds in the account required to meet the debt, and to communicate with Mr V about an equitable payment arrangement reflecting his current commitments.

I felt that while the bank's approach was unreasonable in the particular circumstances, it had undoubtedly caused Mr V some inconvenience, for which a moderate amount of compensation was justifiable. I proposed that the bank make a payment of \$250 to Mr V, and the complaint was settled on that basis.

Mr S applied for a home loan from a lending institution. The application was declined because a debt of approximately \$600 was listed in his name with a credit reference agency.

CASE 38 More than one mistake in collecting a debt

In June 2005 Mr S applied for a home loan from a lending institution. The application was declined because a debt of approximately \$600 was listed in his name with a credit reference agency. Mr S was not aware of this debt listing, and made enquiries.

Mr S discovered that the debt related to a credit card account opened in January 1996. He contended that he had last received a statement for the account in February 2003, and had not received any further statements.

Mr S said that he had on a number of occasions after February 2003 complained about the lack of statements. He had continued to make new purchases and payments on the account, but had stopped after several months. He said that, without a statement, he was unaware of the status of his account. He heard nothing further about the account, and concluded that it had been abandoned.

The bank's records showed that it continued to send statements to Mr S's correct address after February 2003, the date mentioned by Mr S. The bank said that it tried to contact Mr S throughout the latter part of 2003 and early 2004. By March 2004, in the absence of contact or payment from Mr S, the bank began formal collection procedures, including sending him a letter of demand requiring full payment of the debt by a certain date. After a further three months without contact, the bank referred the debt to the collection agency.

Mr S believed that the bank had acted unreasonably in referring the debt to a collection agency without reference to him and without proof of the existence of the debt. Mr S believed that the debt did not relate to goods purchased, but to "unknown fees and charges built up over [the] contract abandonment period".

In an attempt to resolve the dispute, the bank offered to waive the collection costs that had accumulated on Mr S's account. Mr S rejected the bank's offer, and his complaint was referred to my office.

After investigation, I found that:

- there was no evidence of any bank error resulting in Mr S not receiving account statements after February 2003;
- the bank's records showed clearly that it made several attempts to contact Mr S about the outstanding balance of his account between June and December 2003;
- even if Mr S did not receive account statements after February 2003, his suggestion that the bank had abandoned the account was not reasonable in the circumstances; and
- there was no evidence to support the bank's statement that it had sent a letter of demand to Mr S in 2004, before the matter was referred to the collection agency.

I also found that the bank's response to Mr S's complaint about the debt was inadequate. In his letter of complaint, Mr S had questioned the legitimacy of the debt, and had requested proof of how the amount due had been compiled. The bank did not address this aspect of Mr S's complaint. Although the debt was legitimate, Mr S was entitled to a full response to his questions, given his assertion that he had not received statements or heard anything from the bank for two years when the debt had been transferred to a collection agency.

I proposed that the debt be fixed at the amount originally owed in 2004 before the addition of collection costs, and that Mr S be awarded \$200 compensation for inconvenience, to be deducted from the outstanding debt.

The bank accepted my initial assessment on the understanding that Mr S would enter into a payment arrangement for the remainder of the debt.

Mr S rejected my initial assessment and made a further submission involving several different issues, most of which were not relevant to the complaint. However, while these issues were still under consideration, the bank erroneously transferred the debt to another collection agency.

After hearing the bank's explanation, I accepted that this referral to another agency had been a genuine administrative error, but Mr S was understandably very annoyed and upset. Accordingly when I came to make my recommendation on the complaint, I increased the compensation for inconvenience to \$250. However, although the bank accepted my recommendation, Mr S failed to respond to it and no further action was taken.

Mr and Mrs H received a letter from a credit reference agency about payment of an outstanding debt of about \$14,000. The debt related to a home loan they had taken out. Mrs H believed that the loan had been repaid.

CASE 39

The appropriate removal of a listing with a credit reference agency

In early 2005 Mr and Mrs H received a letter from a debt collection agency demanding payment of an outstanding debt of about \$14,000. The debt related to a home loan they had taken out in the early 1990s, to purchase a second property. Mrs H believed that the loan had been repaid to the bank when the property was subsequently sold, and said that it had not communicated with her about the loan after that.

Mrs H discovered that the loan had not been repaid on the sale of their property, and that Mr H had been making repayments to the bank without her knowledge. Two years before the debt was referred to the debt collection agency, Mrs H had phoned the bank to query a letter addressed to both her and her husband. Mr H would not allow her to read this letter. The bank told her that the letter concerned mortgage arrears. Mrs H told the bank that she had no mortgage with it, but the bank could not supply her with further information. As she heard nothing further from the bank, Mrs H assumed that any problem had been cleared up.

Before Mrs H received the debt collection agency's demand letter in 2005, Mr H had been declared bankrupt. The bank told Mrs H that she, as a joint signatory to their account, was therefore responsible for repaying the debt.

Mrs H contacted her solicitor, who told her that the mortgage had not been registered, although a note on the original loan agreement specifically required this. Because it was not registered, it had not been discharged when the property was sold.

Mrs H complained to the bank, which told her that it had served a letter of demand on both her and her husband in 2002. Mrs H denied receiving this. The bank offered to accept half of the debt in full and final settlement if Mrs H made a lump sum payment. When Mrs H declined the offer, her complaint was referred to my office.

I found that Mr and Mrs H's solicitors, and not the bank, were responsible for registering the mortgage, and that they had failed to do so. The bank had made every effort to ensure that the mortgage was registered by instructing the solicitors in accordance with its normal practice. Despite its enquiries to the solicitors, the bank was not informed about the property sale until a year after it took place. In the meantime, the bank continued to receive loan repayments, seemingly from both Mr and Mrs H, and therefore had no reason to contact Mrs H.

As the loan was in the name of both Mr and Mrs H, they were jointly and severally liable for the debt. The bank did not know of Mrs H's changed circumstances, and therefore quite understandably sent all correspondence to the last known address for her and her husband. I found that the bank could not be held responsible for Mr H's decision to withhold the bank's correspondence from Mrs H.

I recommended that Mrs H accept the bank's original offer, and that the complaint be withdrawn. Both the bank and Mrs H accepted my recommendation, but Mrs H did so on the proviso that the default listing would be removed. After further discussion between my office and the parties, the listing was removed, with Mrs H paying the agreed amount.

Mr and Mrs B wanted to arrange a mortgage to purchase a block of land. A credit check revealed that Mr B's name was listed with a credit reference agency.

CASE 40 No removal of a credit listing

Mr B and his wife had three credit cards with overdue amounts owing on each. While working in Australia, Mr B was made redundant and fell behind in his repayments. Both he and his wife notified the bank on several occasions that they were unable to meet their repayments. The bank agreed to freeze interest on the cards in return for a payment arrangement.

While Mr and Mrs B made several payments under the arrangement, their difficult financial circumstances led to several payments being missed. The bank wrote to Mr B, asking him to contact it immediately to discuss repayment of the debt. The bank advised Mr B that, if it received no response from him, his name could be listed with a credit reference agency, thus "affecting [his] ability to obtain credit ...". The bank wrote to Mr B on several more occasions, alerting him to the possibility of a credit listing and/or possible legal action to recover the debt.

Several months later, Mr and Mrs B wanted to arrange a mortgage to purchase a block of land. The loan application was declined after a credit check revealed that Mr B's name was listed with a credit reference agency. Mr B complained to the bank that he had not been informed of the listing, indicating that he wanted the listing removed

so the land purchase could proceed. He advised the bank that their financial position had improved, and that they would be able to repay the credit card debt once the mortgage had been approved.

The bank declined to remove the credit listing, and provided Mr B with written evidence of occasions when it had warned him that a listing might be made. Mr B was not satisfied with the bank's response, and the complaint was referred to my office.

After investigation, I found that the bank had formally advised Mr B on several occasions that he might be listed with a credit agency if his debts remained unpaid. Mr B had had signed a credit card application form forming the basis of the contract between him and the bank. This form contained terms allowing the bank to list him as a debtor in certain defined circumstances. Although Mr B did his best to keep the bank informed of his financial situation and of his intention to pay off the debt, the bank was entitled to act under its contract to enforce the collection of the debt.

I recommended that the complaint be withdrawn. When Mr B failed to respond, no further action was taken.

6

Internet Banking

We receive comparatively few complaints about internet banking. Despite a good deal of media publicity, internet banking fraud complaints appear to be fairly rare.

Case 41 illustrates the only type of internet banking fraud that has yet been the subject of consideration by my office. Because of the absence of regulatory or other guidelines to assist in determining the case, it was necessary to use basic legal principles to develop an approach to this and similar cases. For this reason the case note is rather longer than usual and includes details of the matters to be taken into consideration when I am faced with a case of this nature.

As internet banking becomes more accepted among the general community of bank customers, rather than being confined to those who are comfortable and proficient internet users, cases such as **case 42** are beginning to occur. If a customer makes a mistake when entering the

number of the account to which a transfer of funds is to be made, the bank should certainly help recover the funds if this is possible. If, however, the person who has erroneously received the funds refuses to repay them, this is a matter to be determined between the payer and the payee. It is not something for which the bank can be held responsible, though it should give its customer such assistance as it can.

Case 43 was a difficult complaint to assess, as it involved a technical banking facility new to New Zealand. It was possible to apply the existing provisions of the Code of Banking Practice to the bank's administration of its customers' affairs, but the major difficulty was finding a formula by which potential sales across the internet could be calculated.

Mr L, a recent migrant to New Zealand, spent time using the internet, where he met a Russian, who offered employment as an “account manager”. He would receive payment into his account, and would remit the balance to Russia.

CASE 41 The mule scam

Mr L was a fairly recent migrant to New Zealand. While his English was adequate for everyday purposes, he felt most comfortable with Chinese, his first language. He spent a good deal of time using the internet, where he met a Russian, who he knew only as Sergei, in a chat room.

Sergei offered Mr L employment as an “account manager” for a software company. He explained that the company had New Zealand customers who preferred to make payments directly into a New Zealand bank account. Mr L would receive payment into his account, would deduct a 5% commission, and would remit the balance to Russia by Western Union transfer. Sergei said that there were tax advantages in conducting business in this way, and that it would also be quicker than transferring funds directly into a Russian bank account.

Mr L asked Sergei for his phone number, and followed up with a personal telephone call. This helped to convince Mr L that the job was genuine, and he agreed to accept transfers into his account.

After several transactions had been made over a period of ten days, Sergei asked Mr L to accept higher value transfers. When Mr L explained that there was a daily limit on the amount he could transfer out of his New Zealand account, Sergei advised him to recruit a friend to help him out. However, the friend’s first transaction was identified by the bank as possibly fraudulent, and enquiries were made which led to Mr L.

Although some of Mr L’s most recent transactions could be reversed, eight were irretrievable. The bank closed Mr L’s account and reversed all the transfers into his account, leaving him with an overdraft of more than \$18,000. Its fraud department told him that he had been involved in illegal activity, and described him as an accomplice of the criminals. Mr L considered this to be untrue and was very distressed.

Mr L felt that he had been the victim of fraudulent practices as much as the account-holders from whose accounts the funds had been transferred, but that he alone was expected to carry all the loss. He questioned the bank’s security measures, and also complained about the handling of the case by the bank’s fraud department.

My early investigation focussed on the measures taken by the bank to identify and prevent money laundering. I was concerned about the number of relatively major transactions that had passed through a previously inactive account without arousing suspicion. I also had concerns when I found that the bank considered that some of its customers’ home computers had been infected by a Trojan virus, which had logged keystrokes and made such information available to Sergei and his colleagues. This suggested that the customers could have contributed to their losses by having failed to install appropriate protective software on their computers, but the bank did not expect them to carry any of the loss.

At this point I made some general suggestions for banks' future handling of such cases:

- they should give consideration to placing a hold on suspected mule accounts, instead of immediately reversing suspect transactions;
- their staff should not make assumptions about the guilt or innocence of mules, who should be threatened with prosecution only if a clear prima facie case has been established of their deliberate involvement in criminal activity; and
- they should establish in each case how the funds have been transferred to the mule account, and whether a reasonable standard of care on the part of the original account-holder could have prevented the transfer.

When I was on the point of forming an opinion on the merits of Mr L's complaint, I learned of several similar complaints from other bank customers who had also been caught up in the scam. Given the importance of establishing a consistent approach to such cases, I commissioned an independent legal opinion on the principles which should apply.

The legal opinion found that mule transactions should be treated as payments made by mistake. That is, it should be assumed that the bank had processed the transfers in the mistaken belief that it was acting on valid instructions from its customers. It was therefore necessary to consider the application of section 94B of the Judicature Act 1908 governing the recoverability of payments by mistake. In essence, a payment is deemed not recoverable if:

- it has been received in good faith; and
- the recipient has altered his/her position in reliance on the validity of the payment; and
- it would be inequitable to require recovery.

I concluded that, while Mr L may have acted foolishly, he had been neither fraudulent nor reckless. He had therefore received the transferred funds in good faith. He had clearly altered his position in reliance on the validity of the payment, as the funds became irrecoverable as soon as they were sent overseas.

I was not, however, satisfied that it would be inequitable to require recovery of the funds. Two aspects of Mr L's behaviour concerned me: he had made no attempt to

independently verify the credentials of his new employer; and he was prepared to profit from business activities which, as he knew, might be structured to avoid tax.

On the other hand, while Mr L had not exercised a proper degree of care in entering into the transactions, the following considerations weighted the scales in his favour:

- English was not his first language. I did not think he could be expected to detect all the warning signs that might have been apparent to someone who was completely at home with English. He was also less likely to have been able to read and understand any information supplied by the bank or any other agency about scams of this kind;
- he had taken the trouble to call Sergei, and found him absolutely convincing. Indeed, he was initially reluctant to believe that Sergei was knowingly involved in fraudulent activity, and suggested that Sergei could have been deceived into taking part in the scam; and
- the fraudulent transfer by parties outside New Zealand of funds from one New Zealand account to another by electronic means was a recent phenomenon at that time. One could not reasonably expect bank customers to be on their guard about such transactions. The funds were designated as cleared, and could be immediately withdrawn. There was no apparent risk of reversal.

When I concluded my investigation I had formed the view that the loss arising from the transactions should be shared equally by the bank and Mr L. I noted that the bank was, of course, free to seek recovery of part of its loss from the customer from whose accounts the funds were transferred, if that was deemed appropriate. I also concluded that bank staff had, whether intentionally or otherwise, led Mr L to believe he was being considered guilty of a crime, before the facts of the matter had been clearly established.

On this basis I recommended that the bank reimburse Mr L one half of the total of the fraudulent transactions – an amount of \$7,195. I also recommended that it should pay him compensation of \$300 for inconvenience, and write off any interest or charges attributable to the overdraft created by the reversal of the fraudulent transactions.

Both the bank and Mr L accepted my recommendations.

An online payment was made to purchase a new computer. When the bank account number was entered, two of the numbers were transposed, and about \$4,000 was transferred to the wrong person.

CASE 42

Bank not responsible for customer error

In May 2005, A Inc, a community organisation, purchased an online business banking computer system from a bank to help manage its accounts. It says it chose this product after being advised by the bank that it was a more secure option than ordinary internet banking.

In November 2005 an employee of the organisation made an online payment to a technology company to purchase a new computer. However, while entering the bank account number of the technology company, the employee accidentally transposed two of the numbers, and about \$4,000 was erroneously transferred into the account of another customer (Mr B) at a different bank.

The mistake was not picked up by A Inc until about a month later, when it received an outstanding account from the technology company. A Inc's bank said that it could not reverse the mistaken transaction, as too much time had passed. It requested a return of the funds from Mr B's bank, which advised that he refused to return the funds mistakenly received.

A Inc believed the bank had an obligation to warn it that the computer system "wasn't full proof" (sic) and that special care would be required when entering bank account numbers.

Although the bank was sympathetic to A Inc's situation, it maintained that it was not responsible for the error, as under the terms and conditions for use of the system, customers were responsible for any loss caused by errors on their part when entering account information. The bank said that A Inc had accepted these terms and conditions when it completed the standard application form. Nevertheless, the bank offered A Inc a goodwill payment of \$500.

Initially A Inc did not accept the bank's offer, and the complaint was referred to my office.

In forming a view on the complaint, I agreed that the customer is responsible for entering the correct information when making an internet banking transfer. There was no need for a special warning, as it should be clear to anyone entering such data that there will be a problem if the information is not accurate. Had the same mistake been made during an "over-the-counter" transaction, it would have had the same outcome.

A Inc accepted my view, and also accepted the bank's original offer of \$500.

Mr O found a payment system which allowed customers to purchase products online using a credit card. He requested this system from the New Zealand arm of an overseas bank.

CASE 43

When e-commerce did not eventuate

Mr O was in the business of selling a CD-ROM containing specialised information. In March 2004 he found information on the website of an overseas bank describing a payment system which allowed customers to purchase products online using a credit card. He requested this system from the New Zealand arm of the same bank to enable him to sell the CD-ROM to customers via his website. Mr O signed and completed the merchant agreement given to him by the bank. He was then provided with a manual payment system, which the bank said he could use temporarily until the automated online product became available in four to five weeks' time.

Five weeks later the bank emailed Mr O instructions for linking his website with the bank's system, along with electronic files containing samples of the required computer code. When he opened the files, he found that the codes were not compatible with the product he had requested. The bank had apparently made an incorrect assumption about the software Mr O would be using.

After four months and considerable difficulty in communicating with the bank's agents, there had been no apparent progress in establishing the automated service, nor had Mr O received any information on how to upgrade his web links to the bank's service. He was finding the manual system inadequate, and complained to the bank.

He was advised that the bank was now ready to provide him with both the information that he needed and the support necessary to start online payments.

By this time six months had elapsed since Mr O had ordered the system, and he was still unable to install it on his website. He wrote to the bank saying that he was neither willing nor able to continue the process. He asked the bank to take no further action with the installation of the online payment system. He suggested that the bank should compensate him for the considerable time and money that he had spent since he first entered into a contract to purchase the payment system. Although the bank acknowledged that its communication with Mr O could have been better, it was not prepared to accept responsibility for his inability to install the system, and thus his financial loss.

Mr O asked me to review his complaint. Along with the inconvenience that he had suffered, he claimed that he had failed to secure over \$20,000 in potential sales.

It was very clear to me that the bank had been responsible for lengthy and unacceptable delays. An e-commerce development company was commissioned to review the suitability of the documentation, instructions, and software provided to Mr O. It found that, although the

voluminous 150-page documentation was complete, Mr O's bank had not specifically drawn his attention to those sections of the documentation he most needed to refer to. The reviewing company also noted that the sample files provided by the bank were applicable to web server software different to that used by Mr O.

Under the Code of Banking Practice a bank must provide customers with timely information to facilitate their understanding of how its products and services operate. It was essential for Mr O to have correct and sufficient documentation to enable him to operate the banking service that he had contracted to install.

I found that the bank's failure to provide Mr O at an early stage with any information about its requirements for the effective operation of the system amounted to misrepresentation on its part. Although the bank's foreign website did contain substantial information about the system, I found this misleading, as it was not entirely relevant to the New Zealand system. The bank continued to supply information, including installation instructions, that was not compatible with the system requested by Mr O.

As the bank had contributed substantially to the inability to install the requested online payment system, I found that it should reimburse Mr O an amount of about \$15,000 for all potential sales over a nine month period (calculated in accordance with an agreed formula). I also recommended payment of \$2,000 for the inconvenience caused by the bank. The bank and Mr O accepted my recommendations.

7

Investments

We continue to receive complaints arising out of poor practices in “selling” investment products in 1999 and 2000, shortly before the sharp decline in the market value of the investments.

While every case is different, **cases 44 and 45** are good examples of the general approach adopted in assessing complaints of this nature. **Case 46**, on the other hand, was a simple case of misrepresentation by the bank’s investment adviser.

Cases 47 and 48 arose out of the winding up of some single sector investment products that had not performed particularly well. **Case 47** originally came to me as a complaint about the winding up of a unit trust and I found there was no doubt that the bank was entitled to wind it up. However, during the investigation it became apparent that there had been deficiencies in the selling process as well.

In most cases where a customer complained about the winding up of a unit trust or similar investment vehicle, no financial loss was attributable to the winding up of the trust (as opposed to the performance of the investment). It remained open to the customer to invest the funds in another investment product. In **case 48** this was not an option that the customer could easily take up, and after some consideration the bank agreed to compensate him for the inconvenience caused by winding up the unit trust.

Mr and Mrs J invested into a bank's balanced retirement fund. They were both in their mid 70s, owed no debts and were financially comfortable. The managed funds did not perform well.

CASE 44

A failure to re-assess a customer's needs

In 1999 Mr and Mrs J invested \$300,000 into a bank's balanced retirement fund. They were both in their mid 70s, owed no debts and were financially comfortable.

They had earlier phoned their bank to enquire about low risk and low maintenance investments. An investment adviser from the local branch came to their home and gave them information on the bank's investment plans. Mr J told her about his and his wife's situation, and said that he "just needed something to do with the money". Their key investment objectives were to invest for capital growth; to minimise the impact of inflation; and to have the flexibility to alter their portfolio should their circumstances change. They did not require an income from their investment, and had a moderate risk profile. The adviser told Mr J about various managed funds investing in multiple companies. According to Mr J, she advised him that the return on the investment would never go below 10% per annum.

After discussions about their personal objectives, a finance plan was prepared for Mr and Mrs J. They were given time to consider the plan and were asked to review its contents. As Mr J held the bank in high regard and trusted the adviser, he proceeded to invest \$300,000 in the recommended balanced fund. He did not read the small print of the documents.

In May 2000, Mr and Mrs J invested a further \$100,000 into a higher risk fund including a large shares component.

In June 2000, Mr and Mrs J invested a further \$240,000 into another shares fund offered by the bank.

Following their investments, the market took a turn for the worse. The managed funds did not perform well, and they suffered a loss of approximately \$25,000 on their investments from the balanced and high risk funds. They

decided to switch their investment in the high risk fund to a low risk cash fund. Two months later, they decided to close the managed funds account altogether, with a total loss of approximately \$50,000. They retained their investment in the shares fund.

In late 2004, Mr and Mrs J complained to the bank, claiming that it had not provided sufficient advice about the risk associated with their investments. The bank maintained that it had followed its proper investment process, and that its investment adviser had provided appropriate investment recommendations.

Mr and Mrs J subsequently lodged a complaint with my office. During my investigation, Mr and Mrs J closed their shares fund investment, with a further loss of \$46,286. Mr J claimed that the investments were not appropriate for their needs or their risk profile, and that as the bank knew of the risk involved and the age of Mr and Mrs J, it should not have recommended the investment. He said he was not advised that their investment could lose value to the extent that it did.

After a lengthy investigation, which included interviews of Mr J and the investment adviser, I concluded that Mr J did not have a good understanding of the investment plan when it was sold to him. He had relied heavily on his view of the bank as a reputable organisation in which he had great faith. There was clear evidence that the couple did not want an investment involving shares, but it was not clear whether this point was made to the investment adviser. As they appeared to be relatively sophisticated investors, it would have been reasonable for the adviser to expect Mr and Mrs J to ask questions if they were uncertain about any details of the investment plan.

I found that the adviser probably focussed Mr J's attention on the possible benefits of the investment plan, highlighting the good returns that the funds had been receiving at the time of the investment, without giving sufficient emphasis to the risks involved in the investments, including, in particular, the risk that Mr and Mrs J could lose a portion of their original capital sum, if there was a reasonably lengthy period of negative returns. However, the evidence was insufficient to support an overall finding that the bank had misrepresented the level of risk in a manner that would breach its obligations under the Fair Trading Act 1986 and/or the Code of Banking Practice.

I was also unable to find that the bank's recommendation to invest in a balanced fund had been unsuitable for Mr and Mrs Js' needs or requirements at the time.

However, the same could not be said for Mr and Mrs Js' subsequent investments in the high risk and shares funds. I was particularly concerned that there had not been any reassessment of Mr and Mrs J's risk profiles or investment goals when they decided to invest in the high risk fund in May 2000 and in the shares fund in June 2000. In promoting and "selling" an investment in the high risk fund to Mr and Mrs J, the investment adviser gave insufficient weight to their personal attitude

to risk and to their risk profile. In particular, in selling an investment which had a large proportion of its assets in shares, when Mr and Mrs J had indicated some hesitancy about investing in shares, I found that Mr and Mrs J had been sold a product that was very arguably unsuitable for their needs and risk profile. The same could be said for their subsequent investment in the shares fund.

After weighing all factors, I found that a fair resolution to the case was for the bank to pay compensation to Mr and Mrs J in the sum of \$50,000 towards the direct loss they had suffered and a further sum of \$2,000 for inconvenience for the considerable stress, embarrassment and anxiety they had experienced as a result of their unsuccessful investments.

Mr J was not satisfied that I had paid sufficient consideration to the lost opportunity to earn interest or a return on the funds, had they been invested more conservatively. I discussed the matter with both parties, and the bank subsequently offered a settlement of \$70,000. Mr and Mrs J accepted this, and the case was closed.

Mr M received a redundancy payment. Following a meeting with the bank's investment adviser, he invested \$120,000 in the bank's retirement savings plan in a balanced portfolio. The value of the investment fell.

CASE 45

A disappointing investment

In November 1999 Mr M, then aged 57, received a lump sum redundancy payment. His bank contacted him to suggest that he discuss investment options with one of its advisers. Following a meeting with the bank's investment adviser, Mr M invested \$120,000 in the bank's retirement savings plan in a balanced portfolio.

Although at first the investment performed well, by mid 2001 its value had started to decline. Mr M went to see his bank manager with the intention of withdrawing his money on his 60th birthday, in April 2002. Mr M said the bank manager talked him out of doing this, saying she was sure the value of the investment would improve.

By July 2002 the value of the investment had fallen further to approximately \$107,000. Mr M decided that he could not afford to take the risk of his investment declining further in value, and withdrew from the retirement savings plan.

A few years later, Mr M discovered from a friend that he could make a complaint about his experience to the Banking Ombudsman, and lodged a complaint with my office.

Mr M said that the bank's retirement savings plan was promoted to him by the investment adviser as "the best thing since sliced bread". While he had understood that returns on the investment could vary, he said that he was not told that the value of the investment could fall below the original capital sum invested. On the other hand, the bank said that Mr M had acknowledged at the time of investing that he understood that the value of his investment could decrease as well as increase.

My investigation established that Mr M was a relatively unsophisticated investor. He had made his investment in the retirement savings plan on the strength of one meeting only with the bank's investment adviser. The circumstances of that meeting had been rather disjointed, with the investment

adviser leaving the office on at least three occasions. Mr M had not been given an opportunity to read the investment statement before deciding to invest. There was no evidence to show how either how Mr M had come to be assessed as a "balanced" investor, or that the bank had carried out any detailed analysis of his risk profile.

I considered that it was poor practice for the bank to have completed a change to Mr M's investment, when he was switching from a "safe" investment in the form of a term deposit to a riskier investment in a retirement savings plan, on the strength of only one meeting. Not only had there been insufficient time for Mr M to absorb all of the information about the new investment, but he needed time to assimilate several new concepts before being able to make a properly informed decision on a managed funds type investment. I was not satisfied that the risks involved in investing in managed funds had been properly explained to Mr M.

When Mr M expressed concerns about the performance of his investment in early 2002 and indicated a wish to withdraw from it, his bank manager should have referred him to an investment adviser for specialist investment advice and, if necessary, a reassessment of his investment attitudes and goals.

I found that a fair remedy in this case was for the bank to refund the difference between the value of Mr M's investment in April 2002 and the value of his investment upon withdrawal three months later, in July 2002. This amounted to a sum of approximately \$10,300. In addition, I recommended that the bank pay interest at a rate of 6% per annum compounding on that sum from the date of withdrawal to the date of payment. This amounted to a further \$3,000.

The complaint was settled in accordance with my recommendation.

Mr and Mrs G had \$300,000 to invest. The investment adviser said that they would earn a return of between 9 and 10% per annum. The investment returned 6.76%.

CASE 46 An investment that failed to deliver

Following the sale of their business, Mr and Mrs G had \$300,000 to invest. They met with an investment adviser from their bank, who suggested an investment portfolio with a 30/70 split between growth and income assets. A few months later, Mr and Mrs G added a further \$500,000 from the sale of an investment property to their investment. Mr and Mrs G were novice investors in managed funds, and relied heavily on the investment adviser for advice.

Mr and Mrs G said that they made it clear to the investment adviser that their principal need was an income from their investment portfolio, as they no longer earned any income from their business or investment property. According to them, the investment adviser said that they would earn a return of between 9 and 10% per annum after fees and tax on an investment portfolio with a 30/70 split.

The investment returned about 6.76% after fees and tax. The monthly distribution made to Mr and Mrs G fell far short of what they were expecting. Mr and Mrs G complained to the bank, and sought compensation of approximately \$32,000.

The bank did not accept that it was responsible for the failure of Mr and Mrs G's investment portfolio to perform to expectation. However, it accepted that Mr and Mrs G had suffered some inconvenience, as the portfolio had failed to deliver a regular cash income from the outset, and offered to pay compensation of \$2,000 for this.

After investigation, including interviews of Mr and Mrs G, their current financial adviser and the bank's investment adviser, I found that the bank's investment adviser had misrepresented the level of return that Mr and Mrs G could expect to receive from their investment. In particular, I noted that the investment adviser had handwritten a note of "9-10%" on the investment proposal, and that he had

failed to explain in plain and simple terms that, because an investment had performed well in the past, it would not necessarily continue to do so in the future.

In assessing the compensation to be paid by the bank, I rejected Mr and Mrs G's claim that they should be paid the difference between what they had actually earned on their investment and the amount they had been promised in return. This was because the investment portfolio, as structured, would never have produced returns of 9 to 10% per annum after fees and tax for the period in question, and an investment that could produce such a return would have carried an unacceptable level of risk.

Under my Terms of Reference I may award compensation only for direct loss or damage, and am accordingly unable to award damages for misrepresentation and/or breach of contract. Therefore I looked at the returns that Mr and Mrs G would have earned had their money been invested on term deposit, which would have been a more suitable investment for them, given their fairly conservative investment profile. The best term deposit rate available from the bank for the relevant period would have returned about \$3,450 more than Mr and Mrs G received from their investment

I also recommended that the bank refund the implementation fee of \$1,000 paid by Mr and Mrs G when first investing with the bank. In addition, the bank had already made what I considered to be a fair offer of a sum of \$2,000 as compensation for inconvenience, and subsequently agreed to pay the \$1,350 fee for Mr and Mrs G's current financial adviser. It was not unreasonable for Mr and Mrs G to have sought advice from an independent adviser, whose input had been of assistance to my investigation. This amounted to total compensation of approximately \$8,800. Mr and Mrs G and the bank accepted my recommendation.

Mr and Mrs T invested \$44,000 in a unit trust. When the trust was wound up, they received approximately \$26,200, thereby suffering a loss of just under \$18,000.

CASE 47

A bank's right to wind up a managed fund – but not a suitable investment

In 2000 Mr and Mrs T invested \$44,000 in a unit trust drawn to their attention by their bank. This unit trust invested solely in international shares. About five years later the bank notified Mr and Mrs T that it was being wound up, and offered them a number of alternative investment options.

When the trust was wound up, Mr and Mrs T received approximately \$26,200, thereby suffering a loss of just under \$18,000.

Mr and Mrs T complained to the bank about both the investment advice they were given when they decided to invest in the unit trust and the bank's decision to close the fund suddenly, depriving them of an opportunity to recoup their lost capital by choosing the right moment for disinvestment. The bank was not able to resolve Mr and Mrs T's complaint to their satisfaction, and I took up investigation of it.

I found that the bank's investment adviser had probably highlighted for Mr and Mrs T the recent good returns earned on the unit trust at the time of their investment, without sufficiently emphasising the risks of investing in international shares. However, before Mr and Mrs T made their investment, they had been given printed material which, in my estimation, adequately set out the risks associated with such investments. Therefore I did not consider that the bank had misrepresented the level of risk to Mr and Mrs T.

It was also clear that, legally, the bank was entitled to wind up the unit trust. This had been disclosed in the investment statement.

Therefore there was no basis for requiring the bank to reimburse Mr and Mrs T for their investment loss.

However, during my investigation, it was discovered that the original recommended investment for Mr and Mrs T's risk profile was an investment in a different unit trust to that which they actually invested in. This unit trust, whilst still carrying a reasonable level of risk, had only half its money invested in international shares, and had in fact performed better over recent times than Mr and Mrs T's investment.

It appeared, for reasons that were not immediately apparent, that the bank's investment adviser had encouraged Mr and Mrs T to invest in the international shares fund rather than the other fund, possibly because the international shares fund had been producing better returns at the time. However, had Mr and Mrs T been fully informed of the differences between the two funds, it was quite likely, particularly because they had expressed a wish to diversify their investment, that they would have elected to spread their risk by investing either in the recommended unit trust or in a mixture of that unit trust and the international shares trust.

Therefore, I suggested that the bank reimburse Mr and Mrs T for half the difference in value between the amount they received when withdrawing their investment and what the value of their investment would have been at that time if their funds had been invested in the originally recommended unit trust. This amounted to a sum of approximately \$6,600. Mr and Mrs T and the bank agreed to settle on this basis.

Mr H invested in a unit trust. When the investment was closed, Mr H received a sum of approximately \$94,600, suffering a loss of over \$30,000 on his original investment.

CASE 48

Suitability of sale of a managed fund investment to a New Zealander overseas

Mr H is a New Zealand citizen who has been living in England since 1996.

In early 1999 he invested \$250,000 in two unit trust products sold to him by his New Zealand bank. He paid fees totalling approximately \$6,300 when taking up the investments.

In 2002 Mr H withdrew his investment from one of the unit trusts, but left half of his original investment sum in the other unit trust.

In 2005 Mr H's bank advised that it was winding up the remaining unit trust. When the investment was closed, Mr H received a sum of approximately \$94,600, thus suffering a loss of over \$30,000 on his original investment.

Mr H complained to the bank and later to my office. He believed that the unit trust investments may have been mis-sold to him in the beginning, given that he was living overseas. He had in the meantime been advised by bank staff that, because he was living overseas, bank policy meant that a term deposit was the only option available to him for the reinvestment of his funds.

After completing my investigation, I had some concerns about the sales process used when Mr H made his investments in 1999. Because he was resident overseas he did not have an opportunity to engage in any meaningful discussion of his investment with the investment adviser. The form outlining his circumstances, investment requirements and investment risk profile had been sent to him by post marked with crosses in places where he had to sign. It was fortunate for the bank that Mr H, because of his work background, knew how sharemarkets worked and also knew the risks associated with an investment in shares, and thus in the particular unit trust in which he was invested. A less knowledgeable customer could well have been misled about the nature and risks of the investment.

Although the bank was not very forthcoming about the date on which it introduced its policy not to accept investments into wealth products for residents living outside New Zealand, it appeared that the policy had taken effect some time after Mr H made his investment. Therefore, I could not say that, when Mr H made his investment, bank policy was such that the unit trust products ought not to have been offered to him.

There was no doubt that the bank was legally entitled to wind up the unit trust. The possibility that the unit trust could at some stage be wound up by the manager had been disclosed in the bank's investment statement.

The bank had offered Mr H compensation of \$2,000 for inconvenience. It recognised that, due to Mr H's position as a resident overseas, the closure of the unit trust had caused him inconvenience. He would not be able to arrange to reinvest directly with the bank in a managed funds product, but would have to appoint someone to act for him in New Zealand under a power of attorney.

In addition to the compensation for inconvenience, I suggested that, as a gesture of goodwill, the bank should refund two-thirds of the initial service fee of \$3,156 that Mr H had paid when investing in the unit trust. Given Mr H's particular circumstances as a resident overseas, he had been deprived of an opportunity to continue with his managed funds investment, which he had anticipated retaining for approximately twenty years, until he retired, and would not easily be able to reinvest in a similar product. This amounted to a further sum of \$2,085, making total compensation of \$4,085.

Mr H's complaint was settled on the basis of this proposal.

8

Foreign Exchange and Cross-Border Transactions

Case 49 is an example of a well-known scam whereby a customer advertising goods or services for sale over the internet receives a response with an offer considerably in excess of the asking price.

The offer is accepted and a cheque arrives, often followed shortly afterwards by a request for the excess funds to be transferred elsewhere. The customer complies with the request and/or withdraws the funds and the cheque is later dishonoured leaving an overdraft in the customer's account.

New Zealand banks usually impose a hold period on foreign cheques. After the end of the hold period, the cheque is less likely to be dishonoured but, as in this case, dishonour is still possible. With scams of this kind in mind, it is extremely important that banks give very clear advice to customers seeking to deposit a foreign cheque so that they know that even if access to the funds is permitted after the hold period, there can still be a risk of dishonour and it is the customer who is expected to carry this risk.

Another common cause of complaint is the time taken for transferred funds to reach an overseas destination. Generally speaking, a New Zealand bank transferring funds overseas on behalf of a customer has only limited responsibility for the transfer once it has left New Zealand and none at all once it has left the bank to which it was directed in the first instance. In **case 50** the bank accepted responsibility for mislaying the transfer but unfortunately administrative deficiencies within the banking system

meant that the customer was not advised of the delay in time to take remedial steps. Similarly in **case 51** the delays and difficulties were caused by the bank's failure to read the customer's instructions.

Recent volatility in the New Zealand dollar has led to a number of complaints about exchange rate losses, where customers converted foreign currency into New Zealand dollars or vice versa only to find that if they had waited a little longer, the rate would have been more favourable. Movements in exchange rates can be unpredictable. Even the prediction of exchange rate trends involves a good deal of uncertainty and is a specialist task. Local branch staff cannot be expected to advise customers on exchange rate matters and in particular, as illustrated by **case 52**, they cannot be expected to volunteer advice on currency fluctuations.

The business of converting funds from one currency to another can be even more complex when it is a question of the exchange rate applied to transactions made overseas using a New Zealand credit card. The credit card organisations, such as Visa and Mastercard are not members of the Banking Ombudsman scheme, and I cannot consider complaints about them. In **case 53**, all I could do was to satisfy myself that the rate given to the customer was that provided by the credit card organisation. I could not go further to determine why this rate appeared to be out of line with other rates at about the same time.

Mr R sold his car on a website. He deposited the cheque using the bank's standard foreign cheque deposit form. The bank put the funds on hold for 30 days. Six weeks later the bank was notified that the cheque was counterfeit.

CASE 49 A sharp price but a poor outcome

Mr R advertised his limited edition car for sale on an internet website. He received an expression of interest from a Mr X in England, who said that he would like to buy the car for a client in Nigeria. The price that Mr X offered was €8,000 (NZ\$15,822). As the car would have been expected to sell for approximately \$9,500 in New Zealand, Mr R decided to accept the offer. Mr X sent a cheque, and it was agreed that the car would be shipped once the bank had cleared the funds.

Mr R deposited the cheque using the bank's standard foreign cheque deposit form. The bank gave him a copy of the form to take with him and, in accordance with its standard practice, put the funds on hold for 30 days. When the holding period expired, Mr R proceeded to draw down the funds and spend the money. Six weeks later the bank was notified that the cheque was counterfeit. It accordingly dishonoured the cheque and notified Mr R, whose account was placed in overdraft for the amount of \$15,492. He advised the bank that he was unable to pay this debt.

A complaint was brought to me by Mr R on the basis that, when he had deposited the foreign cheque, the bank had not advised him that it might be dishonoured at a date beyond the 30 day holding period. He assumed that once

he was able to draw on the funds they were clear funds. He claimed that he was not specifically told by the bank to read the terms and conditions on the foreign cheque deposit form he had signed. He also expressed concern that two months had elapsed between the deposit date and the date on which he became aware that the cheque was invalid.

The bank accepted that Mr R had been the target of an international scam and felt sympathetic towards him, but was of the opinion that he bore the risk of any dishonour of the cheque. It said Mr R should have read the terms and conditions when he signed the foreign cheque deposit form. On the other hand Mr R felt that that the bank officer ought to have warned him, when he deposited the cheque, that it could still be dishonoured after the 30 day hold period and that if it was dishonoured, he would be liable to repay the amount of the funds withdrawn.

It seemed to me that there was a degree of merit in Mr R's case. As the bank was prepared to discuss the possibility of a negotiated settlement, I spoke with both parties. As Mr R still had the car, we eventually agreed that he should sell it in New Zealand and pay the proceeds to the bank, in return for which the bank would write off the remaining debt.

Mr M made a money transfer. He was dissatisfied with the way in which he was treated by bank staff when he initiated the transfer, which then went astray.

CASE 50 A delayed transfer of funds to India

Mr M occasionally buys and sells Indian shares. To secure the best possible interest rates on his money, he maintained both a New Zealand bank account and an overdraft facility with his broker in India. When he bought Indian shares he would use the Indian overdraft facility and then repay it by transferring funds from his New Zealand account.

The complaint centred around a particular international money transfer which Mr M made in October 2005. He was dissatisfied with the way in which he was treated by bank staff when he initiated the transfer. To make matters worse, the transfer then went astray, and the bank needed thirteen days to locate it and to try to pay the funds into the Indian overdraft facility, which the Indian broker had cancelled in the meantime because of the delay in payment.

When Mr M complained to the bank, he was not satisfied with the explanation it gave, and made a formal complaint to my office.

My investigation confirmed that there had been deficiencies in the way that Mr M was dealt with in the local branch of the bank, but the bank had addressed these during its own investigation, and had offered an apology which Mr M accepted.

I also found that the transfer was initially sent to the wrong bank four days after Mr M authorised it. The bank discovered the mistake the day after the transfer had been sent. Although one part of the bank was aware of what had gone wrong and started to correct it, it did not act with appropriate urgency. In the meantime Mr M, knowing that his Indian broker had not received the transfer, made enquiries of his local branch manager, who was unable to locate it. Mr M then took up his complaint with the New Zealand bank's complaints department. On the very same day on which the New Zealand bank finally located the transfer, the funds were deposited to the Indian bank account. Unfortunately, this was one day too late to stop the Indian broker from cancelling Mr M's overdraft facility.

This complaint was eventually resolved when the bank accepted my recommendation that it should pay Mr M \$500 in compensation for inconvenience suffered. The bank also undertook to write to the Indian broker explaining why Mr M's funds had been delayed, and proposing that, under these circumstances, the overdraft facility could appropriately be reinstated. However, should the overdraft facility not be reinstated, the bank agreed to pay Mr M a further \$500. Mr M also accepted my recommendations.

The bank received Mr and Mrs B's instructions requesting the transfer of \$100,000 from their bank account to bank A for a specified account in the name of bank B, a bank in a different country. The transaction failed.

CASE 51

If a bank fails to comply with a clear instruction...

Mr and Mrs B live overseas, but have accounts with a bank in New Zealand. In early 2006 Mr B emailed the bank, asking about the fees and charges for a funds transfer out of New Zealand. The bank emailed a reply and attached an international funds transfer form.

A month later the New Zealand bank received Mr and Mrs B's written instructions requesting the transfer of \$100,000 from their bank account to bank A in the USA for a specified account in the name of bank B, a bank in a different country. On the same day the bank bypassed bank A and processed the payment directly to bank B, using its own system that automatically directed the funds through the bank's own correspondent banks in the USA to bank B in bank B's home country.

Two days later, the bank's correspondent bank reported that the funds had been returned because the bank B account was "dormant". A week later, the New Zealand bank received confirmation that the transaction had failed. The bank made a second attempt to transfer the funds, this time manually to the specified account with the USA bank, and the transaction was successful.

Mr and Mrs B sought compensation from the bank for the loss sustained due to the late arrival of the funds, which were required for an investment. After making enquires of its correspondent banks, the bank declined to pay compensation because it believed that the ultimate beneficiary was the same in each case.

After investigation by my office, I found that the bank had misunderstood Mr and Mrs B's instructions. While the funds were intended for bank B, which was not domiciled in the USA, the clear instruction was to pay them into bank B's own account with the specified bank in the USA. There had been no instruction to send the funds to bank B in the country where it was domiciled.

I proposed to recommend that the bank compensate Mr and Mrs B for the direct loss suffered as a result of the delay in transmission of the funds, together with a sum of \$500 for inconvenience. Both parties accepted my proposed recommendation.

Dr Q and her husband had savings they wanted to convert to New Zealand dollars. She did not realise that the New Zealand dollar was at a peak against the Australian dollar.

CASE 52

A disadvantageous exchange

Dr Q and her husband moved to New Zealand from Australia in December 2005 to take up positions as doctors. They brought their savings in the form of an Australian dollar bank draft, with the intention of converting it into New Zealand dollars.

On 9 December 2005 Dr Q visited a suburban branch of a New Zealand bank, where she approached the enquiries counter. She was then passed on to a person who she took to be a foreign currency adviser, but was in fact a member of the general branch staff.

Dr Q spoke with the presumed currency adviser for some time. She was told that the funds could not be immediately credited to her account, and was also advised about the fees to be charged and the time frame for the transfer. Dr Q did not ask any questions about currency conversion rates. She was then taken to a third staff member, who opened a deposit account for the funds.

Approximately four weeks later the bank phoned Dr Q, advising that the exchange rate was A\$0.9267 against the New Zealand dollar, and asked whether that was acceptable to her. Dr Q then authorised the conversion. Dr Q neither requested nor received any advice on how foreign exchange markets might fluctuate. She did not realise that the New Zealand dollar was at a peak against the Australian dollar.

Three months later the New Zealand dollar had dropped 10 cents against the Australian dollar. Had Dr Q waited three months to make her transaction, she would have received NZ\$20,000 more. At this point Dr Q accepted that her loss of NZ\$20,000 on the transaction was simply unfortunate.

Some time later Dr Q's husband decided to transfer his superannuation from Australia to New Zealand. In this instance he was using another financial institution, whose representative advised him not to transfer the funds until the exchange rate was more favourable. This led Dr Q to

think that her bank should have given her more advice, and she lodged a complaint.

It is not good banking practice for non specialised bank staff to volunteer advice on foreign exchange rates, as such advice requires expertise they do not possess. If a customer requests such advice, the appropriate action is to refer them to a foreign exchange specialist or to suggest that they seek outside advice. However, in this case there was no evidence that Dr Q did anything other than request the bank to open an account to deposit the funds, and bank staff could not have been expected to refer her to specialist advice.

Dr Q is an educated person with experience of international travel and travel-related currency conversions, and could reasonably have been expected to know that foreign exchange rates do vary over time. I accepted that she might not have been conversant with the particulars of New Zealand currency fluctuations, but I considered that she should have known enough to ask questions about current trends in exchange rates, if she had required such information. As it was, she merely asked the bank to convert her draft into New Zealand dollars without enquiring about the exchange rate, and the branch staff followed her instructions.

Even if I had found the bank at fault for failing to volunteer advice about exchange rate fluctuations, I could not have been certain that Dr Q would have been able to wait three months until (with the advantage of hindsight) the exchange rate was more favourable. It would also not necessarily have been apparent at the time of the transaction that the exchange rate was at its most unfavourable.

I proposed to recommend that the complaint be withdrawn. As Dr Q failed to respond to my initial assessment and subsequent correspondence, I could only assume that she had decided not to pursue the matter.

Mr C had a credit card. When he checked his statement on his return to New Zealand, he noted that the exchange rate applied on one particular day differed significantly from the rates on the two other days when he had made purchases.

CASE 53

A limited investigation of an odd exchange rate

Mr C had a credit card issued by a New Zealand bank. He used the card for purchases during a visit to Australia. When he checked his credit card statement on his return to New Zealand, he noted that the exchange rate applied on one particular day differed significantly from the rates on the two other days when he had made purchases. Upon further checking, he concluded that the bank must have made a mistake, since the rate in question was 3% less than official rates published on the same day, including those published by the Reserve Bank. He complained to his bank, which told him that there had been no mistake, and that in any event by the time the transactions came under the bank's control the conversion to New Zealand dollars had already been made. Mr C then complained to me.

My investigation found that the standard terms and conditions of Mr C's credit card specified that the

exchange rate used would be the rate supplied by Visa or MasterCard. This means that the cardholder agrees to accept whatever rate is supplied by the card consortium, irrespective of whether it corresponds to locally published exchange rates. The investigation confirmed that the rate used was that supplied.

I consequently concluded that, although Mr C had clearly identified a discrepancy between the published data on exchange rates and the rate supplied by the credit card consortium to the bank, the bank had nevertheless complied with the terms of its contractual obligations to its customer, and I could not uphold the complaint.

9

Insurance

While I occasionally receive complaints directed at the decision of a bank-owned insurance company to decline a claim, most insurance complaints are concerned with the selling by bank staff of insurance policies to their customers. This is an area of business where it is particularly important to ascertain the customer's needs in order to provide the appropriate policy. In **case 54**, the bank's standard policy was not appropriate for the customer's needs, and it is possible that there was no available policy to meet those needs. However, it seems the bank simply put in place the standard policy without giving any thought to the religious and cultural implications of such an approach.

Mr and Mrs B are Muslims whose religious beliefs require them to avoid non Islamic commercial forms of insurance.

CASE 54

The cultural background to product suitability

Mr and Mrs B are Muslims whose religious beliefs require them to avoid non Islamic commercial forms of insurance, unless necessity dictates otherwise. They decided that loan repayment insurance to cover the death of either of them, or redundancy of the higher earner, met the standard of necessity in this case. They sought cover for these events only, and explained their religious position to the bank when they applied for the insurance. A policy was put in place, with premium payments beginning in February 2004.

The couple learned in October 2005 that they had been given a standard policy including additional cover that was not compatible with their beliefs. They immediately cancelled the entire insurance package, seeking an inquiry and reimbursement of their premiums paid over the previous twenty-one months.

An internal review of their complaint undertaken by the bank concluded that adequate information on the policy had been provided to the couple and sufficient time (15 days) had been given to enable them to cancel the policy at no cost. As Mr and Mrs B had received the benefit of full cover for 21 months, the bank declined to refund their premium payments.

Mr and Mrs B brought their complaint to my office. I found that they had explained their particular insurance needs to the bank, and had requested their personal banker to arrange only their two needed forms of cover. I considered that the bank should have understood that the standard insurance policy would not meet their specific requirements.

Although Mr and Mrs B made an informed decision on their insurance needs, the policy provided did not accord with those needs. The bank effectively compromised the couple's informed decision required under the Code of Banking Practice, and thus breached good banking practice.

The bank claimed that the policy provided was the only package including cover for death and redundancy. It was either unable or unwilling to exclude the unwanted forms of cover from the policy in order to meet their more limited needs. The issue was therefore whether the bank should have disclosed to Mr and Mrs B that their expectation of limited cover could not be met.

As a matter of administrative fairness, I found that the bank should have warned Mr and Mrs B that the insurance cover to be provided varied from that requested. However, the insurance contract in question was easy to read and understand, and the 15 day free look period granted to clients complied with good banking practice and was relatively generous. The couple had made a serious mistake in not reading the insurance documents sent to them in February 2004 and in not seeking changes within the 15 day period. To that extent there was a degree of contributory fault.

Ultimately I found that the bank had failed to treat the couple's religious beliefs with sufficient respect and had thus caused them unnecessary offence and distress. When it knew (and I was satisfied it did know) that standard New Zealand financial products might be unacceptable for religious reasons, it should have taken care to ensure that Mr and Mrs B understood and accepted any deviation from their original instructions. By supplying an insurance policy that was not as requested and by not advising the policy holders of this deviation, the bank did not follow good banking practice. For their part Mr and Mrs B were careless in not ensuring that the insurance contract met their needs. I concluded that the bank should reimburse them for premiums paid for the unwanted insurance cover, and should also pay them \$750 compensation for distress and anxiety. The bank and Mr and Mrs B accepted my recommendations.

10

Miscellaneous

This section of the case note collection, more than any other, illustrates the wide range of complaints that come to the Banking Ombudsman, the difficulties that can be encountered in investigation and sometimes the ingenuity that is required to reach a resolution.

Case 55 illustrates a common misunderstanding that can arise when guarantees are given in support of a family member obtaining a home loan. Even if the amount of the guarantee is limited to the amount of the loan, it is often a guarantee of all the customer's borrowing up to that limit, not simply of the original home loan. In this case the guarantors effectively ended up with liability for their daughter and son-in-law's credit card debt, which they had never intended to guarantee. The case was in fact resolved without the need to form an opinion on its merits, but there is no doubt that the complainants were legally responsible for a considerably wider range of borrowing than they had anticipated.

Complaints involving banks and alleged breaches of the Privacy Act are normally referred to the Privacy Commissioner for resolution unless other issues are intertwined with the privacy issue. In **case 56**, however, the complainant was in a fragile state, and did not want to be referred on to a second agency. Accordingly I agreed to see if a resolution could be facilitated, and once the

full circumstances of the complainant became apparent, the facilitation was successful.

Case 57 also involves the handling of personal information by a bank. In this case the bank failed to advise a former customer that her information had been used in fraudulent activities. This was clearly wrong, for the reasons explained in the case note, and caused the complainant considerable anxiety.

Case 58 was an unfortunate case where the customer eventually had to accept that she had been deceived by her partner, and had not been the victim of maladministration on the part of the bank.

Finally, **cases 59 and 60** are indicative of the wide diversity of issues, languages and cultures that we meet in complaint handling. The investigation of **case 59** was conducted largely in Chinese with the assistance of translation and interpretation services but even so, a misunderstanding arose that was not corrected until late in the investigation.

Case 60 involved not only poor banking practice and the theft of funds but a complainant living on the other side of the world, with all the problems associated with time zones and language barriers.

In 1997 Mr and Mrs J gave a personal guarantee to the bank in support of a loan for their daughter and her husband. The guarantee was limited to \$104,000. In March 2001 the bank lent a further \$30,000 to Mr and Mrs T.

CASE 55

An example of a facilitation resulting in the withdrawal of a guarantee complaint

In 1997 Mr and Mrs J gave a personal guarantee to the bank in support of a loan it had made to their daughter and her husband (Mr and Mrs T). The guarantee was limited to \$104,000, which was the amount of the loan, but not to the particular loan. It operated as a guarantee of all Mr and Mrs T's borrowing up to \$104,000.

In March 2001 the bank lent a further \$30,000 to Mr and Mrs T. According to the bank, it had telephoned Mr J and obtained his prior consent for the new loan.

In 2003 Mr and Mrs T sold their house and moved to Australia. The proceeds from the sale of their house were insufficient to repay their two loans. Approximately \$9,000 was left owing on the 1997 loan and \$28,000 on the 2001 loan.

Mr and Mrs J later paid the outstanding loan balances for Mr and Mrs T.

Mr J then complained that the bank should not have advanced the additional \$30,000 to Mr and Mrs T in 2001. He said that he had not agreed to guarantee the additional loan. Mr J asked the bank to reimburse him for the approximately \$30,000 he had paid to it.

After obtaining the bank's report on the complaint, as well as Mr and Mrs T's consent to the release of information,

my investigator was able to explain to Mr and Mrs J that the second loan advanced to Mr and Mrs T in 2001 had been to refinance other more expensive debt that they had, mainly vehicle finance and credit card debt. Therefore, it was arguable that the further loan was of assistance to Mr and Mrs T's overall financial position at the time. It was also noted that the bank had not at any time made demand of Mr and Mrs J under their guarantee, and that they had themselves decided to clear the outstanding balances of Mr and Mrs T's loans. It was also pointed out to Mr J that if the Banking Ombudsman were to require the bank to compensate him for part or all of the money he had paid, the bank would almost certainly pursue Mr and Mrs T for the amount of compensation involved.

Whilst Mr J remained sure that he had never agreed to guarantee the second loan, he accepted the reasons for the loan and said that, in the light of the further information provided by the bank showing how the loan monies had been used by Mr and Mrs T, he would not take his complaint further.

The complaint was withdrawn on that basis.

Mrs T held accounts at her bank. Her husband was the signatory to one of these accounts. She also had another joint account in her name and that of her twelve year old disabled son. She had not told Mr T about this.

CASE 56

A breach of confidentiality with severe consequences

Mrs T held accounts at her bank. Her husband was the signatory to one of these accounts. She also had another joint account in her name and that of her twelve year old disabled son. Mrs T was saving small amounts of money from time to time to provide for her son's future. She had not told Mr T about this.

When Mr T went one day to withdraw money from the account to which he was a signatory, he asked whether Mrs T had any other accounts. The bank officer advised him of the account in the names of Mrs T and her son, saying that it had a balance of approximately \$900.

Mr T, who suffered from severe depression, later became very angry with Mrs T, and demanded that she withdraw the money from the account in her and the son's name to pay for dental work that Mr T wanted to have done. He said that he no longer trusted Mrs T, and that she would have to account to him for every dollar that she earned and spent. Mr T made life at home very difficult for Mrs T, causing her considerable stress.

The bank apologised to Mrs T for the breach of confidentiality, and offered compensation of \$600 to

enable her to open an account with a different bank for her son. Mrs T did not consider this adequate compensation, and complained to my office. She said that the restrictions now put on her would make it impossible to open another account.

After discussion with Mrs T and the bank, my investigator negotiated an increased offer from the bank. The bank agreed to reimburse the \$900 that had been in the account before Mr T learned of its existence, and to pay Mrs T an additional \$2,000 for the considerable stress and inconvenience caused to her. In settling on this sum, the bank acknowledged that the consequences of the breach of confidentiality for Mrs T, because of her difficult domestic situation, had been particularly severe. She had lost her husband's trust, and the consequences of this might well weigh adversely on her life and their relationship into the future. For these reasons, a substantial compensatory sum for inconvenience was appropriate.

The complaint was eventually settled on this basis.

Mrs G discovered by accident that a dishonest employee of her former bank had misused her account to fraudulently take out a loan. She was greatly concerned.

CASE 57

Identity theft

Completely out of the blue Mrs G received a bank statement from a bank where she had been a customer at some time in the past. When she made enquiries of the bank she was advised that it had been sent to her in error. The bank had discovered that, after she had changed to another bank, a dishonest employee had used her details to fraudulently establish a loan in her name. Mrs G was horrified. After the complaint had been considered through the bank's internal complaints process, without satisfying Mrs G, she referred it to me.

Mrs G expressed anxiety that she had discovered the fraudulent activity only by accident. The bank's immediate reaction had been that, because the employee had been caught, Mrs G did not need to know that she had been unwittingly involved. Mrs G explained to my investigator that a significant part of her complaint was that the

bank had not contacted her to advise that her personal information had been misused. She was worried that the offender's activities could have extended beyond the bank, and that her personal information could have been misused in contexts not yet known to her. Knowing nothing about the offender and the circumstances of the offence, she even had concerns about her personal safety and that of her family.

The bank had not, initially, understood this aspect of the complaint. Once it was explained, the bank had a better understanding of the stress experienced by Mrs G, and offered compensation of \$500. Although Mrs G did not agree, I was of the view that the amount of compensation was reasonable on the basis of what she had told me, and discontinued my investigation on this basis.

Ms Z sold her car. Her partner undertook to deposit cheques into her account, using her Eftpos card at one of her bank's ATMs. According to the bank, the envelopes in the bank's ATM contained neither cheques nor cash.

CASE 58 All is not fair in love and war

Ms Z had decided to sell her car to a particular buyer. Her partner arranged the sale and agreed to receive the payments from the purchaser in the form of cheques made out to cash. He undertook to deposit them into her account, using her Eftpos card at one of her bank's ATMs. The funds were paid over a six day period in three separate deposits totalling \$16,500. The last deposit was on 25 January of the year in question.

Once deposited into Ms Z's account, the funds were immediately available for her use. Ms Z used more than \$8,000 of the transferred funds. On 26 January – one day after the third and final deposit – the bank reversed the \$16,500 credit, leaving Ms Z's account \$8,557 overdrawn. According to the bank, the envelopes deposited in the bank's ATM had contained neither cheques nor cash.

Ms Z maintained that her partner had deposited the funds into the ATM, and that the bank had lost them. When the

bank would not accept this claim, she drew her complaint to the attention of my office.

To help establish the factual basis of the complaint, the bank made use of security camera footage, and was able to establish beyond reasonable doubt that the envelopes had contained neither cash nor cheques. This information was included in a report prepared by the bank, which was sent to Ms Z for comment. Ms Z eventually contacted my investigator, and explained that she now accepted that her partner had invented the entire story about the sale of the car. She was satisfied that he had deceived her in this way to gain possession of her car and to make use of the funds deposited into her account.

Ms Z apologised for the inconvenience she had caused, and withdrew her complaint.

Mr T's company had taken over a lease from a previous owner. He made a rent payment into the landlord's account, but due to a bank error the transaction was not completed.

CASE 59 Complex consequences of a bank error

Mr T operated a business in Auckland. It appeared that in January 2004 his company had taken it over from a previous owner and had been assigned the lease of the business premises. On 5 January 2004 Mr T made a rent payment into the landlord's account, but due to a bank error the transaction was not completed and the funds were returned to Mr T's account.

On 14 January the landlord issued a final warning to Mr T, stating that if he did not pay the outstanding rent, he could be evicted from the premises. The warning referred to the non-payment of the rent, and also to alleged breaches of the terms of the lease in 2003. A week later Mr T and his family were evicted.

Mr T complained to the bank, seeking reimbursement of \$5,705 for all losses associated with the eviction. The bank accepted that it had erred in not paying the rent into the landlord's account, but was not prepared to accept full responsibility for the eviction. It claimed that other factors must have contributed, because failure to make one rent payment would not normally cause a landlord to evict a tenant.

It became apparent during my investigation that the business relationship with the landlord was complicated. The assignment of the lease had not in fact been completed at the date of the eviction, and although the landlord was aware that Mr T was in the process of taking over the lease, he was clearly uncomfortable with this situation. It appeared that tension between the predecessors in the business and the landlord had contributed to the seriousness with which the landlord viewed Mr T's failure to pay rent. Although there was a suggestion that the landlord had written to Mr T on 14 January, advising him that the rent had not been received, this letter could not be located.

I found that the bank's error was the immediate cause of the landlord's decision to evict Mr T, but that the irregular relationship and Mr T's failure to contact the bank after he received the landlord's letter of 14 January had contributed to the events. If it had not been for this background, an eviction for a failure to make one rent payment would have been less likely. I proposed that the bank reimburse Mr T for 70% of his costs (\$3,993 plus interest), in addition to paying \$500 in recognition of the inconvenience caused to him by the eviction.

When my assessment was accepted by Mr T but rejected by the bank, I had to make a recommendation on the matter. It was at this juncture that I identified a significant factual misunderstanding that had occurred due to the mistranslation of information provided by Mr T. Mr T had since 2003 actually been the director of the predecessor business, as well as a director of his own company, and was thus personally responsible for ensuring that the terms of the lease were observed. I found that this fact lent weight to the bank's argument, as Mr T would then have been responsible for the earlier breaches of the lease agreement.

If there had been no tension between the business (of which Mr T was at all relevant times a director) and the landlord, it is unlikely that eviction would have occurred so promptly. However, it remained significant that the eviction notice was issued so soon after the error that a causal link must be inferred between the eviction and the bank's failure to process the payment correctly. I recommended that the bank pay 50% of the costs incurred by Mr T, in addition to \$250 compensation for inconvenience. Both parties accepted my recommendation.

Mrs B's application for New Zealand residency was declined. When she contacted her New Zealand bank, it had closed her account, after transferring her funds to an overseas agency. All funds in the account had disappeared.

CASE 60 Investigation at a distance

Mrs B had intended to emigrate with her family from a Baltic state to New Zealand, and used an agency based in another Baltic state to assist with her application. In May 2003, in anticipation of her emigration, a New Zealand bank account was opened by the agency on her behalf. Later that month the agency transferred NZ\$57,007.78 directly into her New Zealand account. Two months later she gave the agency a further 65,000 in cash to deposit into the New Zealand account, although it appears that only about one sixth of this amount was actually deposited.

Unfortunately for Mrs B, her application for New Zealand residency was declined. She subsequently contacted the New Zealand bank, requesting it to transfer her funds back to her country of origin.

The bank replied that her New Zealand account had been closed, with the funds having been forwarded at her request to a bank account in the Baltic state where her agency was based. The funds had been forwarded to a company account sounding similar to the account from which she had made her original transfer to New Zealand.

Mrs B complained that she had authorised neither the transfer of funds nor the closure of her New Zealand account. Furthermore, she had not received any of the transferred funds. She was not satisfied with the bank's response to her complaint, and complained formally to my office.

My investigation into Mrs B's complaint revealed both that the bank had made some errors and that the emigration agency had apparently misappropriated some of her funds.

From the outset the bank had not followed good banking practice. Because Mrs B had not entered New Zealand,

the bank account must have been opened on her behalf by a third party. There was no record of who opened her account, and the bank had mislaid all documentation relating to this.

The address for the account was a New Zealand address, and was therefore not Mrs B's residential address.

The bank had received a letter dated 12 November 2003, supposedly from Mrs B, requesting the closure of her account and the transfer of funds to an account in the Baltic state where her agency was based. A close examination showed that the letter, had been notarised and the notarisation was dated two months previously, 12 October 2003. This would mean that the letter was notarised two months before it was written – an impossibility. Although the discrepancy in dates could conceivably have been a simple typing error, it should have been detected by the bank. Payment of the funds should have been deferred until a new notarised letter had been received.

I found that the bank had failed to identify its customer properly when opening her account, and later accepted a deficient instruction to close the account and transfer the funds out of New Zealand. On this basis I recommended that the bank should refund the amount transferred out of the account, and should also reimburse some of Mrs B's costs. She should also receive compensation for the inconvenience she had suffered. The bank and Mrs B accepted the settlement I had recommended, with the bank paying her compensation in excess of \$80,000.

Banks participating in the scheme

as at 30 June 2007

ANZ National Bank Ltd (ANZ and the National Bank of New Zealand)

ASB Bank Limited

Bank of New Zealand

Citibank NA

HSBC Limited

Kiwibank

Rabobank New Zealand Limited

TSB Bank Limited

Westpac

The Office of the Banking Ombudsman

PO Box 10-573, Wellington 6143

Freephone 0800 805 950

Email help@bankombudsman.org.nz

Website www.bankombudsman.org.nz

