



Banking Ombudsman

Case Notes

08
09



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About the Banking Ombudsman

The Banking Ombudsman scheme was established on 1 July 1992 – the first such scheme in the private sector in New Zealand

- We investigate complaints about banking services supplied by participating banks
- We are independent and impartial
- Our service is free, efficient, and informal
- Banks must comply with awards of compensation made by the Banking Ombudsman





Liz Brown Banking Ombudsman

Introduction

The annual collection of Banking Ombudsman case notes is significant for a number of reasons. This year I am emphasising three reasons, as they assume particular prominence when we receive a large number of complaints about a single product or service, as we have done this year.

The publication of case notes:

- is an important part of the Banking Ombudsman's accountability process

At the core of the Banking Ombudsman's terms of reference is the requirement to make decisions that are fair and reasonable in all the circumstances of the individual case. If the public of New Zealand is to have faith in the Banking Ombudsman's capacity to resolve their complaints about their banks, they need to be satisfied that she is fulfilling that requirement.

These case notes are therefore designed to tell the stories of those who have complained to the Banking Ombudsman and to show the Banking Ombudsman process at work in a variety of ways. They are intended in particular to show the reasoning that leads from the information supplied by the bank and the

complainant or uncovered by investigation to an assessment or recommendation that meets generally accepted standards of fairness and reasonableness.

- assists banks to develop and maintain good practices

Most banks will be subject, at one time or another, to most of the more common types of complaint, and knowledge of the Banking Ombudsman's approach to such complaints will help develop good practice in the areas where the complaints arise. In the late 1990s, for example, there were many complaints about some banks' refusal to refund unauthorised card transactions when an offender had used the card with the correct PIN, but there was no other evidence of culpability on the part of the cardholder. This type of complaint has almost disappeared as banks have adopted the Banking Ombudsman approach of looking more closely at the circumstances of the individual case.

When new types of complaints arise, or when market conditions lead to a surge in one type of complaint, as has happened this year, the Banking Ombudsman's approach can help set good standards across the banking industry. It is noteworthy that, although I have found some deficiencies in the investment advice processes that were the subject of many complaints this year, they are not the same deficiencies as I found in similar complaints in 2001-2003, and the advice process was generally more robust.

- assists professional advisers, such as lawyers, and advisers in community organisations when they are called on to advise a client on a banking complaint

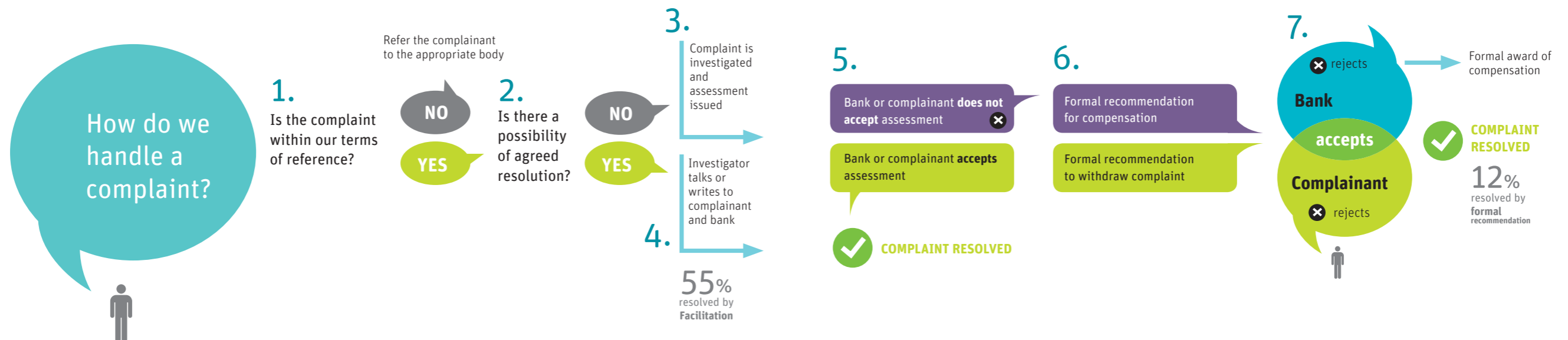
The case notes are written in plain language for a wide range of readers. They should be not only a reference point for the adviser, but material that is easy to give to their clients to illustrate the advice that has been given.

This year's collection of case notes reflects the change in the content of complaints brought to the Banking Ombudsman during the 2008-9 year. Last year there were two case notes on complaints about investments; this year there are fourteen.

Interestingly, there is exactly the same number of case notes on lending and debt recovery complaints as in 2007-8, but this year they are weighted towards complaints about the cost of early repayment of fixed rate loans.

Some of the cases reported here were resolved by using approaches that have been in place for many years, but some required new or amended approaches, and in some cases approaches are still being developed. Information about the principles underlying these approaches will be found in the commentary that heads each chapter.

The creation of a searchable database of case notes, available on the Banking Ombudsman website, means that new case notes can be published throughout the year, enabling us to provide a better and more timely information service to banks and their customers. Partly for this reason, we are no longer publishing our annual collection of case notes in the traditional printed volume. This and future publications will be sent in electronic form to our usual subscribers, and will be available on request from our office.





Good banking practice

Early repayment charges

In 2008, when it became apparent that we were likely to receive complaints about the cost of early repayment of a fixed rate loan, I conducted a survey of the banking industry to establish good banking practice in relation to early repayment charges.

In particular, I was aware that the Credit Contracts and Consumer Finance Act 2003 (CCCFA) had come into effect since we had last had a wave of complaints about early repayment charges, and I wanted to establish its effect on banks' practices.

Eight banks responded to the survey.

1. The CCCFA provides that a lender may make a charge if a fixed rate loan is repaid early, but the charge must be reasonable. It must reflect the actual cost to the lender of the early repayment. The CCCFA also provides for a "safe harbour" formula for calculating an early repayment charge. A lender using the formula is deemed to be making a reasonable charge.
 - Two of the banks surveyed were using the "safe harbour" formula and another was using a formula that produces very similar results.
 - The remaining banks provided copies of the formulae they were using. One used a formula that took into account movements in retail interest rates to calculate the early repayment charge, and three used a formula based on movements in wholesale interest rates. One bank had alternative formulae.

2. Those banks that do not use the "safe harbour" or a similar formula were asked what steps they had taken to ensure that their calculations complied with the CCCFA.
 - Two banks responded with a description of their formulae. One compared the net present value of scheduled cash flows in the absence of early repayment with the net present value of cash flows after early repayment. The other calculated the amount that would have been paid by the customer if the loan had not been repaid early and compared it with the amount the bank could receive if it re-lent, for the remainder of the fixed rate term, the amount repaid early.
 - The remaining three banks referred to the expert advice they had taken on establishing and reviewing their formulae.

3. All banks considered they took reasonable steps to ensure that they mitigated the loss caused by early repayment.
 - Four banks referred to the contents of their formula for calculating the early repayment charge.
 - Two banks said that they either invest the repaid funds via the wholesale market at the best available rate for the relevant term and then use that rate to quantify the charge, or make a calculation based on the position if they had invested the repaid funds into the lending market.
 - One bank said it enters into interest rate swap arrangements under which it swaps its exposure to the fixed interest rate for a variable interest rate.
 - One bank said that it offsets its funding hedge commitments in the same markets it accessed to manage its original funding hedges.

4. The CCCFA permits but does not require a lender to make an early repayment charge. Banks were asked what factors they took into account in deciding whether to make such a charge in a particular case.
 - Two banks said they would waive the early repayment charge in some cases and another said it would not charge it on nominal amounts.
 - The remaining banks either said or implied that a charge will be made if the bank's calculation indicates that the early repayment will cause the bank a loss.
5. Banks were asked whether they charged an administration fee in addition to an early repayment charge, and if so how the fee was calculated and whether it was sometimes waived.
 - One bank does not charge an administration fee.
 - One bank charges an administration fee (\$30) for partial repayment only.
 - Two banks charge an administration fee of \$300, one charges \$250, one charges \$100, and two charge \$50.
 - One bank may apply an exit fee of \$250 in addition to the administration fee in some circumstances.
 - Four banks (including the three with the highest fees) said they would waive the administration fee in some circumstances.

Monitoring customers' accounts for possible fraudulent or unusual activity

In 2007-8 I surveyed banks to establish to what extent they monitored customers' accounts for activity that could be an indicator of fraud. The results were reported in last year's collection of case notes.

Most banks said then that they regularly review and update their monitoring programmes, and as I continued to receive complaints with a background in fraud that could have been detected, or detected earlier, by more extensive monitoring, I decided to update the earlier survey.

In view of complaints that raised questions of financial abuse of elderly customers, I also asked two new questions directed at any monitoring of accounts:

- where a third party had authority to operate the account
- where the customer could be classified as vulnerable.

Eight banks responded to the survey, though not all of them supply the full range of services to which monitoring may be applicable.

I am unable to be very specific about banks' responses, as the information supplied to me was often sensitive, and publishing it would prejudice the detection and prevention of fraudulent activity.

Most banks had made incremental changes to their systems since the previous survey and anticipated further changes, especially once the Anti-Money Laundering and Countering Financing of Terrorism Bill becomes law.

No bank specifically monitors activity on accounts where a third party has authority to operate or where the customer can be identified as vulnerable, though several banks remarked that they would expect suspicious activities on such accounts to be detected by their standard monitoring processes.



Account operation

How far must a bank go to protect the interests of its customer? Directly or indirectly, this was the question in all four of the cases reported below.

Many complaints about the operation of accounts arise out of disputes over ownership of accounts or of the funds in them. The two are not necessarily the same, as can be seen from [case 1](#).

When there is a dispute between two parties to an account, the bank may, and often should, stop access to the account until the parties have resolved their dispute. It may make enquiries to satisfy itself that there is a genuine dispute, but it is essential that it does not become embroiled in the dispute and that all parties to the account are protected.

In [case 2](#) the bank was right to freeze the account, but then permitted two of the parties to the dispute to take action that disadvantaged the third. The result was a complaint that was difficult to resolve because not all parties to the original dispute were parties to the complaint. The bank's action had removed any incentive there may have been for the first two parties to come to an agreement with the third.

A bank has a general obligation to treat both parties to a joint account equally and in accordance with the account mandate. In [case 3](#), although I ultimately found that there had been maladministration rather than discrimination on the basis of gender, the complainant had not been treated equally with her former husband, and it was not surprising that she felt there had been discrimination. A reasonably substantial payment of compensation for inconvenience was warranted.

The customer as well as the bank must act responsibly and take reasonable steps for self-protection. [Case 4](#) was a case where the main cause of the customer's loss was employee fraud, facilitated by poor internal controls and business practices. The bank's negligence only contributed to the loss.



Ms J opened an account in the name of her young daughter. Ms J's daughter, visited another of the bank's branches to open an account. The bank officer told her she already had an account and agreed to transfer the funds in it ...

Disputed ownership of account – clear ownership of funds in it – account frozen – compensation for inconvenience – loss caused by delays beyond bank's control – extent of inconvenience attributable to bank's actions

In 1994 Ms J opened an account in the name of her young daughter. At first it was used for her daughter's funds, but later Ms J used the account to separate savings from household expenditure and to deposit large sums earmarked for particular purposes. She had regular access to it through Eftpos, telephone banking and the internet.

In May 2006, Ms J's daughter, who was then living with her father, visited another of the bank's branches to open an account. The bank officer told her she already had an account and at her request agreed to transfer the funds in it, which amounted to over \$49,000, into the new account. When she was told about the transfer Ms J laid claim to the funds, which she needed to pay for renovations to a property. The bank suspended the account immediately, pending resolution of the disputed ownership of the funds. It suggested Ms J should take steps to resolve the matter with her daughter. Ms J tried to do this, but was unsuccessful.

When my office first became involved, my aim was to facilitate a resolution to allow Mrs J to access the funds, which she needed to finance house renovations. The bank acknowledged that, while the legal ownership of the account was in dispute, it was clear that the funds in the account belonged to Ms J. The bank proposed to release the funds that had been transferred out and offered her \$1,000 compensation for inconvenience.

Ms J did not accept the offer. She considered the loss caused by the bank far exceeded the amount in the account and decided to pursue her complaint through her lawyer rather than my office. Further discussions between the bank and Ms J's lawyer failed to resolve matters and after some months, Ms J asked me to re-open my investigation.

In the meantime, the bank had reached agreement with Ms J's daughter's family and was prepared to release the funds to

Ms J. After the funds were released the issues remaining to be determined were:

- what direct loss had Ms J suffered as a result of the bank's actions
- what level of compensation for inconvenience was appropriate.

I found that, once the bank had established in September 2006 that the funds in the disputed account belonged to Ms J, there was no valid reason not to return the funds to her. Competing claims for compensation did not constitute sufficient reason for retaining the funds.

After Ms J decided to withdraw her complaint from my office, there had been long delays which were outside the bank's control. For this reason I decided to limit my consideration of Ms J's loss to the period between the date when the funds were removed from the disputed account and the date by which I would have expected to complete my assessment of the complaint, had it not been withdrawn.

I identified a number of costs which were incurred as a direct result of the freezing of the funds and recommended that the bank pay compensation for these. I was not able to accept claims for other losses unsubstantiated by evidence, or which were an indirect or consequential result of the freeze on Ms J's funds.

There was no doubt that Ms J experienced considerable inconvenience in an increasingly stressful situation, but not all the stress she suffered was a result of the bank's actions. While the bank's actions added to Ms J's problems, it did not cause them, and I did not consider this was a case where an award of the maximum compensation was justifiable. I proposed to recommend a payment of \$3,000.

Ms J did not accept my initial assessment and made further submissions in support of her claim for increased compensation, but I was not convinced that there was any reason to amend the findings of my initial assessment, which I decided to confirm. Ms J did not accept my formal recommendation. The case was closed on this basis.



The directors were in dispute and one of the directors, Ms N, requested that the bank freeze the company accounts ...

Company account – directors’ dispute – two directors form new company – funds improperly directed to new account – not all directors party to dispute

In 2006 a promotional company was incorporated (company A). It had three directors, all of whom had signing authority on the company’s account.

By late 2007 the directors were in dispute and one of the directors, Ms N, requested that the bank freeze the company accounts, including the account where funds from electronic transactions were deposited. The bank froze the accounts.

Around this time the other two directors incorporated a new company (company B) with a similar name to company A. One of these directors contacted the bank and advised it that company A had changed its name to company B. The director completed a “request to change merchant facilities” form which was accepted by the bank.

As a result \$20,000 from electronic transactions that should have been deposited to company A’s account was deposited to company B’s account.

Ms N contacted the bank and asked that the funds be returned to company A. The bank declined, stating that it would not intervene in a dispute between directors.

The complaint was referred to my office for investigation.

Early in my investigation the bank agreed that it had made an error, but declined to return the funds to company A without a settlement agreement signed by all directors, which was not possible to obtain.

This was a difficult complaint to determine as it would be unfair to make a decision (such as directing the bank to return the funds to company A) that would adversely affect persons not a party to the complaint (the other two directors).

In my initial assessment I made a finding that the bank had erred, and offered to assist the bank and Ms N to reach a negotiated agreement. One of my investigators facilitated the process, but it came to light that Ms N had received advice that suggested accepting a part reimbursement would leave her open to charges that she did not do all she could to pay her creditors. Accordingly she would not accept less than full reimbursement, which neither I nor the bank considered was warranted.

As a result I was required to make a recommendation. I recommended that Ms N be paid one third of the disputed funds plus \$1,900 in costs and compensation. The case was settled on this basis.



Mrs G asked the bank to remove her name from a joint account. The account was being used by her former husband alone. The bank refused to action her request ...

Credit card account – unauthorised transaction – card stopped in error – removal of name from joint account – failure to stop account – protection of account holder interests

Mrs G raised three concerns about her dealings with her bank.

Her then husband, Mr G, charged a business transaction to her credit card account without her authority. When she complained to the business consultant in the bank who handled their affairs, she was advised to discuss the matter with her husband. He agreed to refund the transaction as soon as funds became available.

Mr and Mrs G then separated, and three months later the transaction had not been refunded. Mrs G complained again to the business consultant, who again told her to sort the matter out with her former husband. Mrs G later complained in writing to the bank, and eventually the disputed transaction and all charges were reversed. The bank declined to give Mrs G any information about its dealings with Mr G in relation to repayment of the transaction.

After their separation, Mrs G asked the bank to remove her name from a joint account. The account was being used by her former husband alone. The bank refused to action her request because the account was in overdraft. She was told that, if she closed her individual accounts with the bank, the money would first be applied against the overdraft.

Around the same time, Mrs G asked the bank’s business consultant for duplicate statements for the joint account, with the cost to be debited to the joint account. The business consultant declined Mrs G’s request because Mr G would not consent to the debit. In the same letter, the consultant confirmed the overdraft had been cleared, but no action was taken to remove Mrs G’s name from the joint account.

The bank did not respond to Mrs G’s letter when she complained that, while she was being told transactions on the account required her former husband’s consent, he was allowed to use the account without her consent.

Some weeks later, the account was again overdrawn. Mrs G wrote to the business consultant complaining that the bank’s refusal to remove her name from the joint account made her jointly liable for the unauthorised overdraft, although the debt belonged to her former husband. She received no reply. The account remained in

joint names until Mrs G discovered she could no longer access it online. She enquired about the status of the account and was told it had been closed.

After investigation of the complaints, I found that:

- the original advice given to Mrs G to sort the matter out with her then husband was not unreasonable. However, when she raised the matter again after the bank had been made aware of the separation, the bank should have assisted her
- although Mrs G had experienced no loss from the unauthorised debit on her credit card account, she had undoubtedly suffered inconvenience over a number of months while she tried to have the transaction reversed. However, the bank could not give her any details of its dealings with Mr G over the credit card transaction without breaching the obligation of confidence it owed him
- the bank was entitled to insist that the overdraft be repaid before removing Mrs G’s name from the account. However, the bank should have offered to freeze the joint account at that point. This would have protected Mrs G’s position and would have ensured that no further withdrawals were made from the account
- when the bank’s business consultant refused to debit the joint account with the cost of the statements because Mr G had declined to give his consent to the charge, she was not acting in accordance with the account mandate. There was nothing to support Mrs G’s contention that she had been subjected to gender bias, but it was clear that the bank’s business consultant had not dealt with the joint holders of the account in an even handed way. Mrs G did not suffer any financial loss, but she did suffer substantial frustration from the time she first asked for her name to be removed from the account.

I concluded that an award of compensation for inconvenience for each of the matters raised by Mrs G was justifiable and recommended that the bank pay her a total of \$2,000. The bank and Mrs G accepted my recommendation.



Between late 2003 and early 2007 Ms X fraudulently negotiated 49 cheques.

Employee fraud – bank accepted documents fraudulently amended and signed – company’s internal processes insufficient to detect fraud – responsibility for company’s losses

A Ltd was defrauded by an employee, Ms X, over a period of four years.

Between late 2003 and early 2007 Ms X fraudulently negotiated 49 cheques. Five of these cheques were deposited into an account held by X Ltd, a company associated with Ms X, and 41 were cashed at a branch of A Ltd’s bank. The remaining three cheques, which had been altered by Ms X, were deposited in an account in her name.

In September 2006, A Ltd asked Ms X to deposit \$18,100 into its account. Instead, Ms X deposited only \$8,000 into the company’s account and stole \$10,100. She also withdrew \$8,005 from the company’s account by forging a signature on a withdrawal slip and purchased an \$8,000 bank cheque, which she deposited into the company’s account.

Some time after this, Ms X defrauded A Ltd of a further \$8,131.35 by way of electronic banking transfers.

A Ltd complained to my office that the bank should be held accountable for allowing the fraud to occur. In particular, it complained that:

- the bank paid the 49 cheques, which had been fraudulently negotiated by Ms X
- in September 2006, the bank should not have accepted the withdrawal slip and cheque, which had been fraudulently signed by Ms X
- the bank could have prevented Ms X from stealing a further \$8,131.35 if it had told A Ltd about the September 2006 transactions.

After investigation, I concluded that:

- Ms X’s actions, not the bank’s, were the primary cause of A Ltd’s loss and the inconvenience caused to it

- the alterations to the three cheques were not made by the account signatory, and the bank should not have accepted the cheques. The bank should also have been on notice of Ms X’s suspicious behaviour as A Ltd had already notified it of other fraud Ms X had committed

- A Ltd had also contributed to its loss. Its practice of pre-signing cheques created the opportunity for Ms X to alter them and commit fraud. In addition, poor internal controls allowed the fraud to go undetected

- it was likely that the bank was not legally required to reimburse A Ltd the value of the other 46 cheques. The alterations to those cheques were skilful and the bank was not suspicious about them

- the bank did not directly cause A Ltd’s loss of \$10,100 in September 2006. It did not handle the cash that Ms X stole and was unaware that Ms X undertook the transactions to hide her theft. I found A Ltd partly responsible for this loss. Its lack of internal controls, particularly its failure to arrange for someone other than the person responsible for its banking to reconcile its business records with account statements, was a significant cause of the loss

- the bank should perhaps have been suspicious about the September 2006 transactions and made an attempt to contact A Ltd. Whilst A Ltd might have been able to prevent further fraud occurring if the bank had done this, the bank did not directly cause the loss of \$8,131.35.

I recommended that A Ltd accept the bank’s offer to pay half the value of 39 of the cheques as a goodwill gesture. I also recommended that the bank pay A Ltd half the value of the three altered cheques and \$2,000 for the inconvenience caused to it. The bank and A Ltd accepted my recommendations.



Lending and debt recovery

There was an increase in complaints about lending during the 2008-9 year, especially in complaints about the cost of early repayment of fixed interest rate loans. As most of the complaints were made in the second half of the year, relatively few investigations had been completed by 30 June 2009. Comment on the approach to these complaints will be found in my annual report for 2008-9, and three of the case notes below illustrate some of the issues.

At an early stage, and after discussions with the Commerce Commission, I decided not to investigate complaints that banks were failing to comply with the provisions of the Credit Contracts and Consumer Finance Act 2003 in the way they calculated early repayment charges, and that the Commerce Commission is the appropriate forum for such complaints.

Case 5 was the first case of many about the early repayment charges. It is an indication that neither banks nor their customers were prepared for the sudden rise in the cost of breaking the term of a fixed rate loan. While there was no doubt in this case that a charge was payable, the customer was caused unnecessary inconvenience by the bank officer’s intervention and misinformation.

There are often evidential difficulties in determining complaints about early repayment charges. Customers may say that they were given misleading information about the likely amount of any early repayment charge, and their account of the relevant events may be very credible. It is ten years or so since there were last the sort of economic conditions that cause high early repayment charges, and many bank staff would only have seen low or no charges when a fixed rate loan term was broken.

The formulae used to calculate an early repayment charge are complex, and most customers would not be able to estimate for themselves the likely amount of any early repayment charge. It is an area where customers are particularly reliant on their banks for accurate information and advice.

Even so, the loan contract usually has clear and prominent provisions about the customer’s obligation to pay an early repayment charge, and unless there is some evidence in support of an allegation of misleading information given by bank staff, the complaint is unlikely to be upheld. **Cases 6 and 7** make this point, as does **case 8**, where it seems very likely that the customers were relying on their own past experience as much as on anything the bank may have told them.

Case 9 is an example of a rather different type of complaint where an early repayment charge is seen as the cost of poor advice about the suitability of a fixed rate term.

Under paragraph 18(b) of my terms of reference I am prohibited from considering a complaint about a bank’s commercial judgment in a lending situation but I may consider complaints about failures in administration. On the assumption that banks do not intentionally set up procedures that are in breach of the Code of Banking Practice, a complaint of a breach of the Code is always likely to be a complaint of maladministration.

Section 5.1(c) of the Code says that a bank will only provide credit when the information available to it suggests that the customer will be able to meet the terms of the credit facility. Complaints of “irresponsible lending” are usually complaints of a breach of this section of the Code.

Banks are generally conservative lenders and unless there is an actual mistake in the lending process, it is highly unlikely that there will be a breach of the Code obligation when a loan has



When Ms D said she was refinancing, the bank officer told her the bank would require her to pay an early repayment fee, estimated at \$9,000.

Lending – early repayment of fixed term loan – misleading information given by the bank – misleading information caused stress

Ms D decided to refinance her home loan. Her solicitor advised the bank that Ms D wished to repay her home loan in full and requested a settlement statement.

On the settlement date, Ms D received a telephone call from a bank officer. He asked whether she was refinancing or selling the property. When Ms D said she was refinancing, the bank officer told her the bank would require her to pay an early repayment fee, estimated at \$9,000. She questioned the bank's decision to charge an early repayment fee which she had not taken into account when arranging new finance. She asked how it was calculated but the bank officer was unable to tell her. He agreed to enquire and call her back. When he called back he confirmed the amount of the charge.

Ms D was about to leave New Zealand on holiday when she received the telephone calls. She was unable to deal with the matter herself but was extremely concerned, as her new lending arrangements were already in place. She asked her solicitor to handle the matter on her behalf.

Later that day, in reply to his earlier request, Ms D's solicitor received a settlement statement from the bank which included an early repayment fee of \$6,245.11. Ms D's solicitor paid the bank the full amount specified in the statement, to allow settlement to take place.

When she returned from holiday, Ms D complained to my office. Ms D complained that:

- she felt threatened and intimidated by the bank officer
- the matter had caused her stress because she was about to leave New Zealand on holiday and was unable to resolve the issue herself.

After investigation, I found that:

- the bank officer was ill prepared for the discussion with Ms D. As a consequence, he gave Ms D misleading information about the amount of the fee
- the reason for the bank officer's call to Ms D on the date of settlement was not clear and his involvement was not helpful. The question of the early repayment charge should have been dealt with between the bank and Ms D's solicitor
- the bank officer's involvement in the matter caused Ms D stress and inconvenience.

I concluded that the bank should pay Ms D a moderate amount of compensation. Both Ms D and the bank accepted my proposed recommendation.

been made in accordance with the bank's usual lending criteria to an adult customer who is not under any sort of disability and who has requested the loan. If the loan is marginally outside the usual lending criteria, as in [case 10](#), there will usually be no breach if the bank has made enquiries and has satisfied itself about the customer's ability to repay.

Customers under the age of eighteen have some special legal protections but, as illustrated by [case 11](#), a bank has no obligation to enquire into the financial management skills or to consult the parents of its young customers once they have reached the age of majority.

[Case 12](#) concerned a vulnerable customer who was the victim of fraud. Although it was unlikely that the bank had erred in extending to him the usual small overdraft facility made available to customers with good account conduct, it treated the case as one of irresponsible lending and made an offer that was in accordance with my usual approach to such cases.

Over the years I have also developed a standard approach to cases where a bank's mistake has led the customer to make insufficient loan repayments. The approach is described in [case 13](#).

Several complaints this year have arisen when a customer:

- has loans secured by more than one property
- sells one property expecting to have to repay only the loan taken to buy that property
- makes commitments in reliance on the expected surplus from the sale
- finds that the bank requires a reduction in the total borrowing which will take up all or part of the expected surplus.

As in [case 14](#), the bank is usually entitled to require the reduction and is often unaware of the customer's expectations. If it becomes aware of them, it should make its requirement clear at the first possible opportunity.

A common background to complaints about joint loans is in the disputes and difficulties caused by the breakdown of a marriage or other personal relationship. The parties often fail to understand that, while they may have agreed that only one of them will be responsible for home loan repayments, the bank is entitled to hold them equally responsible unless it has also agreed to the arrangement. Even if, as in [case 15](#), a court has ordered the transfer of the home to one party, this does not necessarily affect the other party's responsibility for a loan.

The breakdown of a long relationship can be devastating for the parties, and if information emerges that raises a question about a bank's involvement in the relationship finances, it is not always reasonable to expect the affected party to follow it up immediately. However, a long delay, as in [case 16](#), can mean that the result of the investigation is inconclusive because relevant evidence is no longer available. This does not necessarily mean that the investigation is of no value to the parties, and I give careful consideration to requests to investigate historic events.

[Case 17](#) is also about keeping both parties to a joint loan informed. In this case the relevant events occurred after the end of the relationship and the bank knew that its customer wanted to be told about any problems with the loan. While its failure to do so did not cause the loss claimed by the customer, it did cause her considerable inconvenience.



According to Mr E, the bank told him he would be required to pay a \$300 administration fee, but no penalty.

Lending – discussion with bank before sale of security property – early repayment charge for breaking fixed term loan – information about amount of charge received the day before settlement

Mr E had a fixed term loan with the bank secured by a mortgage over his property.

In June 2008 Mr E decided to sell the property and before he confirmed the sale he wanted to know whether the bank would charge him a penalty for breaking the fixed term loan. According to Mr E, the bank told him he would be required to pay a \$300 administration fee, but no penalty.

The bank had no record of a discussion with Mr E about the cost of breaking his fixed rate loan - the recorded reason for Mr E's contact in June 2008 was to discuss a top up of his lending to complete renovations to the property.

Following his contact with the bank Mr E confirmed the sale of the property, with settlement to take place three months later.

Two days before settlement, Mr E's solicitor confirmed to the bank that the property had been sold. The bank contacted Mr E to advise that it required an early repayment fee of \$5,959.19 to be paid. Mr E complained about the early repayment fee but agreed to pay it to allow the settlement to take place.

When he was not able to resolve matters with the bank, Mr E contacted my office.

Mr E complained that the bank told him that, if he broke his fixed term loan, he would incur an administration fee of \$300, but no other penalty. He also complained that the bank only advised him of the early repayment fee on the day before settlement.

After investigation, I concluded that:

- I was unable to establish exactly what was discussed between Mr E and the bank in June 2008
- the bank was not in a position to give a realistic estimate of the likely amount of any early repayment cost three months in advance
- I was not convinced Mr E would have made a different decision about selling his property if he had been aware that he could incur an early repayment fee.

Both Mr E and the bank accepted my proposed recommendation that the complaint should be withdrawn.



... the bank advised Mr and Mrs K that they were required to pay an early repayment fee of \$11,000.

Fixed rate loan agreement – loan repaid early – early repayment fee charged – incorrect understanding of when early repayment fees charged – unable to determine exact nature of bank's advice – bank calculated and charged early repayment fee in accordance with loan agreement

Mr and Mrs K had entered into a two year fixed rate loan agreement with the bank.

At the end of the fixed rate term, and after talking to Mr A, one of the bank's officers, Mr and Mrs K agreed to reserve a fixed interest rate of 8.99% per annum for a further two years.

Four months later, Mr and Mrs K sold their house and made arrangements to repay their loan.

On 5 December 2008, the bank advised Mr and Mrs K that they were required to pay an early repayment fee of \$11,000. Mr K queried this requirement. He told the bank's officer, Mrs T, that his understanding was that the bank only charged an early repayment fee if interest rates had increased since the loan agreement had been signed. He also told her he had expected that no early repayment fee would be payable as interest rates had dropped.

Mr K then called Mr A, who told Mr K that he would not have said that an early repayment fee would be required if interest rates increased because the reverse is in fact true.

Mr K then tried to call Mrs T again without success.

Mr K called Mrs T on 8 December 2008. She told him that interest rates had moved again and that the early repayment fee was now \$13,500. When Mr K complained that the early repayment fee had increased because he had been unable to speak to Mrs T on 5 December 2008, the bank reduced the fee to \$13,000.

Later that day, Mr and Mrs K broke the existing loan agreement early.

The bank later acknowledged that the early repayment fee would have been lower if Mr K had been able to contact Mrs T and break the loan on 5 December 2008. The bank agreed to reduce the early repayment fee from \$13,000 to \$11,000.

Mr and Mrs K then complained to my office. They complained they were led to believe that an early repayment fee would only be payable if interest rates increased between the time when they fixed the interest rate and the time when they sold their property. As they were aware that interest rates were likely to drop and they intended to sell their property, Mr and Mrs K would never have entered into a fixed interest rate agreement if the bank had correctly explained to them the way in which it charged early repayment fees.

After investigation, I found that:

- I was unable to determine what had been said in the conversation between Mr and Mrs K and Mr A before the loan was renewed
- the loan agreement allowed Mr and Mrs K to repay the loan early if they paid an early repayment fee. The bank had calculated and charged the early repayment fee in accordance with the loan agreement.

For these reasons I recommended that the complaint be withdrawn. The case was closed on this basis.



Mr and Mrs Y repaid the loan early. On settlement, they discovered the bank had added \$5,000 to the amount required to repay the loan, to cover the early repayment charge.

Fixed rate loan agreement – loan broken early – early repayment charge on settlement – provision in loan agreement for early repayment charge – bank unaware that complainants intended to break fixed term early – no evidence to suggest complainants would have acted differently

Mr and Mrs Y had entered into a two year fixed rate loan agreement with the bank. Eighteen months later, they repaid the loan early. The bank charged them an administration fee but no early repayment charge.

A year later, after meeting with one of the bank's officers, Mr and Mrs Y entered into another fixed rate loan agreement with the bank.

Fourteen months later, Mr and Mrs Y repaid the loan early. On settlement, they discovered the bank had added \$5,000 to the amount required to repay the loan, to cover the early repayment charge.

Mr and Mrs Y complained to the bank, and when they were dissatisfied with its response, to my office. They complained that the bank did not tell them that an early repayment fee might be charged if the fixed interest rate loan agreement was terminated and the loan was repaid early.

After investigation, I concluded that:

- the loan agreement provided for an early repayment charge if the loan was repaid early
- although Mr and Mrs Y had told me that they move house every year and had expected to repay the loan early, the bank was unaware that they intended to break the fixed term early
- even if Mr and Mrs Y had known about the early repayment charge, they could still have decided to fix the interest rate. There was no way of knowing that interest rates were going to drop as far as they did and that the early repayment charge was going to be so significant.

My formal recommendation was that the complaint be withdrawn. The case was closed on this basis.



When Mr P arranged a loan with his personal banker, he wanted to fix the interest rate for no longer than 12 months ...

Lending – early repayment charge – bank fixed loan for longer than requested – no loss until early repayment occurs

When Mr P arranged a loan with his personal banker, he wanted to fix the interest rate for no longer than 12 months because of certain lifestyle changes he intended to make within that time. His personal banker was very insistent that a two year fixed term was more beneficial. When he went to his solicitor to sign the loan documentation, he discovered that the loan had been arranged for a two year fixed period. He signed the loan agreement, thereby accepting the two year fixed period.

A few days after Mr P had signed the agreement he received a call from his personal banker, during which he told him that, within the next six to twelve months, he intended to sell the property securing the loan, and to repay the loan. However, he did not raise any concern about the two year fixed period arranged by the bank.

Six months later, interest rates had dropped significantly. At that point Mr P complained about the two year fixed term arranged by the bank and enquired about the cost of breaking his loan, although he had not sold his property. The bank did not accept that Mr P had been forced into accepting a two year fixed term but, as a goodwill gesture, offered Mr P \$1,000 towards the early repayment cost if he chose to break his fixed rate loan.

When Mr P complained to my office he acknowledged that he had signed the loan agreement in the full knowledge that the loan interest rate was fixed for two years and that he had raised no concerns at the time, either with his solicitor or with the bank. After discussion and confirmation from the bank that its earlier offer was still available, Mr P decided to accept the bank's offer of \$1,000 towards the cost of early repayment.

The complaint was settled on this basis.

10



Mr and Mrs Y lost the capital they had invested. They complained to me that the bank should not have approved the loan in the first place.

Marginal lending to fund investment venture – investment failed – claim of irresponsible lending – paragraph 18(b) of my terms of reference applied

Mr and Mrs Y applied to their bank for a loan to fund an investment venture. When the bank first considered their loan application, it found that it did not meet the basic servicing criteria. However, their personal banker decided to submit the application to the bank's credit committee for consideration for a number of reasons, including:

- Mr and Mrs Y's favourable account and lending history
- their ability to offer unencumbered security
- Mrs Y's imminent return to paid employment from parental leave
- the anticipated short duration of the investment
- their expectation that the monthly return on the investment would meet the interest payments on the loan.

The bank took these factors into account and decided to approve the loan, with interest only payments for two years at a fixed rate of interest.

The investment venture failed and Mr and Mrs Y lost the capital they had invested. They complained to me that the bank should not have approved the loan in the first place.

I explained to Mr and Mrs Y that paragraph 18(b) of my terms of reference does not allow me to review a lending decision made by a bank unless it is claimed that the decision making process was deficient. A bank is entitled to use its judgement in deciding the level of risk it is prepared to tolerate.

There was no suggestion that Mr and Mrs Y did not understand the responsibilities they were taking on, or were under any pressure to take out the loan, or had doubts about their ability to service the loan.

After considering the background to the bank's lending decision, I concluded that, while the decision to lend may have been marginal in terms of Mr and Mrs Y's ability to service the loan, the bank was entitled to consider the application in the light of all the circumstances. There was nothing to suggest that the bank's decision making process was deficient, or that it had made its decision based on erroneous information or without making sufficient enquiries.

I told Mr and Mrs Y that I could not take the complaint any further. The case was closed on this basis.

11



Mrs P complained about a bank's decision to allow her eighteen-year-old son to borrow \$8,500.

Claim of irresponsible lending to a teenager – legal age of consent – met bank's lending criteria – no obligation on bank to consult parents

Mrs P complained about a bank's decision to allow her eighteen-year-old son to borrow \$8,500. She felt that the bank had made no effort to establish whether he had sufficient money management skills to act responsibly with the funds advanced. She believed that the bank officer should have made more enquiries, including consultation with his parents, to ensure that their son would be able to maintain repayments on the loan.

The bank explained that eighteen is the legal age of consent, and that her son did not need parental consent to enter into a credit contract. It considered that it had a robust lending policy and criteria. It reviewed the application and confirmed that it met the bank's criteria for a personal loan.

I explained to Mrs P that the bank was under no obligation to have a policy in place to consult the parents of youthful applicants who are legally adult, and that in the absence of such a policy the bank was not in breach of any obligation or duty owed either to her or to her son.

In this case there was no evidence to suggest that the bank's lending decision was deficient or had been made without taking relevant information into account. I noted that the application required information about employment status and earnings, and that a statement of position had been completed and signed as accurate before the lending was approved. I concluded that there were no grounds to further investigate Mrs P's concerns. The case was closed on this basis.



12

She complained that the bank should not have offered Mr E an overdraft facility, given his mental illness.

Overdraft facility granted to a mentally ill man – fraud – unable to close account until overdraft debt paid – mother claimed to have been bullied by bank into paying overdraft debt – assertion that overdraft facility should not have been given to mentally impaired man – complaint not investigated

Mr E, who suffers from schizophrenia, had a \$500 overdraft facility with the bank.

In January 2008 Mr E's mother, Mrs G, realised that he had become the victim of a fraudster. According to Mrs G, the fraudster had taken over \$2,000 from Mr E during the previous two years. She went to the police, who advised her to close his account and to open a new account at another bank.

Mrs G immediately undertook to follow the advice the police had given her. She met with a bank officer to discuss closing Mr E's account. At the meeting, the bank officer told Mrs G that the account could only be closed if the balance of \$475 owing on the overdraft was paid. Mrs G became upset but eventually agreed to pay the balance owing on the overdraft.

Mrs G then complained to the bank. She said that, at the meeting, the bank officer had bullied her into paying the balance owing on the overdraft. She also complained that the bank should not have given Mr E an overdraft facility, given his mental illness.

In response to her complaint, the bank offered to repay Mrs G \$475 and to arrange an affordable repayment programme with Mr E to enable him to repay the debt with no interest or charges. The bank also offered to give Mrs G a written apology.

Mrs G was not satisfied with the bank's offer and complained to my office. However, I decided not to investigate her complaint for the following reasons:

- a bank cannot refuse to extend credit to a customer on the grounds of mental capacity, as this would be a breach of the Human Rights Act 1993
- it is standard banking practice to provide a small overdraft facility to customers who are reliable in their account conduct
- I accepted that Mrs G's experience at the bank was stressful and upsetting. However, it is standard practice for a bank to require an unpaid debt to be repaid before an account can be closed. The bank was not in breach of any duty or obligation owed to Mr E by requiring his overdraft to be repaid before closing his account
- the fact that Mr E had been the victim of fraud was very distressing for Mrs G. However, the fraudster's actions were not caused by the bank
- the bank's offer was in line with my usual approach to compensation in complaints about irresponsible lending. In my view, the bank's offer was fair and reasonable.

After receiving my decision, Mrs G still rejected the bank's offer but thanked me for considering the matter. The case was closed on this basis.



13

A mistake had been made in the loan agreement. The loan repayments of \$1,085 should have been made fortnightly, rather than monthly.

Loans – housing finance – underfunding of loan – bank mistake – loan repayments less than required – loan principal increased while incorrect repayments made – Banking Ombudsman's approach to underfunding cases – factors to be considered

In July 2006 Mr and Mrs D obtained a loan of \$325,000 from their bank. The loan was on a fixed interest rate and the loan agreement stated that monthly loan repayments of \$1,085 were to be made.

In November 2007 Mr and Mrs D decided to sell their property and purchase another one. It was then discovered that a mistake had been made in the loan agreement. The loan repayments of \$1,085 should have been made fortnightly, rather than monthly. As a result of the mistake, the principal amount owing on the loan had increased to \$342,000, instead of decreasing to approximately \$319,000. The bank agreed to a new loan for \$342,000 to enable Mr and Mrs D to settle the purchase of their new property.

Mr and Mrs D then complained to the bank. They were not happy that the amount they owed to the bank had increased by \$17,000, instead of reducing by \$6,000. After some weeks of negotiation, the bank offered to pay compensation of \$11,000.

Mr and Mrs D did not accept the bank's offer.

As a result of the bank's error, the loan principal had increased by approximately \$23,000. I therefore asked the bank to calculate the net present value of the cost to Mr and Mrs D of servicing that additional \$23,000 for the term of the loan. The bank advised that this amounted to a sum of \$13,300.

The approach that I take to loan "underfunding" complaints is to recognise that the loss to the customer is not the amount that should have been paid off the loan principal or the amount by

which that principal has increased. It is the cost of servicing that amount over the remaining term of the loan. It is therefore necessary to:

- calculate the net present value of the additional cost to the customer of repaying the loan
- consider whether there has been any contributory fault on the part of the customer, for example, by not reading loan statements from time to time
- take into account the fact that, over the term of the previous loan (in this case 17 months), the customer has had the use of the money that would otherwise have been spent on loan repayments
- consider whether the customer has suffered inconvenience, for example, disruption to financial planning.

Taking those factors into account, I told Mr and Mrs D and the bank that the offer made by the bank was not unreasonable. I suggested that the bank could offer an extra \$1,000 compensation for inconvenience.

The bank agreed to increase its offer to \$12,000 and, after further discussion, Mr and Mrs D accepted the offer.



Mr and Mrs C's daughter wanted to buy an apartment. Mrs C thought that she and Mr C were using \$50,000 of the equity in their home to allow Miss C to borrow sufficient funds ...

Mortgage – joint and several loan for property purchase by third party – existing mortgage security for lending – repayment requirements on sale of property

Mr and Mrs C's daughter wanted to buy an apartment. To assist their daughter with her purchase, Mr and Mrs C agreed to use some of the equity in their jointly owned home.

Mrs C thought that she and Mr C were using \$50,000 of the equity in their home to allow Miss C to borrow sufficient funds to purchase the apartment. In fact all the funds advanced by the bank to finance the purchase were secured by a mortgage over the apartment and the existing mortgage over the home.

Mr and Mrs C later separated and Mrs C sold their home. Mrs C expected the bank would require her to repay the residue of the loan that she and Mr C had taken out to buy the home and that she would receive the surplus funds for her own use. In fact, on settlement the bank required Mrs C to apply the surplus funds to repay a substantial part of the loan relating to Miss C's apartment.

Mrs C complained to my office. She complained that:

- when she sold her home, Mrs C was not aware that the mortgage over the home secured the loan relating to Miss C's apartment
- the bank had acted wrongly when it required the surplus funds to reduce Miss C's loan and when it failed to advise Mrs C of its intention to require the surplus funds to repay part of that loan.

After investigation, I concluded that the bank was entitled to require the surplus funds to reduce Miss C's loan because:

- Mr C, Mrs C and Miss C were jointly and severally responsible for the loan. At the time the lending arrangements were made, the solicitor acting for them confirmed to the bank that he had explained the arrangements to them
- there was insufficient equity in the apartment alone to support the lending over that property. Therefore, to discharge the mortgage over Mrs C's house, the bank needed to apply the available surplus to reduce the lending over the apartment.

While Mrs C discussed her plans with her local branch, there was no record of the discussions. The loan records were held centrally, and it seemed likely that branch staff saw no reason to question her description of the loan structure. They would therefore not have been in a position to warn her that the surplus could be less than expected.

I explained to Mrs C that the funds she was expecting from sale of her house were effectively invested in her daughter's apartment. She and her daughter needed to discuss how she could get access to the funds.

I did not identify any wrongdoing on the bank's part, and my proposed recommendation was that the complaint be withdrawn. The investigation was completed on that basis.



Mr and Mrs J separated. After lengthy legal proceedings, the Family Court ruled that Mrs J was to receive the residential property as part of the relationship property settlement.

Lending – default – Property Law Act notices – expiry – mortgagee sale – application of proceeds of sale

Mr and Mrs J bought a residential property in 1997. To finance the purchase, Mr and Mrs J, and Mr J's company borrowed money from the bank. The two loans were secured by a registered mortgage over the residential property.

Five years later, Mr J and a business partner borrowed money from the bank to purchase two investment properties. The loan was secured by a registered mortgage over the investment properties and the existing registered mortgage over the residential property.

In 2003 Mr and Mrs J separated. After lengthy legal proceedings, the Family Court ruled that Mrs J was to receive the residential property as part of the relationship property settlement. The residential property was transferred to Mrs J in May 2007 without the bank's consent. The bank did not receive any instructions about restructuring the loans relating to the residential property but Mr J believed that, as a result of the Family Court ruling, he no longer had any responsibility for the loans over that property.

Between June 2003 and April 2007 all three loans fell into arrears, and the bank issued several demands and Property Law Act (PLA) notices. In April 2007 the bank issued further PLA notices in respect of the loans to Mr J's company, and Mr J and his business partner. In July 2007 the bank advised Mr J that it intended to proceed to mortgagee sale of the investment properties and had accepted a mortgagee sale tender. The loans relating to the residential property were repaid from the proceeds of the sale.

After complaining to the bank without success, Mr J complained to my office.

Mr J complained about:

- the bank's decision to proceed with a mortgagee sale of the investment properties, even though he had paid the arrears on the loan
- the bank's decision to require repayment of the loans relating to the residential property from the sale proceeds of the investment properties.

After investigation I concluded that:

- the bank was legally entitled to pursue mortgagee sale action once the PLA notices had expired, even if the arrears had been paid. I was satisfied that Mr J's claim that the bank had conspired to force the mortgagee sale of the investment properties was unjustified
- the bank was entitled to insist on repayment of all loans. The Family Court decision did not affect Mr J's obligations under the loan agreements, and the bank was under no obligation to take the Court's decision into account when it sought repayment of the loans. If Mr J considered that the relationship property settlement obliged Mrs J to assume responsibility for the loans over the relationship property, that was a matter for their respective lawyers to arrange, not the bank.

Mr J did not accept my findings, but provided no new argument to support his views. My formal recommendation was that the complaints should be withdrawn. The case was closed on this basis.

16



Mrs F realised why the home loan had not reduced over the years as she expected. Mr F had made further drawings on the loan account.



Joint home loan – redraw facility added later – further borrowing – balance of loan increased – relationship broke down – unexpectedly high debt – effect of passage of time

Mr and Mrs F took out a home loan of \$200,000 in 1993. Their marriage broke down in 2006, at which time Mrs F repaid the balance on the loan, which was considerably higher than she expected, and took out a new loan in her name alone. Mr F was later convicted of serious criminal offences and sentenced to a term of imprisonment.

Mr F had always looked after the household finances, and it was not until after the separation and Mr F's trial, and two years after repaying the loan, that Mrs F realised why the home loan had not reduced over the years as she expected. Mr F had made further drawings on the loan account. He had also established telephone banking facilities on the account and had transferred funds out of it.

Mrs F complained that the bank had, without her knowledge or consent, converted the loan into a revolving credit facility and had established the telephone banking facility, thus enabling Mr F to increase their indebtedness.

Although I would not normally investigate a case such as this where the relevant events occurred such a long time previously, I was satisfied that Mrs F had been devastated by the events of 2005-8 and had not had the time, energy or expertise to look into the reasons for the high level of debt she had had to repay. When she was unable to resolve her complaint with the bank, I agreed to investigate it, but warned her that the investigation could prove unsatisfactory if relevant documents had been lost or destroyed over the years.

It became clear that at some time during the 1990s the loan had been altered to include a redraw facility and the total borrowing had increased. The bank no longer held the various loan agreements, but it could not be criticised for destroying them when the loan had been repaid more than two years previously and there was no apparent reason to keep them.

I was able to establish that:

- Mr F had borrowed an additional \$35,000 in 1993
- both Mr and Mrs F had signed an application for further borrowing in 1996. The application form stated that their home loan then stood at about \$226,000. The application was accepted and the bank approved further borrowing of \$30,000

- it was very likely that a new loan agreement, incorporating the redraw facility, was signed in 1996
- both Mr and Mrs F could make individual transactions on the loan account: it was not necessary for either to have the other's consent to transactions. Accordingly, there was nothing wrong with the bank permitting Mr F to set up telephone banking
- most of the funds transferred from the loan account went into Mr and Mrs F's joint account. It was not possible to determine how the funds were spent, but Mrs F may well have had some of the benefit from them
- the telephone contact details held for the account were Mr F's details. The bank sent statements and other correspondence to Mr and Mrs F's home address, but it had no reason to believe that it should be contacting Mrs F by telephone about the account.

I concluded that while I had some reservations about the process by which Mr F was able to make further borrowings in 1993, Mrs F was a party to the application made in 1996 and should have realised that the home loan was then higher than it had been in 1993. It was very likely that at the same time she also signed a new loan agreement, including a redraw facility. The bank undoubtedly sent statements and letters addressed to her and Mr F at their home address, giving her a further opportunity for information about her financial affairs.

Clearly Mrs F had no reason to distrust Mr F at the time, and relied on him to manage the family finances. She probably did not read the loan application forms in any detail or open the bank statements. However, this was no fault of the bank and I could not find any failure on its part.

I proposed to recommend that Mrs F withdraw her complaint. Somewhat reluctantly, she accepted my proposal, saying that while the outcome of the investigation had been disappointing, the process of working through the activities on the bank account had been useful to her in understanding exactly how she had been cheated by her former husband. The case was closed on this basis.

17



At some time after the separation, Mr Q stopped funding the joint account. The bank continued to take the loan repayments from it, and by October 2007 it was overdrawn.

Joint home loan – separation agreement – overdraft on loan servicing account – loan arrears – bank failure to inform one party of overdraft and arrears – loss of bargaining position – compensation for inconvenience and costs but no direct loss

Ms Q and her husband separated in March 2007. They agreed that Mr Q would continue to live in the family home and would service the home loan. If Ms Q wanted to sell her share of the property, she would give him six months' notice.

Ms Q informed the bank of the separation and asked it to contact her if there were any issues with the home loan or the joint account from which loan repayments were made.

At some time after the separation, Mr Q stopped funding the joint account. The bank continued to take the loan repayments from it, and by October 2007 it was overdrawn. By the end of November, it was over the overdraft limit of \$5,000. In early February 2008 the bank began to dishonour the loan repayments.

The bank did not tell Ms Q about the state of the account even though in January 2008 she had discussions with it about a new home loan.

In the meantime, Ms Q gave notice that she wanted to sell her share of the property, and in February 2008 Mr Q started to market it. In early March he received an offer which was \$35,000 below a recent valuation of the house and \$75,000 below the price at which it was being marketed. He rejected the offer. Shortly afterwards, the bank finally told Ms Q about the loan arrears and the overdraft on the joint account.

The property sold in June 2008 for \$50,000 less than the earlier offer. To make matters worse, the bank included a debt of Mr Q's in the amount required for settlement. It was eventually deducted from Mr Q's share of the proceeds of sale, but not until Ms Q had incurred more legal costs.

Ms Q complained that the bank had failed to contact her as soon as there were problems with the loan account. She said that if she had known about the problems, she would have required the house to be put on the market earlier, and would have put pressure on Mr Q to accept the offer made in March. She claimed the \$50,000 lost on the sale of the house, additional legal costs and compensation for inconvenience.

The bank offered a contribution to Ms Q's legal costs and \$1,000 compensation for inconvenience. It said that Ms Q had not asked it to send her statements on the accounts and that she should have monitored them to make sure Mr Q was making the loan repayments. It agreed that it should have told Ms Q about the overdraft during the meeting in January 2008, but it did not consider that its inaction had caused her any loss. There was no certainty that she would have persuaded Mr Q to accept the March offer on the house.

Ms Q rejected the bank's offer and asked me to investigate her complaint.

I found that the bank should have told Ms Q about the state of the joint accounts, at the latest during the January meeting. However, while the bank had caused Ms Q substantial inconvenience and some legal costs, it had not caused her any direct loss. There was no certainty that, if she had known about the overdraft and the loan arrears, she would have persuaded Mr Q to accept the offer made in March. In addition, there was no certainty that Ms Q herself would have been willing to accept the offer. The house had only been on the market for a short time, and the offer was well below the price they hoped to achieve.

I concluded that the bank had underestimated the inconvenience caused by its failure to tell Ms Q about the overdraft and loan arrears and by its mistake in the settlement statement. While I did not think Ms Q could necessarily have forced a sale of the house if she had known about the problem, she would have been in a better bargaining position. The mistake on settlement meant that she had to have further contact with Mr Q at a time when she had hoped to put the relationship behind her.

Ms Q did not accept my initial proposal that the bank should pay \$3,000 compensation for inconvenience, together with half her legal costs. She still considered that the bank had caused her to lose \$50,000. However, after I had reviewed the investigation and come to the same conclusion as before, she accepted my recommendation.



Cards

The first case in this section raises issues as to financial abuse of the elderly, which is becoming an increasing problem in our society. The misuse of elderly customers' debit cards is a classic example of financial exploitation. In my view, banks have an important role to play in helping to detect and prevent financial abuse and exploitation of the elderly. At present there is very little systemic monitoring of the accounts of elderly customers (see chapter 1 for an industry survey on this subject).

As technology advances, and as banks develop more sophisticated monitoring tools, all banks should extend their monitoring to look for unusual activity on an account, or uncharacteristic patterns of use of an account over an extended period of time such as occurred in [case 18](#).

[Case 19](#) was also a case of unauthorised use of a card, and illustrates a common misunderstanding about the period over which a daily limit for withdrawals applies.

Very occasionally, as in [case 20](#), there seems to be absolutely no explanation for the unauthorised use of a card. Undoubtedly the offender obtained the PIN for the card in some way, but an earlier disclosure of the PIN, while a breach of the terms on which the card was issued, was so unlikely to have contributed to the loss that I could not find a causal link between the two.

[Case 21](#) is an example of a different sort of unauthorised use of a card. There was no question of fraud, and there was very probably a debt due from the cardholder to the merchant who deducted payment from the card. However, the cardholder had not authorised the use of the card to make the payment and it had to be reversed.

Any failure of a card to function as expected can be irritating, but if it fails to function when the cardholder is overseas, the

consequences can be much more serious. In [case 22](#), which is a good example of the sort of negotiations that can take place through my office as information about the complaint comes to light, the bank had difficulty recognising the extent of the inconvenience suffered by its customer. The case note sets out some details of the approach to calculating compensation for inconvenience in this kind of case. In [case 23](#) the problem was compounded by the unhelpful attitude of bank staff. Banks should recognise that a customer who calls from overseas about a problem of access to funds may not be able to afford a lengthy phone call. If the problem cannot be resolved immediately, the call centre operator should either give the customer a cost-free number to call or should arrange to call back with a solution to the problem.

The last two cases in this section are to do with problems experienced by merchants who take payment by credit card. In [case 24](#) the bank had failed to give the merchant clear and unambiguous information about obtaining some protection against fraud when taking payments over the internet, while in [case 25](#) the merchant was a car rental operator who fell foul of a little-known rule about charging the cost of repairs to a hirer. It is also a case that illustrates the importance of reading and absorbing information sent out by a bank.



Mr G's health deteriorated ... His son took over his banking affairs and was dismayed to discover that Mr G's savings account of approximately \$27,000 had been "cleaned out"...

Cards – unauthorised use – financial abuse of elderly – breach of conditions of use by customer – card linked to more than one account – no evidence of customer's authority to link savings account to card – bank to bear part of loss

Mr G, aged 81, was befriended by a young woman, J, who offered to help him with his shopping. At first Mr G gave J cash to pay for his shopping. As time went on and Mr G grew to trust J, he gave her his Eftpos card and PIN.

Mr G's health deteriorated and he was admitted to a rest home. His son took over his banking affairs and was dismayed to discover that Mr G's savings account of approximately \$27,000 had been "cleaned out" over a period of several months.

It turned out that, when J was doing Mr G's shopping, she used his Eftpos card to withdraw money from his savings account, via an ATM.

Mr G said he had no idea that his Eftpos card could access his savings account. He thought that J would only be able to access his current account, which had a balance of about \$4,000.

J was prosecuted for the theft and sentenced to a term of imprisonment, but could not repay the funds stolen.

Mr G's son complained. He said the bank should not have allowed the Eftpos card to access the savings account, and that it had failed to exercise a reasonable duty of care in monitoring Mr G's accounts.

My investigation found that:

- there was no positive evidence that Mr G had instructed the bank to link his Eftpos card to his savings account
- it was reasonably clear that Mr G did not know that the card had been linked to his savings account because he had never used the card to access the savings account himself. There was no reason for him to have wanted his savings account to be linked to the card

- the series of cash withdrawals from the savings account in a short space of time was completely out of character for Mr G

- there is no legal duty on banks, nor is it common practice, for banks to monitor customers' accounts for this type of fraudulent activity

- there was no reason for the bank to have checked the status of Mr G's accounts until advised by his son that he was taking over management of the accounts

- although Mr G had breached the conditions of use for his card by disclosing his PIN to J, he thought any potential loss was limited to the balance of \$4,000 in his current account. He did not know that he was enabling access to his savings account.

In the circumstances, I considered that a fair outcome was for Mr G to bear the loss of \$4,000, which he had known he was risking when giving his card and PIN to J. The balance of the loss of approximately \$23,500 was to be shared equally between the bank and Mr G. Any reparation recovered from J would also have to be shared proportionately between the bank and Mr G. I made a recommendation to give effect to this and both parties accepted the recommendation.

19



Mr and Mrs F called the bank to report the fraudulent transactions. They advised the bank that the PIN on the two debit cards and the Visa card was the year of Mrs F's birth.

Wallet stolen – fraudulent transactions – PIN on cards was customer's year of birth – PIN unsuitable – customer liable for fraudulent transactions

Mr and Mrs F were using internet banking when they noticed that unauthorised transactions totalling \$11,000 had been made on their accounts. Shortly afterwards, they discovered that Mrs F's wallet was missing from her handbag. Mrs F believed her wallet had been stolen the previous day. The wallet contained two debit cards, her Visa card and her driver's licence.

Mr and Mrs F called the bank to report the fraudulent transactions. They advised the bank that the PIN on the two debit cards and the Visa card was the year of Mrs F's birth.

Although there were limits on withdrawals from Mr and Mrs F's accounts, the offender was able to exceed the limits on their personal account and their Visa account by a total of \$4,500.

Mr and Mrs F complained to their bank. The bank offered to pay them \$7,700 in settlement of their complaint, being the total of the over-limit transactions together with half the amount of the other transactions.

Mr and Mrs F were not satisfied with the bank's offer and complained to my office. They complained that:

- the bank did not warn or remind Mrs F that she should use a PIN other than her year of her birth for her cards
- the fraudulent transactions, which occurred in a 24 hour period, exceeded the daily limit for the Visa account and the business account by \$3,000 more than the bank had acknowledged.

After investigation, I concluded that:

- although Mr and Mrs F had been the unfortunate victims of theft, they were liable for all fraudulent transactions on the accounts within their prearranged limits. Mrs F had breached the terms and conditions of the accounts by selecting an unsuitable PIN
- standard banking practice provides that a daily limit period runs from midnight to midnight on a calendar day. It does not run over any 24 hour period, as argued by Mr and Mrs F
- the bank's offer was fair and reasonable.

I suggested that Mr and Mrs F should accept the bank's initial offer and they agreed to accept it.

20



Mr R's credit card was used to make a number of unauthorised withdrawals from his account in a period of two hours late at night.

Credit card – fraud – unauthorised use – breach of terms and conditions of use – disclosure of PIN – no causal link

Mr R's credit card was used to make a number of unauthorised withdrawals from his account in a period of two hours late at night. As soon as he discovered the unauthorised withdrawals, Mr R rang the bank and cancelled his card. Believing he had complied with all the conditions of use for the card, Mr R sought reimbursement of his loss from the bank. The bank considered Mr R had breached the conditions of use for the card and declined to reimburse him.

Mr R used the same PIN for his credit card and his debit card. He thought it was possible that his current partner and his previous partner may have known the PIN for his debit card, but he had not disclosed the PIN for his credit card to anyone.

Mr R had used the credit card three hours before the first unauthorised withdrawal, and the card had been in his possession at all times during the period of the withdrawals. Mr R and his partner were together at all relevant times, and nobody had broken into their apartment overnight. He had not seen his former partner for some time and she did not know where he lived.

Under the conditions of use for the card (and the provisions of the Code of Banking Practice), a customer is entitled to reimbursement for loss arising from the unauthorised use of the card, less the standard \$50 maximum customer liability, unless it can be shown on the balance of probabilities that:

- the customer has breached the conditions of use for the card and
- that breach has caused or contributed to the loss.

The absence of evidence made this an extremely difficult case to investigate. Weighing such evidence as there was, I found that, while it was likely Mr R had breached the conditions of use of his credit card by disclosing his PIN to two individuals, there was no evidence that either of those individuals had been directly or indirectly involved in the disputed transaction. I was not satisfied there was a causal link between Mr R's breach and the loss arising from the unauthorised withdrawals.

I proposed that the bank should reimburse Mr R for his loss, less his customer liability of \$50. Mr R and the bank accepted my proposal.

21



Although it appeared that T Ltd owed money to M Ltd under the contract, there was no evidence that M Ltd had been given written or oral authority to charge \$10,806 to the credit card.

Credit card – liability for unauthorised transaction – bank and customer bound by terms and conditions on which card was issued

T Ltd and M Ltd were parties to a contract for the supply of software products. Under the contract, each month T Ltd was to pay M Ltd royalties calculated on the basis of monthly sales. T Ltd was also to pay M Ltd USD\$10,000 in royalties each year. T Ltd gave M Ltd its credit card details. On several occasions after that, T Ltd emailed M Ltd and authorised it to charge royalty payments to the credit card.

In August 2007 M Ltd contacted T Ltd and said that it had not paid the required amount of \$5,000 every six months. It asked T Ltd whether it wanted the balance owing to be charged to the credit card. T Ltd replied that it did not want the credit card to be charged.

Two days later, M Ltd told T Ltd that it had charged \$10,606 to the credit card. T Ltd asked M Ltd and the bank to reverse the transaction.

In response, M Ltd offered to issue a credit for \$7,026 and to terminate the contract, or to issue a credit for \$4,037.25 and to continue with the contract. T Ltd asked M Ltd to issue a credit for \$7,026.

Two days later, when the credit had not been received, the bank processed a chargeback on behalf of T Ltd. The chargeback was challenged by M Ltd. The bank then told T Ltd that the disputed transaction would be charged to the credit card.

T Ltd complained to my office that it had not initiated or authorised the \$10,606 transaction.

After investigation, I concluded that:

- although it appeared that T Ltd owed money to M Ltd under the contract, there was no evidence that T Ltd had given M Ltd written or oral authority to charge \$10,606 to the credit card
- there was evidence that T Ltd had authorised M Ltd to charge three individual amounts of \$115, \$372.50 and \$45 to the credit card
- the relationship between T Ltd and the bank was governed by the terms and conditions on which the bank issued the credit card. Although the terms and conditions provided that the customer must pay the full amount of all transactions debited to the credit card, they also provided that the customer was not liable for direct loss caused by any unauthorised transactions where it was clear that the customer could not have contributed to the loss. There was no evidence that T Ltd had in any way contributed to the loss
- T Ltd was not liable for the charge.

I recommended that the complaint be settled by the bank crediting T Ltd's credit card with the sum of \$10,074, being the unauthorised transaction for \$10,606 less the three authorised amounts. Both parties accepted my recommendation.

22



Before she travelled to Europe on holiday, Mrs F obtained a new credit card. On a number of occasions, the electronic terminals in stores overseas could not recognise her new card.

Cards – ruined holiday – failure of card overseas – inconvenience – assessment of compensation

Before she travelled to Europe on holiday, Mrs F obtained a new credit card. On a number of occasions, the electronic terminals in stores overseas could not recognise her new card. To her embarrassment, Mrs F found herself unable to complete her purchases.

Mrs F checked her bank's website, which said that customers could, if they preferred, change to another card. She then rang the number on her credit card for help. However, when she asked to change her card, she was told this would not be possible; she could only have a card of the same kind. 20,000 reward points were credited to her account as compensation for inconvenience.

To continue with her holiday, Mrs F had to withdraw money from her bank account several times, use up savings she had in Europe and borrow money from other people. She also cut short a planned trip to Italy because she ran out of money.

On her return to New Zealand, Mrs F complained to the bank. The bank said that the inconvenience had been caused by merchants refusing to accept the card and suggested that, as an alternative, she could have used her card to obtain cash. The bank offered a further 70,000 reward points by way of compensation. It also arranged for a new type of card to be sent to her.

Mrs F was not satisfied with this offer. The bank had not understood the reason she could not use her card, nor had it acknowledged the full extent to which she had been inconvenienced. Mrs F intended to return to Europe the following year to do all the things she had been unable to do because her credit card did not work; she expected compensation to cover the cost of her airfares for that trip and to properly compensate her for the inconvenience, stress and embarrassment she had suffered.

The bank then made a further offer of \$2,800 plus 90,000 reward points. It was made clear to my investigator that the bank considered this to be a very generous offer. However, Mrs F did not accept it. She said that she would be prepared to settle if the bank were to offer a further 70,000 reward points.

At first the bank was indignant at the request for further compensation. It felt the compensation offer had been quite generous for what it thought was a couple of failed card attempts.

My investigator pointed out that the card had failed on a number of occasions and that this had had a severe impact on Mrs F's enjoyment of her holiday.

The bank slightly increased its offer. Again, Mrs F felt the bank had failed to recognise that she had asked it to both meet the cost of airfares for her return trip to Europe and compensate her for the inconvenience suffered. The bank's offer did not include sufficient compensation for inconvenience.

My investigator explained to the bank that, if a settlement could not be reached, the matter would proceed to a formal investigation and determination of the complaint, and outlined some of the factors that would be considered in the course of the investigation. If I determined that Mrs F's holiday was ruined by the problems experienced with her card, or that the problems had severely disrupted her enjoyment of her holiday, the compensation I would be likely to award would include the cost of airfares to and from Europe.

In considering compensation for inconvenience, I would look at:

- the effect the problems with the card had on Mrs F, including the stress and embarrassment she suffered
- the length of time the inconvenience continued and
- what steps, if any, the bank took to try to resolve the problem promptly.

Usually in such cases the range of compensation for inconvenience would be from \$500-\$2,000.

The bank reiterated its view that it had already made a generous offer. However, to achieve a prompt resolution, it agreed to meet Mrs F's request for 70,000 reward points in addition to the 90,000 reward points already credited to her account. The bank again offered a cash contribution of \$2,800 to cover Mrs F's airfares to and from Europe.

Both parties agreed to this offer. Mrs F was very pleased with the resolution achieved through my office.

23



Mrs G embarked on a holiday ... she transferred all her funds to her New Zealand credit card, expecting to be able to use it to obtain cash advances over the counter at local banks.

Credit card cancelled in error – bank’s responses to contact unhelpful – holiday spoilt – compensation for inconvenience

In early June 2007, Mrs G embarked on a travelling holiday in Asia. To finance the holiday, she transferred all her funds to her New Zealand credit card. She knew she would be unable to use the credit card to withdraw cash from ATMs because she did not have a PIN on the card. Instead, she expected to be able to use the credit card to obtain cash advances over the counter at local banks.

When Mrs G attempted to obtain a cash advance at a local bank in Taiwan, she was told that Taiwanese banks do not offer such a service. Mrs G emailed her bank in New Zealand. She said that she had been able to get an emergency cash advance from Visa International and asked how she could access her money without having to go through this process again. In its response, the bank said the situation was unusual and advised Mrs G to contact Visa International.

On 11 June 2007 the bank cancelled Mrs G’s credit card. However, it did not tell her that it had done so.

Around the same time, Mrs G arrived in Bangkok. As she was still unable to use her credit card, she telephoned and emailed the bank several times. Each time, she told it that her credit card was being declined and that, as a consequence, she was having to arrange weekly emergency cash advances through Visa International.

Although Mrs G received responses to her telephone calls and emails, she did not receive an explanation until the middle of June 2007. At that point, the bank explained that Visa International had informed it that Mrs G’s card had been lost or misplaced after she arranged the first emergency cash advance. The card had then been permanently blocked. For that reason, Mrs G would need a replacement card.

Mrs G collected the replacement card shortly after arriving in Kuala Lumpur in early July 2007.

After receiving the replacement card, Mrs G complained to the bank. She was dissatisfied with the bank’s offer of \$500 compensation for inconvenience and complained to my office. Mrs G complained that:

- the bank was incapable of dealing adequately with a crisis situation
- the bank had cancelled her credit card without reason
- the bank’s settlement offer of \$500 was insufficient.

After investigation I concluded as follows:

- Mrs G experienced a considerable degree of inconvenience while travelling overseas because she was unable to use her credit card as expected
- the inconvenience Mrs G experienced in Taiwan was not a result of the bank’s actions. Mrs G knew she would be unable to use her credit card to withdraw cash from ATMs, and the bank had no responsibility for the practices of Taiwanese merchants or banks
- the bank was responsible for the inconvenience Mrs G experienced from the time the credit card was cancelled until she collected a replacement card in Kuala Lumpur. Mrs G’s inability to use her credit card was caused by the bank’s mistake in cancelling the card
- the bank’s handling of Mrs G’s emergency situation was inadequate, and exacerbated an already stressful situation. The responses to Mrs G’s emails were offhand, inaccurate and unhelpful. In addition, the staff members who took Mrs G’s telephone calls should have given her a telephone number to enable her to call the bank collect when they placed her on hold.

My formal recommendation was that the bank should pay Mrs G \$3,500 in compensation. Both parties accepted my recommendation and the case was closed.

24



Between February and May 2007, fraudulent credit card payments totalling approximately \$72,000 were made to R Ltd, and were charged back.

Merchant “card not present” facility – additional security features not included – internet fraud – fraudulent transactions charged back – reasonable to assume certain security features included with facility – bank contributed to complainant’s loss – bank’s offer to settle fair and reasonable

The director of R Ltd, Mr P, contacted his bank for advice about establishing an online payment facility for a new business venture. He wanted to accept payment by card over the internet.

After discussing his company’s merchant facility needs with Mr P, the bank sent him a merchant details sheet to complete. Mr P completed the sheet and returned it to the bank.

Two weeks later, the bank confirmed the details of the merchant facility by letter. The bank sent Mr P a copy of the merchant services agreement and a brochure about the merchant facility with the letter. Although it should also have sent Mr P a copy of the merchant operating guide at this time, this was not done.

When he applied for the merchant facility, Mr P did not apply for, and the bank did not provide, any of the following additional security features to reduce the risk of fraud:

- Verified by Visa, which allows a merchant to verify the identity of a Visa cardholder at the time of purchase
- SecureCode, which is a similar security feature to Verified by Visa, but applies to Mastercards
- CVC validation, which allows a merchant to confirm that the cardholder is holding the credit card when completing a “card not present” transaction.

Mr P tested R Ltd’s website and services in January and February 2007 and launched them in March 2007.

Between February and May 2007, fraudulent credit card payments totalling approximately \$72,000 were made to R Ltd, and were charged back. Mr P complained to the bank. The bank offered to reduce R Ltd’s liability for the chargebacks to \$48,000, but Mr P rejected the offer.

Mr P then complained to my office. He said that the bank had failed to provide R Ltd with appropriate security features when he obtained the merchant facility.

After investigation, I concluded that:

- it was reasonable for Mr P to assume that R Ltd had been provided with Verified by Visa and SecureCode. The brochure described them as desirable security features, but did not state

that a merchant must apply for them separately

- it was unreasonable for Mr P to assume that R Ltd had been provided with CVC validation. None of the information provided by the bank stated that CVC validations would be provided with the merchant facility
- under the merchant services agreement, R Ltd was liable for the charged back transactions. However, the bank should have given Mr P a copy of the guide so that he had sufficient information to enable him to interpret the contract
- the bank had met its basic obligation to inform Mr P about the risks of accepting credit card transactions. However, it should have given him a copy of the guide, which provided information about the risks of accepting credit card transactions
- the bank and Mr P had both contributed to the loss suffered by R Ltd
- Mr P should have known that Verified by Visa and SecureCode do not apply to Mastercards issued in North and South America. This was specifically stated in the brochure
- the bank’s offer to split R Ltd’s liability for the chargebacks (excluding the chargebacks relating to Mastercards issued in North and South America) was fair and reasonable. Mr P should have accepted the bank’s offer.

I proposed to recommend that R Ltd and the bank should share equally the liability for the chargebacks (excluding the chargebacks relating to Mastercards issued in North and South America). This meant that the bank should reduce R Ltd’s liability for the charged back transactions by approximately \$24,000. Mr P did not accept my proposed recommendation and made extensive further submissions.

After further investigation I concluded that, in addition to my original proposal, I should recognise that Mr P had been very distressed and anxious, and that part of his distress and anxiety was attributable to the bank’s failure to provide him with all the relevant information. For this reason I recommended as I had proposed, but with the addition of \$2,500 by way of compensation for inconvenience. Mr P did not accept my formal recommendation. The case was closed on this basis.



The car rental company processed a credit card transaction to the hirer's account for the cost of the two day hire, plus \$1,800 to pay for the damage as provided by the contract.

Credit card chargeback disputed by rental car merchant – authorisation of payment for car hire not authorisation of payment for car repairs – requirement to obtain hirer's authorisation for separate transaction

Mr S was the proprietor of a rental car business.

A customer rented a car for two days and signed the car rental agreement. This included a clause whereby the hirer acknowledged liability to pay the first \$1,800 of any damage arising during the hire. The remaining liability was insured.

The car was returned two days later in a badly damaged condition. The customer's view was that the damage was not his fault, and had resulted from a mechanical defect. Mr S believed the damage was caused by the customer's misuse of the car.

The car rental company processed a credit card (Mastercard) transaction to the hirer's account for the cost of the two day hire, plus \$1,800 to pay for the damage as provided by the contract.

The hirer then advised his bank that he disputed the Mastercard transaction. It was charged back to the rental car company's account. The car rental company's bank then declined to reimburse the company for the transaction.

Mr S had signed a merchant agreement with the bank. This is a contract setting out the respective obligations of the bank and its customer, the merchant. The contract included clauses which said that the bank could charge back transactions to the merchant where:

- the transaction was not authorised by the card holder, or
- the card holder disputed liability for the transaction, for any reason.

During the investigation, the bank produced evidence that it had sent a letter to all its Mastercard merchants, including Mr S, reminding them that in circumstances where a charge is to be processed in addition to the normal hire fees, and particularly where the charge is for damage to a vehicle, the merchant must obtain separate written authorisation from the customer to make the charge, or alternatively must process the transaction using the card with PIN or signature.

Mr S had not obtained separate authorisation from the customer to make the charge for the damage, and had simply processed the transaction using the card details he already had. Accordingly I recommended that he withdraw his complaint. The case was closed on this basis.



Cheques

There has been a decline in cases where the problem is that cheques have not been crossed or have been inappropriately crossed. This is almost certainly due to the introduction of printed crossings on cheque forms as the default option, and despite a few objections from customers who prefer uncrossed cheques, the move was clearly justified.

However, there continues to be some confusion among customers about the effects of the various cheque crossings, and the responsibilities of banks when a cheque is not paid to the intended recipient or is used as a vehicle for fraud. Crossing a cheque "not transferable" or "account payee only" is not a complete protection against all types of fraud, and in some circumstances a bank will not be liable when cheques are not paid as intended. My approach to such cases is set out in some detail in [case 26](#).

Even if I had been able to find negligence on the part of the bank in [case 26](#), I would have been likely to deduct an amount from the compensation payable. The fact that the payee's name had not been written clearly and legibly had contributed to the fraud. The name of the payee should always be written or printed clearly on a cheque, so there is no possible room for misinterpretation.

The case noted in an earlier section as [case 4](#) (it involved other account management issues, as well as one to do with cheques) was also a case where poor business practices had contributed substantially to the loss suffered by the customer. It is not good

practice to leave signed cheques to be completed by others, and a "not transferable" crossing gives only limited protection. The bank should not have accepted some of the cheques and should have been suspicious of the fraudster's behaviour, but the fraud was definitely facilitated by the customer.

Even when a bank has accepted a cheque into an account when it ought not to have done so, there may not be an actual loss to the customer. In the rather strange circumstances of [case 27](#), I found that the bank's wrongful acceptance of the cheque did not lead directly to the loss suffered by the customer.

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The stolen cheque had been deposited in an account recently opened in a name similar, but not identical, to the intended payee.

Fraud – stolen cheque – “not transferable” cheque paid to person other than payee – defence under section 5 of Cheques Act 1960 – contributory fault – name of payee not written clearly or legibly

Mr Y owned a small business which issued a cheque for about \$17,000, crossed “not transferable”, to pay a supplier. Some weeks later Mr Y learnt that the cheque had been stolen from the post box. The stolen cheque had been deposited in an account recently opened in a name similar, but not identical, to the intended payee. When the account was opened, the person opening the account had provided the required proof of identity. It was later discovered that the documents of identity had been cleverly forged.

The proceeds of the cheque had therefore been collected by the bank for a person other than the intended and named payee. Mr Y’s bank wrote on his behalf to request the return of the funds to his company account. The bank declined to reimburse the amount of the cheque. It made an offer to reimburse \$9,000, being approximately half the loss suffered. Mr Y declined this offer and complained to my office, seeking full reimbursement of the amount of the cheque.

The bank believed it had a complete defence by virtue of section 5 of the Cheques Act 1960.

Section 5 provides that when a banker in good faith and without negligence receives payment for a customer of a cheque, and the customer has no title, or a defective title, to the cheque, then the banker will not incur any liability to the true owner of the cheque by reason only of having received payment.

Section 7B of the Act, which deals with the crossing “not transferable”, was also relevant to this case. The effect of the crossing is that the cheque is only valid as between the parties to it and is not transferable. Mr Y argued that the crossed cheque should have been collected only for the account in the name of the intended payee. The bank was negligent in allowing the cheque to be paid into another account.

The bank relied on the defence in section 5, saying:

- it had acted in good faith; that is to say, it had not acted dishonestly in collecting the cheque
- there was nothing in the cheque itself that could have raised doubts when it was banked. There was no alteration to the

cheque, and the name of the payee, which was handwritten on the cheque, was not clear and could have been read as the name of the account holder

- it had not been negligent in opening the bank account and had followed all proper procedures
- as there was no endorsement on the cheque and no intention to transfer the cheque to another party, section 7B could not apply. The fact that the cheque was marked “not transferable” did not prevent the bank from being able to rely on the defence in section 5.

The issue for me to determine was whether the bank had acted in good faith and without negligence when it collected payment of a cheque for an account in a name other than that of the intended payee.

There was no evidence that the bank acted other than in good faith. Nor was there any evidence of negligence on its part because:

- the payee’s name on the cheque was not written clearly and legibly. The name could be interpreted to be that of the fraudulent account holder
- the bank followed its standard procedures in opening the account. The bank required two forms of identification, including one form of photographic identification. The forms of identification were very good forgeries and the bank officer who opened the account could not have been expected to notice anything unusual. The bank’s account opening procedures were in line with usual banking practices
- the fraudster did nothing to raise the bank’s suspicions when opening the bank account. For example, unlike most fraud cases, the fraudster did not request a special answer on the cheque so that s/he could start withdrawing the money immediately.

I found no evidence of negligence on the bank’s part and concluded that it had an arguable defence to Mr Y’s claim for reimbursement. In the circumstances, the bank’s offer to pay \$9,000 was reasonable, and I proposed that it should be accepted. Both parties accepted my proposal.

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Mr G agreed to lend money to Mr and Mrs T and paid the loan by cheque, crossed “not transferable” and made out in the names of Mr and Mrs T.

Cheque – “not transferable” – made out in joint names, but paid into account controlled by one party – funds used for intended purpose – no direct loss – compensation for inconvenience

Mr T was purchasing his mother’s house jointly with his wife and sister. Mr and Mrs T agreed with Mr G to borrow \$120,000 from him to fund the purchase. The loan would be repaid when the property was sold.

Mr G paid the loan money by cheque, crossed “not transferable” and made out in the names of Mr and Mrs T. Mrs T paid the cheque into an account in the name of BR Ltd. The company was jointly owned by Mr and Mrs T, but Mrs T was the sole director and the only authorised signatory. Mrs T told her husband that the funds had come to her from a family trust by way of an inheritance. She did not tell him they had come from Mr G. The funds were immediately paid to the vendor’s solicitors to complete the purchase of the house.

Mr and Mrs T had separated by the time the house was sold. At settlement, \$100,000 was paid to Mrs T, and the balance of the proceeds was divided equally among the three owners. Sometime later, Mr T was surprised to receive a letter from Mr G requiring repayment of the loan. He eventually contested Mr G’s claim in court, but lost the case. Mr T then brought an action against the former Mrs T and obtained judgement against her. At the time of the complaint, however, neither Mr T nor Mr G had received any money.

Through his barrister, Mr T wrote to my office complaining about the bank. He contended that if the bank had not allowed Mrs T to deposit Mr G’s cheque into her company account he would not have been the victim of his wife’s fraud.

The bank did not dispute that the cheque should not have been paid into the company account. It did, however, dispute that it was liable to Mr T for \$120,000.

If Mrs T had used the funds paid into her business account for a purpose which did not benefit Mr T, I would have had no difficulty in accepting that the bank’s action had caused a loss to Mr T. In this case, however, the funds were used immediately to fund the purchase of the house. That was the exact purpose for which the funds were provided. At that stage Mr T had suffered no loss as a result of the bank’s error.

The main cause of the loss was that Mr T accepted his wife’s explanation and did not question the source of the funds. Mrs T had full control of their financial arrangements and the cheque was in her possession at all times. Even if she had deposited it into the joint account, Mr T would still have believed her explanation about the family trust and would have agreed to repay her apparent contribution when the house was sold.

While I sympathised with the difficult position in which Mr T found himself, I was satisfied that his difficulty had been caused by Mrs T’s deception, and not by the bank’s error. I recommended that he withdraw his complaint. The case was closed on this basis.

Foreign exchange and cross-border transactions



There has been a small increase this year in complaints about foreign exchange and cross-border transactions, probably because the volatility of the New Zealand dollar has caused exchange rate losses when there are delays and difficulties.

The first two cases in this section both involve problems with the cross-border transfer of funds, and in both cases the New Zealand bank failed to give the customer enough information to understand the problem. It may not be the bank's fault when funds apparently go missing in transit, or transfers are not made, but a bank normally has access to information about the process when the customer does not. A good deal of anxiety and general inconvenience is avoided when banks give adequate explanations at the first possible opportunity.

In [case 28](#) the customer had tried to minimise the effect of currency fluctuations, but delays in the transfer of her funds caused her arrangements to collapse, at some cost to her. It transpired that, although the delay was not the fault of her bank in New Zealand, the bank had made it very difficult for her to find out the whereabouts of her funds, and some compensation for inconvenience was warranted.

[Case 29](#) also involved international funds transfers, but in this case the customer was affected by policies to do with sanctions against Iran. The bank was entitled to put in place policies to protect itself and its customers against the effect of sanctions, but it should have explained the policies to its customer much earlier.

Cross-border fraud has not been behind many complaints this year, but in [case 30](#) the problem was caused by a successful fraud involving travellers' cheques. The customer, who was relatively unsophisticated, had to bear some responsibility for failing to question a request with all the hallmarks of a known scam. However, the bank's branch staff appear to have been unfamiliar with the nature of travellers' cheques and to have contributed to the customer's loss by failing to follow the bank's own policies.



Ms F was expecting a large payment into the account ... she entered into a contract for conversion of the currency into New Zealand dollars at a particular rate. The funds did not arrive as expected.

International money transfer – unable to identify recipient – loss sustained when funds not received in time – compensation for inconvenience

Ms F arranged a foreign currency account with her bank. She was expecting a large payment into the account by international money transfer within a few days. In anticipation of its arrival she entered into a contract with a third party for conversion of the currency into New Zealand dollars at a particular rate.

The funds did not arrive as expected. Despite repeated enquiries to her local branch, Ms F could not discover what had happened to the funds for more than two weeks. She eventually found that the funds had been received by the bank, but had been returned to the overseas bank because no account details had been supplied, only a name and address. Ms F lost the non-refundable deposit she had paid for conversion of the funds at a fixed rate of exchange.

Ms F complained that the bank should have been able to trace her because her name and address had been supplied by the overseas bank. She believed the bank should be held responsible for the loss she had incurred.

The bank explained that although in this particular case it did run a name check, it was not able to positively identify Ms F because it had a number of customers with the same or a similar name. Rather than make further enquiries, it returned the funds to the overseas bank in line with its standard policy of returning funds when a money transfer is received with insufficient details.

I concluded that the bank's policy of returning funds when it is unable to identify the correct recipient, rather than trying to trace the recipient, did not breach any obligation or duty it owed its customer. Paragraph 20 of my terms of reference prohibits the investigation of a complaint when it relates to a practice or policy of a bank that does not itself give rise to a breach of any obligation or duty owed to the complainant.

The bank acknowledged that Ms F had experienced some difficulty in getting information from her local branch about the funds she was expecting. The bank offered her \$250 to acknowledge the inconvenience she had suffered. Ms F accepted the bank's offer and the complaint was resolved on that basis.

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Mr M made requests to his bank in New Zealand to transfer money internationally in US dollars ... the bank advised that it was unable to process any payments in US dollars requested by customers residing in Iran because of sanctions.

International money transfer requests – transfers not made – effect of sanctions against Iran – validity of bank's policy – failure to explain policy – compensation for inconvenience

Mr M lives and works in Iran.

In May and June 2008 Mr M made three separate requests to his bank in New Zealand to transfer money internationally in US dollars. On each occasion the transactions were entered into the bank's system, and were then intercepted during the international payments monitoring process. As a result, the transfers were not made.

In July 2008 Mr M emailed the bank asking why his first transfer request had been cancelled, and why the bank had not made the transfers. He also advised the bank that he had tried to contact it many times and had not received a response.

The bank responded to Mr M by letter. In the letter the bank advised that it was unable to process any payments in US dollars that had been requested by customers residing in Iran because of sanctions put in place by the Office of Foreign Assets Control (OFAC), an agency of the United States Department of the Treasury.

Mr M then contacted OFAC. OFAC advised him that New Zealand banks are not subject to US sanctions regulations and that, in Mr M's case, OFAC sanctions were not preventing the transfers. Rather, the bank was taking a restrictive stance in relation to transactions where the funds are moved between several banks and a US bank is involved.

Mr M then complained to my office. He said that:

- the bank had failed to send the three transfers he had requested
- it took a long time for the bank to give him a full explanation of the reasons for declining to send the transactions
- the reasons given by the bank were invalid.

After investigation, I concluded that:

- the bank was not required to provide international money transfer services to Mr M. Banks are not required to provide all services requested by their customers. They are entitled to adopt policies that avoid potential risks from sanctions to their customers and themselves
- the bank should have told Mr M about its policy at a much earlier stage
- the delay in advising Mr M of its policy caused him a significant level of inconvenience.

I proposed that Mr M accept the offer made by the bank to pay him \$1,000. The case was settled on this basis.

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Ms Q received an email from a UK provider address purporting to be a response from a woman who wanted to rent a room. It was arranged that Ms Q would receive travellers' cheques. She was asked to bank the cheques, to take out one month's rent for the flat and send the rest to an address in Nigeria.

Travellers' cheques – fraud – money laundering – breach of procedural guidelines – contributory fault – terms and conditions of personal banking

Ms Q advertised on the internet that she had a room to rent. In January 2008 she received an email from a UK provider address purporting to be a response from a woman who was moving to New Zealand and wanted to rent the room. After an exchange of friendly emails it was arranged that Ms Q would receive travellers' cheques to the value of US\$4,000 (about NZ\$5,000). She was asked to bank the cheques, to take out one month's rent for the flat and send the rest by Western Union to an address in Nigeria.

Ms Q did as she was asked and took the travellers' cheques to the bank on 31 January and 1 February. She was asked if she wanted cash or wanted to put the money in her account. She took the equivalent of US\$2,000 in cash and deposited the rest into her account.

Ms Q sent money to Nigeria on 2 February, as she had been asked. She then received more emails saying her new "flatmate" urgently needed more money before she could fly to New Zealand. Ms Q sent more money to Nigeria, as requested. Then, on 6 February, she received an email to say that her "flatmate" had to reschedule her flight to New Zealand.

On 15 February 2008 the cheques were dishonoured, and Ms Q realised she had been the victim of a money laundering scam. The bank debited her account with a sum of NZ\$5,167.71, the full value of the dishonoured cheques including the amount she had received in cash.

Ms Q complained that the bank had been negligent in not telling her that there was a clearance period or any potential risk before banking the cheques for her. She said that if she had been told of the risk she would not have sent money overseas until the cheques had cleared. She suggested that, by giving her cash, bank staff showed that they did not consider the possibility of the cheques being dishonoured.

The bank did not initially accept Ms Q's complaint. It later agreed that, because the bank employee incorrectly assumed that Ms Q was the original holder of the travellers' cheques, its own procedural guidelines for travellers' cheque purchases had not been followed, and it should assume some liability for the loss.

The bank considered, however, that there was also fault on Ms Q's side. In particular, she had contributed significantly to the situation by her careless reliance on the fraudster's story. It also pointed out that she had retained a small proportion of the proceeds of the cheques.

The bank offered to:

- write off the amount Ms Q had taken in cash
- credit Ms Q's account with half the remaining loss
- pay compensation of \$500 for inconvenience.

I considered the bank's offer to be fair and reasonable and told Ms Q that I was inclined to think I ought not to carry out any further investigation. Ms Q then accepted the bank's offer and the case was settled on that basis.



Guarantees

When a bank agrees to advance funds against the security of a property co-owned by someone who is not a party to the loan agreement it is usual, as in [case 31](#), for the bank to require a guarantee from the co-owner of the property. This is to ensure that the co-owner is aware of the lending arrangements and understands the implications and the liability that may be incurred as a result of the mortgage over the property. Most banks request an all obligations guarantee, although they will consider the option of a limited guarantee if it is specifically requested by the guarantor.

The bank must also ensure that a guarantor obtains independent legal advice before signing a guarantee. However, the bank is not affected by arrangements made between the borrower and the guarantor if it is not a party to those arrangements.



Ms V gave an all obligations guarantee to the bank to support lending advanced to her business partner and secured over the property.

All obligations guarantee – responsibility of guarantor – effect of property agreement – effect of determination of guarantee – independent legal advice – bank’s responsibility to guarantor

Ms V and her business partner jointly owned a property. Ms V gave an all obligations guarantee to the bank to support lending advanced to her business partner and secured over the property. At a later date Ms V and her business partner amended the property sharing agreement between them and she told her partner that she was no longer prepared to act as his guarantor.

The bank advanced further funds to her business partner and, in line with normal practice and its obligations to her as a guarantor, advised Ms V that further advances had been made. Ms V contacted the bank to express her concerns about the additional lending. She believed that the guarantee applied only to her first property sharing agreement with her partner and she no longer wanted to be a guarantor.

The bank subsequently made a further substantial loan to Ms V’s business partner, but at a later date agreed to limit Ms V’s liability under the guarantee to the amount advanced up to the time she first raised her concerns although she had not formally requested that the guarantee be limited.

There were three elements to Ms V’s complaint:

- the bank had acted wrongly in allowing additional lending. She did not think she should be liable under the guarantee after she had told her former business partner that she no longer wanted to be guarantor
- it was unreasonable for the bank to have insisted on an all obligations guarantee
- the bank should agree that the amount owed to her by her business partner would have priority over the bank’s secured lending.

In this case, the bank followed its standard practice in requiring an all obligations guarantee from Ms V. Although the bank would have considered the option of a limited guarantee if it had been specifically requested, it had breached no obligation or duty it owed to Mrs V when it requested an all obligations guarantee.

Ms V had obtained independent legal advice before signing the

guarantee, which is also in accordance with normal practice. It was her lawyer’s rather than the bank’s responsibility to ensure that she understood the full implications of the all obligations guarantee and the full effects of signing the guarantee; the bank’s obligation was to ensure that she had the opportunity to do so.

Ms V believed the bank should have been aware of the new agreement she had entered into with her former business partner. In particular, it should have understood that she no longer wished to be a guarantor. I found that the property agreements between Ms V and her former business partner were private arrangements between the two of them and had nothing to do with the bank. The bank did not even know about them. The new arrangements under the property agreement could therefore have no effect on the rights and obligations under the guarantee.

The bank was under no obligation to consult with Ms V before deciding to advance further funds to her former business partner. Its decision to exercise its right to have first call over any proceeds of the sale of the property was an exercise of its commercial judgement, and was therefore not a matter that I could investigate.

I did not identify any wrongdoing on the part of the bank and proposed to recommend that the complaint be withdrawn.

Ms V did not accept my findings and said that she had found the process of bringing a complaint to my office frustrating and distressing. She had found the approach legalistic, and did not believe the response she had received was based on fairness, commonsense or anything an ordinary citizen could identify with.

I regretted that Ms V had found the process of bringing a complaint to my office frustrating and distressing. However, in considering the merits of a case I must take into account all relevant factors, including the legal obligations of the parties concerned. My findings must be supported by the facts and the legal position. I found no reason to change my findings and recommended that the complaint be withdrawn. The case was closed on this basis.



Insurance

Recent immigrants are probably rather over-represented among those who complain to my office, and in some cases a bank has failed to take into account known differences in its customer's experience and background that may make its products and services difficult to understand. In [case 32](#), however, the bank was not at fault. It could not be expected to realise that its customer's expectations were shaped by a practice of which it had no knowledge.



Mr D arranged life insurance through his bank ... Five years later, he received a letter from the insurance company advising him of a substantial increase in the monthly premium ...

Life insurance – increase in premiums – no evidence of misrepresentation – experience in country of origin

Mr D arranged life insurance through his bank after a direct marketing campaign run by the bank. He received a policy schedule and the terms and conditions for the policy. Five years later, he received a letter from the insurance company advising him of a substantial increase in the monthly premium after a five yearly review of premiums.

Mr D complained to the insurance company and to the bank about the increase in the premium. He said he had been told by a bank officer when he took out the policy that the same premium would apply throughout the life of the policy. Mr D wanted the premium to be returned to the same level as when he had first taken out the insurance policy. When he was unable to resolve his concerns, Mr D brought his complaint to my office.

The bank had no record of any discussion between Mr D and one of its officers. It confirmed that the policy was specifically promoted by direct mail and was not sold through its branch network. When there is no evidence to support a statement made by either party to a dispute, I can make no finding on what was likely to have taken place. I cannot simply accept one person's version of events.

Mr D considered the wording of the policy to be ambiguous and misleading. He said that, in his home country, insurance premiums stayed the same throughout the lifetime of the policy. Mr D had believed this would be the same in New Zealand.

I examined carefully the brochure describing the benefits of the insurance policy. The information given about the premiums on the policy was clear and unambiguous. The brochure clearly stated that the premium was guaranteed for five years, after which it would be adjusted dependent on age. While I understood that Mr D may have been influenced by his experience in his home country, he had an opportunity to read the policy and cancel it if it did not meet his needs. The bank could not be held responsible if he did not take up this opportunity.

I was satisfied that Mr D had received adequate information about the terms of the insurance policy, including details of the review of premiums after five years, and I proposed to recommend that the complaint be withdrawn. Mr D did not accept my findings but, as he was not able to supply any further information to support his case, the investigation was discontinued.



Investments

In normal times complaints about investments make up a small proportion of our caseload and generally arise out of unusual circumstances. This year they have been a large part of our work, and in many cases the investigation is not yet complete. While the selection of case notes below has been chosen to represent the main issues raised by the complaints, it is likely that our approach to them will continue to develop as we work our way through the investigations.

The complaints have nearly all arisen out of advice and information given by advisers from a bank's branch network about two managed funds provided by ING (New Zealand) Ltd: the Diversified Yield Fund (DYF) and the Regular Income Fund (RIF). Both funds were described as investing in fixed interest investments, but were not of a traditional type. They invested almost entirely in collateralised debt obligations and collateralised loan obligations.

The bank promoted the funds, in particular to its existing customers with moderate to large sums on term deposit and in savings accounts. The funds aimed to provide a return of 2% (DYF) or 1% (RIF) over 90 day bill rates, and in the early years there were also some tax advantages.

The funds performed as expected until mid 2007, when their value began to decline. By early 2008 their value had fallen substantially, and in March 2008 the trustee of the funds decided to suspend withdrawals. The funds remained frozen throughout 2008, and their value continued to fall.

Most of the complaints described in the case notes below were lodged as a result of the freezing of the funds, though some were part of a second wave of complaints received after a proposal to offer a buy-out of individual investors' holdings. In June 2009 a second settlement offer was made, and it is likely that there will be more complaints as individual investors realise that they will not recoup the whole of their original investment.

Complaints were mostly to the effect that customers had invested on the advice or recommendation of the bank's adviser, and that:

- the investment was not suitable for the customer's purposes
- its risk or other important features were misrepresented
- the advice process was generally inadequate or inappropriate.

The first issue that arises in many of these complaints is whether the bank actually gave advice to the customer. In some cases the adviser prepared a full investment plan or gave a limited statement of advice, but in others the transaction was described as execution only, and customers had signed an acknowledgement that they had not sought or required any investment advice. In [case 33](#) the customers had not obtained their information about the investment from the bank, which had simply facilitated the transaction for them. They could not say that they had been badly advised when the bank had not advised them at all.

In many cases the issue was less clear cut. Although customers had signed the acknowledgement, they had often done so after receiving information about the investment from the adviser, with an express or implied assurance that it was a suitable investment for them. In [case 34](#) the customers were not experienced investors, and clearly relied on the information given them by their adviser, who should not have used the execution only process.

Once it is established that the customer relied on advice given by the bank, the next question is usually whether that advice was appropriate in the circumstances.

It became apparent at an early stage that some advisers had routinely advised customers to invest all, or almost all, their savings in the DYF and/or RIF.

The fact that the investments have failed does not in itself mean that they were of a higher risk than described or that they were unsuitable for the risk-averse investors to whom they were commonly sold. They were, however, a type of fund that was new and little known to the retail investor, and should have been recommended with caution. They were not generally suitable, individually or together, as an investment for the whole of a customer's savings. In most cases advisers should not have suggested that their customers invest more than about 20% of available funds in them, as in [case 35](#). In some cases, such as [case 36](#), they were not suitable at all, while in others such as [case 37](#) the adviser should have recognised that the different time frames of different investors meant that individualised advice was needed.

Where the adviser's recommendation was for a diversified portfolio of investments with the DYF or RIF making up an appropriate proportion of the portfolio, as in [case 38](#), the complaint is unlikely to be upheld.

In some cases, the question was not so much whether the adviser had recommended an investment that was suitable for the customer as whether the advice was misleading. Many complainants said that they had been led to believe that the investment was "safe" or that while returns might fluctuate, there would be no loss of capital. Some said they had been advised that the DYF and RIF were as safe as a term deposit, or similar to a term deposit.

It is usually easy to establish whether the customer has (or had) some misunderstanding about the nature of the investment. It is much more difficult to establish whether the misunderstanding was caused by misleading advice or other behaviour on the part

of the bank's adviser. In [case 39](#) there was reasonably good evidence that the adviser had not given the complainant any misleading advice, and that in any event the complainant had not accepted the advice that was given. By way of contrast, in [case 40](#) the complainant relied entirely on the advice he had been given, and there was reasonably good evidence that the advice was incomplete, sometimes inaccurate, and probably misleading.

In some cases the bank considered that the complainants had been sufficiently informed about the risks of the investment when they were given a copy of the investment statement. The information about risk in the investment statements for the DYF and RIF is clear, and potential investors should have attempted to read it. Some would have found it difficult to understand because of their lack of knowledge of basic financial concepts, and most would have read it in the context of anything they had already been told by their adviser, which would prevail in the case of an apparent conflict.

It is a practical reality that many customers will rely more on the oral statements of expert advisers than on printed information. In some situations the customer may well believe that the adviser has already covered the information contained or referred to in the printed document and may skim over it. Those unaccustomed to reading technical information, however well drafted, may place greater reliance on the spoken than the written word. In some cases the customer may consider the printed information to be generic material which has essentially been overridden by information given by the adviser to address the individual customer's personal circumstances.

As in [cases 41](#) and [42](#), it is often difficult to balance the rights and obligations of the parties. It is necessary to evaluate with great care even the smallest piece of evidence to try to establish what is most likely to have happened.

Many of the complaints about investment advice involved complainants who were distressed or angry. Some complaints came from complainants who had made investment decisions



Mr and Mrs W complained to the bank that they had been advised that the investment was secure and risk-free, and they wished to be able to access their money.

**Investment advice – own initiative or bank’s recommendation
– advice about risk – unable to access frozen funds – complaint withdrawn**

In February 2005 Mr and Mrs W, as trustees, invested money in the ING Diversified Yield Fund (DYF). In November 2005 they invested a further amount of money, bringing their total investment to \$77,300, and in March 2006 they withdrew \$50,000. Two years later the fund was frozen.

Mr and Mrs W complained to the bank that they had been advised that the investment was secure and risk-free, and they wished to be able to access their money.

The bank did not accept that the trust had invested in the DYF on its recommendation. File notes established that the trustees had held a meeting with their financial adviser and had asked her to facilitate the investment. Mr and Mrs W had independently obtained the investment statement for the DYF before the meeting, and did not require any further advice from the financial adviser. They signed an execution only order which specifically acknowledged that they had not sought or required any investment advice, that they had read the investment statement, and that they understood the risks involved. On that basis, the bank accepted no responsibility for the losses suffered by the trust. The matter was then referred to my office.

My investigation revealed that there was some confusion in the minds of the trustees over the sequence of events. They initially believed they had invested in the DYF following a meeting with

a financial adviser in 2003. At that meeting, their risk profile was assessed and found to be conservative and their investment needs were discussed, but they did not invest in the DYF.

At the meeting held in February 2005, a different financial adviser was present, and the prime focus of the meeting was, at Mr and Mrs W’s request, investment in the DYF. In November 2005, the original financial adviser facilitated a further investment in the DYF, following telephone instructions from the trustees. Details of these meetings and calls were established from thorough diary notes held by the bank. I was therefore satisfied that, when Mr and Mrs W first decided to invest in the DYF they were not relying on advice from the financial adviser but had already made up their minds about the investment.

On that basis I could not find that the trustees had been misled, or even advised about the DYF. There was evidence that they had obtained information about the fund from another source, and were merely asking the financial adviser(s) to facilitate the investment.

I recommended that the complaint be withdrawn. The case was closed on this basis.

on behalf of others such as children ([case 37](#)) or elderly parents ([case 36](#)) and who were carrying a burden of guilt. Some older investors who had saved for financial independence in their retirement faced the prospect of dependency on their children or partners and felt embarrassment or shame. The best possible resolution of such cases will address the complainants’ emotional needs and will give them an understanding of their bank’s position, as well as providing a result that is, by objective standards, fair and reasonable in all the circumstances. The conciliation process is one of the most effective ways to achieve such a resolution.

While it has not been possible to use conciliation in all potentially suitable cases, it has been very successful in resolving those complaints about investment advice where it could be used. [Case 43](#) was one of the more complex complaints of its kind, and already had a long history before we became able to offer conciliation. While a result of some kind would have been reached through the usual process of assessment and recommendation, it would have taken a great deal longer, and would most probably have left both the bank and the customers dissatisfied.

While most complaints involving investment advice were complaints about recent investments in fixed interest funds, [case 44](#) was one that arose out of a much earlier investment in equities, and illustrates some of the difficulties inherent in an

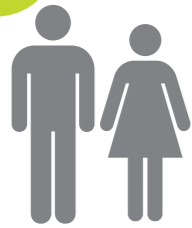
investigation of investment advice given long before the events that gave rise to the complaint.

Most banks provide Kiwisaver investment schemes. We have not received many complaints about such schemes, but their features differ from other investment products provided by banks, and the complaints we have received generally relate to a failure to explain those features. [Case 45](#) was one where the bank officer probably did not explain the commitment the customer was making by investing in a Kiwisaver scheme.

Under the rules of the Kiwisaver scheme, a bank cannot reverse its customer’s decision to opt in to the investment. The appropriate remedy in cases such as [cases 45](#) and [46](#) is therefore compensation for inconvenience.

[Case 47](#) involves rather a different issue – the effect of investment income on eligibility for state-provided benefits.

34



It was apparent that it was the financial adviser who had raised the possibility of investment into the fund, allegedly telling Mr and Mrs J that the DYF was “a low risk investment, as safe as a bank term deposit, and offered higher rates than a term deposit”.

Investment advice – advice given – failure to complete risk assessment or investment plan – disclosure of risk – misrepresentation – undiversified investment – complaint settled

Mr and Mrs J had a number of term deposits with their bank. At the time of maturity of each investment they would meet with their financial adviser to discuss further term deposit options.

In September 2004 the financial adviser recommended that they invest a maturing deposit of \$100,000 in the ING Diversified Yield Fund (DYF). At that meeting Mr and Mrs J signed an execution only order, were provided with a letter of engagement, and paid an implementation fee of \$2,000. Both the execution only order and the letter of engagement contained clauses relating to risk, and advice that the value of the investment could fluctuate or decline in value.

The execution only order also stated that:

- Mrs and Mrs J had not sought or required investment advice
- they had read, accepted and retained a copy of the prospectus and investment statement.

Two years later Mr and Mrs J met with a different financial adviser, again to discuss options for a maturing term deposit. The adviser recommended that they invest a further \$100,000 in the DYF, which was due to close to new investments. At that meeting they again signed an execution only order, were given a letter of engagement, and paid a further implementation fee of \$2,000.

In the latter half of 2007 the value of the DYF began to decline. On 12 March 2008 the fund was frozen. On 8 April 2008, Mr and Mrs J wrote to the bank, expressing their dissatisfaction with the service they had received, and requesting that their original investment of \$200,000 be returned to them. The bank, noting that Mr and Mrs J had signed an execution only order on both occasions when investments in the DYF were made, declined their request. The matter was then referred to my office for investigation.

I found no evidence that Mr and Mrs J had initiated discussion of the possibility of investment into the DYF. They were conservative investors who met with their financial adviser at the maturity of each term deposit to discuss roll-over options only. Indeed, in

2005, the financial adviser had noted that “They do not wish to consider other forms of investment as they feel they would rather have this portion of their funds where they know what their return is going to be for a year”. It was apparent that it was the financial adviser who had raised the possibility of investment into the fund, allegedly telling Mr and Mrs J that the DYF was “a low risk investment, as safe as a bank term deposit, and offered higher rates than a term deposit”. I was unable to confirm that those exact words were used, as the financial adviser made no notes of that meeting.

Mr and Mrs J said they had signed the execution only order and letters of engagement because they thought that was what they had to do. However, they had obviously not had the opportunity to read the prospectus and investment statement, as they committed themselves to the DYF investment at the same meeting as the financial adviser told them about it. Furthermore, there were conflicting statements in the execution only order and the letter of engagement. The letter of engagement acknowledged that Mr and Mrs J had been advised about the risks of the investment. This contradicted the execution only order statement that no advice had been received. It was not reasonable for the bank to say that advice had not been given or to rely on the execution only order to relieve it of any responsibility for the investment.

When Mr and Mrs J invested the first \$100,000 in the DYF, this represented approximately 40% of their total investments. Given that, by past practice, they had clearly established themselves as conservative investors, this was an inappropriate exposure to an investment described as medium risk. When the second \$100,000 investment was made, approximately 80% of their total funds were invested in the DYF. That was an unacceptable level of exposure which no prudent financial adviser would have recommended. There was no evidence that this exposure was ever discussed with Mr and Mrs J. Given their cautious and conservative investment history, it was highly unlikely they would have agreed to even 20% of their funds being invested in a fixed interest fund with medium risk.

34 continued



However, Mr and Mrs J were not without their responsibilities. They accepted that they had both read and understood the execution only order at the time of signing, but considered that the clauses about risk did not apply to them as they did not take risks. They would also have been aware that, although they had been given the investment statement and prospectus, they had not had time to read, understand or consider them. They were relying on the advice and recommendations of both financial advisers, but they were also obliged to ask questions if there was anything they did not understand or agree with.

Overall, I found that the level of skill and prudence exercised by the financial advisers fell short of what could be expected when dealing with relatively unsophisticated and risk-averse investors. On the basis that Mr and Mrs J might have invested 20% of their capital in the DYF if they had been properly advised, and that some responsibility rested with them, I proposed that the bank:

- purchase 70% of Mr and Mrs J's units in the DYF at original capital value (and those units were to be transferred to the bank)
- pay simple interest at 12-month bank deposit rates from the inception date of both investments
- refund 70% of the DYF implementation fees.

The total amount payable to Mr and Mrs J was \$173,245. Both parties accepted my proposal, and the complaint was settled.

Overall, I found that the level of skill and prudence exercised by the financial advisers fell short of what could be expected when dealing with relatively unsophisticated and risk-averse investors.

35



Investment advice – long relationship with financial adviser – appropriateness of investment to clients' defensive profile – risks – diversification – complaint settled

... the adviser recommended that approximately 40% of the money held in an equity fund should be transferred into the ING Diversified Yield Fund (DYF). Mr and Mrs T accepted the financial adviser's recommendation, and on the next day invested \$200,000 ...

Mr and Mrs T had been customers of the bank for over 50 years. They were retired and relied on their 10 year relationship with the bank's financial adviser for information and advice about investments.

A meeting was held on 14 November 2005 (following an investment profile completed in August which categorised Mr and Mrs T as "defensive" investors). The adviser checked out their financial position and reviewed their investments with them. He then said he would prepare a limited investment plan, which he delivered to Mr and Mrs T on the following day.

In the plan, the adviser recommended that approximately 40% of the money held in an equity fund should be transferred into the ING Diversified Yield Fund (DYF). Mr and Mrs T accepted the financial adviser's recommendation, and on the next day invested \$200,000 into the DYF. No recommendation was made to transfer funds into cash or property, as the financial adviser considered that Mr and Mrs T already held substantial amounts in both. An implementation fee of \$4,000 was paid.

During 2006 Mr and Mrs T told their adviser several times that they were disappointed with the performance of the fund. He said that, if they were unhappy, they could withdraw their money and place it in term deposits. However, Mr and Mrs T said they wanted the investment to recoup the implementation fee, and chose to remain with the DYF. Towards the end of 2006, they withdrew \$18,000 from the fund to build a shed.

In August 2007 the financial adviser contacted Mr and Mrs T and explained that world economic factors were affecting the performance of the DYF, but that the bank's advice was that this was a short term situation, and they should hold their investment.

On 24 January 2008 Mr and Mrs T contacted the financial adviser to complain about the declining value of their investment. They were told that the period of recovery was likely to be longer than expected. In March 2008 the DYF was frozen, and funds could no longer be withdrawn.

In May 2008 Mr and Mrs T wrote to the bank to complain about the standard of service they had received and to seek a refund of the full amount they had invested in the DYF. The bank declined the claim and the matter was then referred to my office.

There was a significant amount of disagreement between the bank and Mr and Mrs T over what had taken place both before and after their investment in the DYF. The financial adviser's diary notes and the investment behaviour of Mr and Mrs T therefore assumed some significance. There was no doubt that Mr and Mrs T had been disappointed with the performance of the equity fund from which they diverted \$200,000 into the DYF. They felt that their investment in that fund had provided disappointing returns and too much volatility. For that reason, they originally sought to place the funds in a term deposit which would not be subject to volatility, and would provide them with regular interest and no loss of capital. The financial adviser suggested the DYF, which they understood to be a secure investment, and similar to a term deposit.

As a result of investing \$200,000 into the DYF, Mr and Mrs T's investment portfolio had 49% of its value invested in equities, 48% in an international fixed interest investment (the DYF), and 3% in cash. This was not appropriate diversification for a defensive investor. When Mr and Mrs T later drew down the balance of the equity fund, they placed it in a term deposit, which was consistent with their defensive profile.

35 continued

The information provided by the financial adviser to Mr and Mrs T was generally accurate. I was not satisfied, however, that he fully explained that investment in the DYF was exposing them to "moderate" risk.

The information provided by the financial adviser to Mr and Mrs T was generally accurate. I was not satisfied, however, that he fully explained that investment in the DYF was exposing them to "moderate" risk. Neither was the extent of their investment in the fund appropriate to defensive investors who could prudently expect no more than 20% of their portfolio to be exposed to that level of risk.

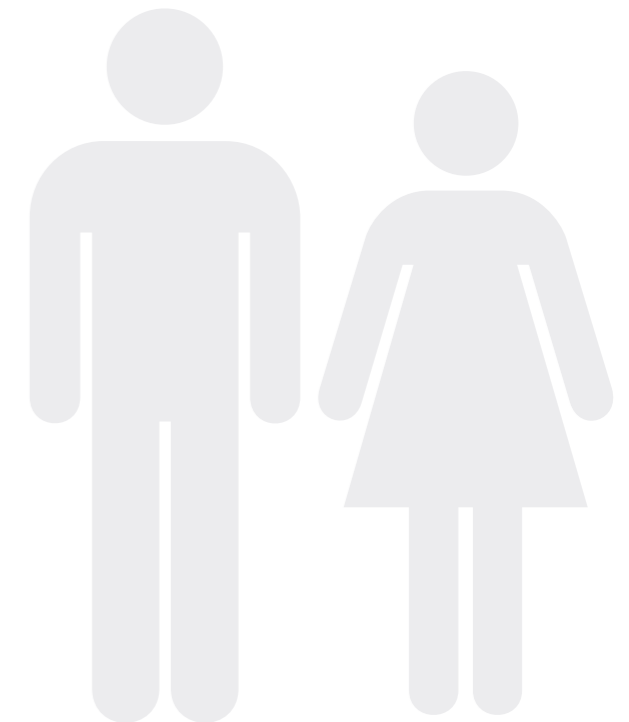
However, Mr and Mrs T had some responsibility to read the information they were given, and to ask questions of the financial adviser if there was anything they did not understand. The investment statement mentioned moderate risk, and given their aversion to volatility, they should have enquired about the meaning of that term.

I also noted that they had decided to remain with the DYF when the financial adviser told them that they could move their investment to a term deposit.

I therefore recommended a partial reimbursement of the loss on Mr and Mrs T's investment as follows:

- the bank was to purchase 50% of Mr and Mrs T's remaining investment in the DYF at its original capital value, less 50% of distributions they had already received
- Mr and Mrs T were to transfer 50% of their units in the DYF to the bank
- the bank was to pay simple interest to Mr and Mrs T on 50% of the investment, from the date of inception until the date of payment, using 12-month bank interest rates over that period
- 50% of the implementation fee was to be reimbursed.

The total sum payable was \$101, 685.80. Both parties accepted my recommendation, and the case was closed on that basis.



36



When the risks were described as “remote” Mrs N, who has little experience of business matters, thought the adviser meant “not at all”.

Investment advice – elderly investor – total investment in single fixed interest fund – appropriateness of investment

Mrs E was aged 95 and living in a rest home. Mrs N, her daughter, held power of attorney for her. In 2004, a financial adviser from the bank called Mrs N to ask if she was interested in discussing an investment for her mother’s money which, at that stage, was being held in a savings account.

Mr and Mrs N and Mrs E met with the adviser. A risk assessment was carried out. Mrs E was assessed as being a conservative investor, although her total score in fact placed her mid-way between a defensive and a conservative investor. At the same meeting, Mrs E signed a letter engaging the bank to provide investment advice and also an application to invest more than \$130,000 in the ING Diversified Yield Fund (DYF). Her only other funds were rather less than \$10,000 in her savings account. At some point after the meeting, the adviser prepared an investment plan for Mrs E.

Mrs N said that, at the meeting, the adviser told them that the bank had been looking at the accounts of its very elderly customers living in rest homes to see where their money could be “better placed”. She said the adviser enthused about the fixed-interest fund, saying it was ideal for older people who tended to tuck their money away in old fashioned savings accounts. He presented the fund in such glowing terms that Mrs N and her husband thought it was a no risk investment. When the risks were described as “remote” Mrs N, who has little experience of business matters, thought the adviser meant “not at all”.

Until 2008, Mrs E’s rest home fees were just covered by her superannuation, with withdrawals from her investment used for other expenses. Almost simultaneously with the freeze on withdrawals from the DYF, the rest home announced a change to its fee structure, which would mean considerably higher fees for Mrs E. She needed access to funds urgently.

Soon after Mrs N approached my office with a complaint, the bank offered Mrs E an interest-free loan of \$15,000. While this resolved the immediate problem, Mrs N felt strongly that the DYF had been a totally unsuitable investment for her mother, and she should never have been advised to invest in it.

Mrs N’s complaint was not resolved through the bank’s internal complaints process. The bank believed its adviser had acted appropriately in recommending the fixed interest fund as an investment for Mrs E. It said the adviser had sought to diversify Mrs E’s portfolio by introducing a fixed interest component. It noted that she had no other growth-based assets.

I concluded that the advice to invest nearly all of Mrs E’s fairly modest life savings in a moderate risk fixed interest fund, with a recommended investment timeframe of at least three years, fell below the expected standard of care and skill for sound financial advice. She did not need growth-based assets, and in any case it was quite misleading for the bank to refer to Mrs E as having an “investment portfolio”. She did not. The advice given to her was simply to replace her low risk, low interest savings account with a fixed interest investment, described as moderate risk, which carried a real risk of fluctuating returns and loss of capital. There appeared to have been no discussion with the investment adviser about a diversified portfolio, nor any explanation from him about what a full investment portfolio entailed.

I proposed to recommend that the bank should reimburse Mrs E the amount of her original capital invested in the fixed interest fund, less the withdrawals she had made and any overdraft the bank had made available. Interest was to be paid at the rate that would have applied if Mrs E’s money had remained invested in the bank’s saving account, and the bank was also to refund the implementation fee.

Both parties accepted my proposal, and Mrs E’s family were free to enjoy her 100th birthday celebrations in the knowledge that her financial future was secure.

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The financial adviser prepared separate investment plans for each of Mr D’s three daughters, but in each investment plan he made the same recommendation ...

Investment advice for three children – different time frames for their investment – same single fund recommended for each child – bank recommended retaining investment – withdrawals suspended – bank agreed to return 80% of capital invested

Mr D’s three daughters each received an inheritance of \$85,000 from their uncle. The funds were to be held in trust by Mr D until each recipient turned 18, and were then to be used for their tertiary education.

In August 2006, Mr D met with a financial adviser from the bank to discuss investing the inheritances. Mr D told the financial adviser that his daughters were of varying ages and would require access to the inheritances at different times. One would be likely to require access to the funds within six months, the second in two and a half years, and the third in five and a half years.

The financial adviser prepared separate investment plans for each of Mr D’s three daughters, but in each investment plan he made the same recommendation to invest the total inheritance in the ING Regular Income Fund (RIF).

Two months later, Mr D instructed the financial adviser to invest all three inheritances in the RIF.

A year later, Mr D contacted the bank because he was concerned with the RIF’s poor performance. After discussing his concerns with the financial adviser, Mr D retained the investments. According to Mr D, he did this because the financial adviser told him that the RIF was very secure and advised him to avoid converting a “paper loss” into an actual loss.

Several months later, the trustees of the RIF suspended all withdrawals from the fund.

Mr D then complained to the bank. He complained that:

- the recommendation to invest in the RIF was inappropriate in the light of his daughters’ specific requirement that the funds be placed in a low risk investment
- he was not given a range of different investment options despite the different needs of his daughters, particularly in relation to their investment timeframes
- he was inappropriately advised to invest his daughters’ money into a single fund without any diversification
- he was not adequately advised of the risks involved in investing in the RIF. In particular, he believed that the RIF was like a term deposit, but returned an additional 1% interest because it took one to two months to make withdrawals from the fund
- the bank did not give him adequate information about the performance of the RIF and he had to obtain information from the local newspaper
- he was inappropriately advised not to withdraw from the fund.

While the bank said it sympathised with Mr D’s situation, it did not accept his complaints.

Before beginning a full investigation, my investigator discussed the case with the bank, which then offered to repay Mr D approximately 80% of the capital invested by each of his daughters. Even though I would probably have made a different recommendation in relation to each investment because of the differing ages of Mr D’s three daughters, he accepted the bank’s offer.

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Mr and Mrs M were very disappointed when the DYF and RIF were frozen. They considered they had been persuaded by their adviser to invest in the two funds.

Investment advice – portfolio approach – most funds in cash investments – proportion in managed funds appropriate

Mr and Mrs M invested in unit trusts through the bank over a number of years. When Mr M took early retirement in 2005, they decided to withdraw from all their unit trusts because they wanted to ensure that their investments had absolutely no risk. They instructed the bank to put their funds on term deposit, including proceeds from the sale of their rental properties. Their total funds were approximately \$750,000.

Soon after this, Mr and Mrs M were contacted by their usual financial adviser, who was concerned that they had withdrawn from the unit trusts. At his suggestion, they invested a small proportion of their money into the ING Diversified Yield Fund (DYF). A few months later, in January 2006, the adviser prepared a comprehensive investment plan for them. The investment plan recommended them to invest in a diverse portfolio of products, including the ING Regular Income Fund (RIF). The monies invested in the DYF and RIF were approximately 15.5% of their total funds available for investment. Aside from small investments in equity and property funds, the rest of Mr and Mrs M's funds, approximately 75% of their savings, were retained in cash investments.

Mr and Mrs M were very disappointed when the DYF and RIF were frozen. They considered they had been persuaded by their adviser to invest in the two funds. They thought they had made it clear that they wanted an investment without risk and were happy to have their money in term deposits. They had been assured the investment was "safe". They now thought the investment advice they had been given was not appropriate for their conservative risk profile. They felt they had been misled about the risks of the investment and had been deceived by the bank.

I found I could not uphold the complaint. The bank's recommendation to invest in the DYF and RIF was not inappropriate for Mr and Mrs M's conservative risk profile. The proportion of their investment in these funds was less than the proportion usually recommended for a conservative investor. In addition, a large percentage of

their investments was in cash, giving them a very conservative investment plan overall.

Nor did the bank misrepresent the risks of the managed funds. I had some concerns about the haste of the investment process: Mr and Mrs M were given the investment plan and the investment statements at the same meeting at which they accepted the investment plan and authorised the investments. It would have been better practice to mail out the investment plan before any meeting, and for a few days to have elapsed before investment decisions were finalised. Even so, Mr and Mrs M were not inexperienced investors, and they had the opportunity to read the investment statements and ask questions of their adviser. They acknowledged in writing that they understood the risks, and their withdrawal from their earlier investment in unit trusts was further evidence that they understood the risks of such an investment.

Weighing up all the evidence, although the financial adviser may have been over enthusiastic in promoting the two funds, there was insufficient evidence to find that he had misled Mr and Mrs M about the risks of the investment. Also, there was sufficient information in the investment statement for them to realise the funds carried some risk.

I proposed that, as a gesture of goodwill, the bank should refund the implementation fee to Mr and Mrs M. The bank agreed to this proposal and the complaint was settled.

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Mr T complained that the financial adviser had persuaded him to invest in the DYF by not advising him of the risks, and by telling him the investment was safe ...

Investment advice – claim of misleading advice – complainant's actions independent of financial adviser's recommendations – responsibility of investor to read investment information

In July 2003 Mr T had a term deposit which was about to mature, and his bank's financial adviser contacted him. The parties had had regular contact over the six years during which Mr T had invested with the bank, and in 2001 the bank had completed a risk profile and a recommended portfolio for Mr T. This categorised him as a conservative investor.

The financial adviser discussed with Mr T the possibility of investing the maturing deposit in the ING Diversified Yield Fund (DYF). He then sent Mr T a copy of the DYF leaflet and the investment statement. Some two weeks later, Mr T contacted the financial adviser and asked for \$30,000 to be invested in the DYF. He told the financial adviser that he had read the investment statement, and wanted to limit his investment to \$30,000. The financial adviser offered to complete a new risk assessment and to draft a new investment plan. Mr T declined this offer. A letter of engagement, the DYF application form, and a withdrawal slip for the \$300 implementation fee were posted to Mr T. He signed them, and the investment in the DYF was completed on 17 August 2003.

In March 2008 the DYF was frozen. Mr T wrote to the bank. He complained that the financial adviser had persuaded him to invest in the DYF by not advising him of the risks, and by telling him the investment was safe, with a return of 7%-8% and tax benefits. He claimed the financial adviser was not offering independent advice because of the close relationship between the bank and ING. He believed the bank should have told him that the value of the DYF was declining, so that he could have withdrawn his investment before the fund was frozen. He sought a refund of the \$30,000 he had invested in the fund.

The bank was able to produce extensive diary notes made by the financial adviser, which established that full disclosure had been made to Mr T of the nature of, and risks associated with, the fund. Mr T had had time to consider the information, and had signed the letter of engagement which specified that the returns were not guaranteed and the value of the investment could fluctuate. It was noted that Mr T had declined to take up the offer of a new risk assessment and new financial plan as recommended by the financial adviser, and had told the adviser that he had read the investment statement. The bank further advised that, if Mr T had approached it to discuss the performance of the fund, its advice, based on information received from ING (NZ) Ltd, and Morningstar (an independent investment research company), would have been to retain his investments, as an improvement was expected. The bank declined to reimburse Mr T.

During my investigation, Mr T told my investigator that he had not read the investment statement.

On balance, I considered Mr T's investment in the DYF to be appropriate, given his risk profile, and the fact that the investment made up only 15% of his portfolio. I could find no failure on the part of the financial adviser relating to disclosure, advice or risk. It seemed clear that the decision to invest was largely Mr T's decision, as was the decision about the amount invested. The bank could not be held responsible for his failure to read the investment information, when he said that he had read it.

My final recommendation was that the complaint should be withdrawn. The case was closed on this basis.

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Mr L said that the adviser emphasised the safety of the DYF [Diversified Yield Fund] ... the adviser said the fund was like a term deposit ...

Investment advice – bank’s financial adviser recommended investment in DYF – withdrawals from DYF suspended – misrepresentation of risks of DYF – breach of obligations under Fair Trading Act 1986 – recommendation below standard of reasonable care and skill expected of a professional financial planner

Mr L planned to retire when he reached the age of 50, and was saving for that reason. Until 2004, most of Mr L’s life savings were invested in a term deposit with the bank. Each year he would roll over the term deposit and add the year’s savings to it.

In October 2004 Mr L went to his bank to arrange the usual rollover of his term deposit. The teller suggested he “could be doing something a bit better with his money” and arranged a meeting with one of the bank’s financial advisers.

The adviser assessed Mr L as having a conservative risk profile, and then prepared an investment plan for him. The investment plan included a recommendation to invest \$210,000 in the ING Diversified Yield Fund (DYF) and to leave \$4,000 in a savings account.

Mr L said later that the adviser emphasised the safety of the DYF. He said that when he asked questions about risk, the adviser said the fund was like a term deposit, and that when he asked how it compared with a term deposit, he was told they were “practically the same”.

The investment plan was presented to Mr L a few days after the meeting. After the presentation, Mr L completed the application form for the DYF and invested \$206,000 in the fund the following day.

On 12 March 2008, the trustees of the DYF suspended all withdrawals from the fund.

Mr L complained to the bank. After receiving an unsatisfactory response, he complained to my office. He said that:

- the DYF was misrepresented to him as a safe investment option and the risks associated with it were not adequately explained
- the investment of all his savings in the DYF was inappropriate, given his conservative risk profile
- the bank failed to adequately inform him of the DYF’s decline in 2007.

At an interview with Mr L during my investigation, it became clear that he did not understand the nature of a fixed interest investment. He said he thought it was one that paid a set rate of interest, but with no capital loss. He realised the DYF was not exactly like a term deposit but thought it was just as safe.

While I was unable to establish exactly what Mr L had been told about the DYF, it seemed unlikely that he had been given the sort of information that would have been appropriate, that is, a clear and unambiguous explanation of:

- the nature of the investment
- how it differed from a term deposit
- the risks, especially the risk of loss of capital in adverse economic conditions.

The adviser had kept diary notes of his meetings with Mr L, but while they recorded various items of information given to him and noted that the investment plan had been explained, he did not mention giving Mr L the investment statement for the DYF or explaining its risks to him. The description of the DYF in the investment plan did not mention any of the risks associated with it.

In addition, the investment plan misrepresented the investment quality of the DYF’s underlying assets. It inaccurately described the investments making up the DYF as having a “minimum” credit rating of BBB, when they actually had a “targeted” rating of BBB. Mr L would not have understood that an investment with a “targeted” rating of BBB may contain at least some investment components of uncertain or indifferent quality. The plan also said that the DYF was towards the conservative end of the investment scale, when it was not at the conservative end of the range of fixed interest investments.

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At an interview with Mr L during my investigation, it became clear that he did not understand the nature of a fixed interest investment.

I found that:

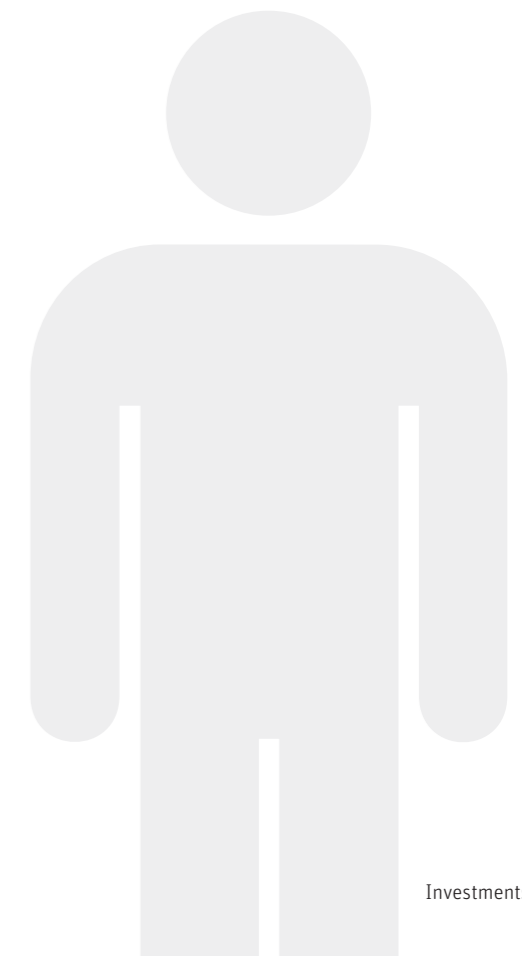
- it was likely that the financial adviser had breached the provisions of the Fair Trading Act 1986 by failing to properly explain the nature of an investment in the DYF to Mr L and the risks associated with such an investment, thus giving the impression that the fund was low risk. Mr L would not have invested in the DYF if the financial adviser had properly advised him of the risks associated with such an investment
- the financial adviser’s advice and recommendation that Mr L invest all of his life savings in the DYF fell below the standard of reasonable care and skill expected of a professional financial planner
- the DYF was not an appropriate single investment product for Mr L, given his risk profile and personal circumstances.

I proposed that the bank should:

- reimburse Mr L the amount of his capital investment in the DYF (\$241,000) less the cash distribution he had been paid after the fund was frozen
- pay Mr L interest on his investment for the period from the date the funds were invested in the DYF until the date of payment
- refund the implementation fees Mr L paid on the investment
- pay Mr L \$500 compensation for inconvenience.

The bank and Mr L accepted my proposal, and the complaint was settled.

It was likely that the financial adviser had breached the provisions of the Fair Trading Act 1986 by failing to properly explain the nature of an investment in the DYF.



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Mr and Mrs K, having taken early retirement in 2005, sought advice from the bank as to the best way to invest their money to generate income until they qualified for superannuation.

Investment advice – accuracy of advice – suitability of investment for complainants’ requirements – whether complainants were properly advised of risks and returns associated with investments – undiversified investment – full reimbursement from bank

Mr and Mrs K, having taken early retirement in 2005, sought advice from the bank as to the best way to invest their money to generate income until they qualified for superannuation. They were specific about the amount of income they wished to receive, on both a monthly and an annual basis. Neither Mr nor Mrs K had ever previously invested funds, and until then they had held all their money in various bank accounts.

At a later stage the bank said that when Mr and Mrs K met the financial adviser, they chose not to proceed with a detailed analysis of their needs or a full financial plan, but requested more limited advice. Mr and Mrs K, however, remembered the adviser saying that there was not much point in conducting the full process as their position and requirements were fairly straightforward.

The financial adviser recommended that Mr K place all his money in the ING Diversified Yield Fund (DYF). The only other option discussed was the ING Regular Income Fund (RIF). Subsequently \$105,000 was placed in the DYF.

Over the next few months both Mr and Mrs K sought further investment advice from the bank as proceeds from the sale of various properties became available, and as a result invested further funds of \$516,000 in both the DYF and the RIF. Mr K also invested \$130,000 in a property fund (not the subject of this complaint). These investments were expected by Mr and Mrs K to provide the income levels they desired.

Despite continuing to invest in the ING funds, Mr K had, as early as December 2005, raised concerns with the bank that his initial investment was not earning as expected. In April 2006 Mr K

again contacted the adviser, asking why neither his nor his wife’s investments were earning at the expected rate. In July 2006 Mrs K contacted the adviser about her investment, asking when the shortfall in the “interest” payment she had received in April would be made up. Further queries of a similar nature were made in 2007. On each occasion there appears to have been some sort of reassurance from the adviser.

In March 2008 Mr K contacted the bank, as neither he nor his wife had received any recent information about their investments. They found that their original adviser had left the bank. A different financial adviser responded with information about the current value of their investments. He acknowledged that losses had been made but advised them that “the current view of most commentators [is] that you should hold this investment”. This information caused Mr and Mrs K great concern, and they arranged a meeting with the new financial adviser on 11 March 2008.

The bank’s record of the meeting indicated that, for the first time, Mr and Mrs K were advised, and understood, that their investments did not pay interest at either a fixed or a variable rate, but rather aimed to achieve a certain return, which had not been achieved in recent months. Nonetheless the adviser noted that “this explanation restored some of their confidence in the funds” and “they have decided to persist with the investments for the time being”. The next day both funds were frozen.

Mr and Mrs K lodged a complaint with the bank claiming that the bank had misrepresented the security of their investments and the expected rates of return of both funds. They sought a return

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... for the first time, Mr and Mrs K were advised, and understood, that their investments did not pay interest at either a fixed or a variable rate, but rather aimed to achieve a certain return ...

of invested funds, lost interest, and implementation fees. Later they also sought compensation for emotional stress. The bank declined the claims, so Mr and Mrs K lodged a complaint with my office.

Following my investigations into this matter, I was satisfied that the bank, through its financial adviser, had:

- failed to properly advise Mr and Mrs K about the nature of the investments it was recommending and about the risks associated with both funds
- misrepresented the rates of return as guaranteed rather than variable
- failed to recommend that Mr and Mrs K have a full financial plan with a proper assessment of their risk profile, and instead made recommendations on a limited basis
- failed to recommend a prudent diversification of investments to spread risk, given that both investors were clearly risk averse
- continued to assure Mr and Mrs K that their investment decisions were sound, even after they had expressed their concerns to the bank on a number of occasions.

The bank did not accept my initial assessment of the complaint, but a consideration of its submissions and a review of the investigation failed to change my views.

I therefore recommended that the bank refund the amounts Mr and Mrs K had invested and also the implementation fees, and pay simple interest over the term of the investments using 12-month bank term deposit rates applicable for that period. I did not recommend compensation for emotional distress, given that the bank could not be held responsible for the performance of the funds.

All parties accepted my recommendations.

Mr and Mrs K lodged a complaint with the bank claiming that the bank had misrepresented the security of their investments and the expected rates of return of both funds.

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Mr and Mrs K complained to the bank about the loss they had suffered. They said they had been misled about the investment and they would not have invested in the fund if they had known that their capital was at risk.

Investment advice – inexperienced investors – failure to understand investment – misleading advice – delay in withdrawal – consequent loss

Mr and Mrs K had invested their life savings of \$100,000 in bonus bonds, but thought they might be able to get a better return from an equally safe investment. They took half their funds out of bonus bonds and went to their bank to ask for investment advice. Mr K worked full time, but expected to retire in about a year's time, and Mrs K worked part time. When Mr K retired, they would have further funds to invest from his employment superannuation scheme.

In July 2006 they met with a financial adviser, who carried out a risk assessment and found them to be conservative investors. She did not provide an investment plan for a full portfolio but recommended a product which, she said, would meet their objectives. The adviser recommended that Mr and Mrs K invest all their available cash funds, a sum of \$50,000, in the ING Regular Income Fund (RIF). Mr and Mrs K agreed with this recommendation.

At the end of the first year of their investment, Mr and Mrs K noticed that it had increased by only a very small amount. They decided to withdraw from the fund. A 30 day notice period was required and, during that time, the value of the investment dropped by approximately \$5,000.

Mr and Mrs K complained to the bank about the loss they had suffered. They said they had been misled about the investment and they would not have invested in the fund if they had known that their capital was at risk. They said the investment had not been appropriate for their identified needs and objectives.

The bank did not accept Mr and Mrs K's claim, which they then brought to my office. They told me that, while they understood that the interest they received on their investment in the fund

could fluctuate, they had not thought they could lose capital. If they had been advised that a loss of capital was possible in bad times, they would not have invested in the fund, but would have put their money on term deposit.

It was very clear that, even after the complaint to my office, Mr and Mrs K did not understand the nature of their investment. They continued to talk about the interest they had expected to earn on it, although it was not an interest-bearing investment. They also had difficulty understanding how part of the original sum they had invested could have disappeared. They seemed to think that the investment was similar to a term deposit, but with a fluctuating interest rate. It was significant that they had become concerned about the investment and sought to withdraw as soon as it started losing value, when a full understanding of the investment would have led them to expect some fluctuation in value.

The main issue I had to determine, therefore, was whether it was more likely that the adviser had caused Mr and Mrs K's misunderstanding, either by positively misrepresenting the nature of the investment or by failing to explain important features of it to them, or that they had been given all appropriate information and explanations, but had forgotten or failed to understand them.

It was significant in this case that the complaint had been made before the ING funds were frozen and before there was media interest in the plight of investors in the funds. There was therefore no possibility that Mr and Mrs K's recollection of events had been influenced by anything they had heard or read.

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It was also clear that, although the investment process had not been rushed, Mr and Mrs K's position as inexperienced investors planning their retirement called for more than the limited advice which it seemed they had been given.

There is information about the risks of the investment in the investment statement, which should be given to each customer, and there was some evidence that Mr and Mrs K had been given a copy. However, although the adviser had kept fairly comprehensive notes of her dealings with them, including notes of subjects discussed, such as the tax position of the fund and the timeframe for withdrawals, there was no mention of discussing the risks of the investment. Nor was there any mention of giving them the investment statement or emphasising the importance of reading it.

It was also clear that, although the investment process had not been rushed, Mr and Mrs K's position as inexperienced investors planning their retirement called for more than the limited advice which it seemed they had been given. After considering all the evidence I was left with the impression that the investment process was inadequate with insufficient attention to detail.

I reviewed all the evidence and found it more probable than not that the financial adviser had failed to properly explain the nature of and risks involved in investing in the RIF.

Mr and Mrs K were not experienced investors and did not have a good understanding of financial matters. They needed a plain and unambiguous explanation of the nature of the investment: how it differed from a term deposit and the risks involved, particularly the possibility of capital loss in times of adverse economic conditions. Even if they had been given a copy of the investment statement, they would have relied on the financial adviser's explanations to a very large extent. It would have been very important for the financial adviser to give a full oral explanation of the nature and risks of the investment.

While I thought it unlikely that Mr and Mrs K would have invested in the RIF if they had been given a full explanation of its risks, I also had to bear in mind that it was not an entirely unsuitable investment for them. It represented less than 20% of the total funds they had (including Mr K's superannuation savings), and they intended to revisit their investment intentions within the year, when the RIF investment could well be seen as a basis for a more diversified investment portfolio.

After a full assessment of the evidence, I suggested that the loss be shared equally between the bank and Mr and Mrs K. This recognised that, although Mr and Mrs K had not been given a proper explanation of the risks of investment, the product was appropriate to their needs and objectives.

Both parties accepted my suggestion. The bank paid half the capital lost when Mr and Mrs K withdrew their money from the fund, together with interest on half the total sum invested between the time of investment and the time of withdrawal, calculated at a rate equal to the return Mr and Mrs K had received when their money was invested in bonus bonds.

I reviewed all the evidence and found it more probable than not that the financial adviser had failed to properly explain the nature of and risks involved in investing in the RIF.



Mr J and Mr V required a short term investment ... They also wanted their funds to be closely monitored to ensure they did not lose the capital they had invested.

Investment advice – failure to inform about performance of investment – complex complaints – conciliation process – factors making case suitable for conciliation

Mr J and Mr V were longstanding customers of the bank and sought advice about their investments, both on a personal basis and as trustees of a trust for the benefit of relatives. They were referred to one of the bank's financial advisers.

Mr J and Mr V initially wanted a medium term investment but when a regular review was undertaken, their needs had changed and they required a short term investment. They intended to purchase property in the near future. They also wanted their funds to be closely monitored to ensure they did not lose the capital they had invested.

The adviser recommended a number of investments including the ING Diversified Yield Fund (DYF). The adviser also suggested that the investment be made through an investment monitoring service.

Mr J and Mr V agreed with the adviser's recommendations, on the understanding that the adviser would monitor the investment and that the investment monitoring service would assist with this.

During 2007 Mr J and Mr V had a number of meetings with the adviser. Although the funds were declining in value, he failed to inform them accurately about the status of their investment. They only became aware of the drop in the value of the DYF after it had been frozen.

Mr J and Mr V complained to the bank both personally and on behalf of the trust.

The bank's response was to accept that the adviser had not acted properly and to make an offer of settlement. Mr J and Mr V rejected the offer as they believed it was too low. They requested a higher amount.

There was a substantial exchange of correspondence in the months following these initial negotiations, but when no agreement was reached the complaint was referred to my office.

The exchange of correspondence continued, with arguments and counter arguments being put forward by each party. A large file built up, but still no agreement could be reached.

At the point when it seemed likely that we would have to conduct an extensive analysis of the correspondence before issuing an initial assessment, my office was introducing a conciliation process as an alternative form of dispute resolution. Our recently employed conciliation expert reviewed the file and suggested that face-to-face conciliation might offer a way forward.

Conciliation was thought to be preferable to a formal assessment and, if necessary, a formal recommendation, for the following reasons:

- *Mr J and Mr V had been long term customers of the bank, and their complaint was more about the advice from the adviser than about the overall operations of the bank*
- *it was apparent that they would prefer to stay on as customers of the bank*
- *agreement had very nearly been reached early in the history of the complaint*
- *it was clear that Mr J and Mr V felt they were not getting their message through to the bank via their correspondence*
- *the written file was very complex, and it would have been extremely difficult to summarise all issues and arguments raised by each party in a formal recommendation*
- *there was a strong indication that both parties wanted to reach a resolution.*



A major role of a conciliator is to gain the trust and respect of both parties, preferably before the conciliation is undertaken.

In preparation for the conciliation my staff member visited the home of Mr J and Mr V, and obtained a fuller picture of the complaint. He also explained how the conciliation process would be conducted, and in particular the role that he would play as conciliator. Mr J and Mr V were happy with the proposed conciliation process, and confirmed that they would participate.

A similar meeting was undertaken with the bank.

A major role of a conciliator is to gain the trust and respect of both parties, preferably before the conciliation is undertaken. This gives comfort to both parties and encourages them to speak openly at the conciliation.

All conciliations are conducted in a confidential setting which also encourages open discussion with the knowledge that neither party will compromise its position if the matter cannot be resolved through conciliation.

When a complex case is dealt with by conciliation it helps if the individual issues can be separated and discussed. This helps to generate potential options for resolution: a process that would be difficult if all issues were discussed at once. With this in mind it was decided to focus the conciliation on Mr J and Mr V's personal complaint only, as the issues that it raised were less emotive.

In addition, it is often the case that, if there are multiple complaints or multiple issues within a complex complaint, once resolution is reached on one of the complaints or one of the major issues, the remaining issues are resolved as well. Furthermore, this can occur by the parties negotiating directly with each other, without the assistance of a conciliator.

The conciliation was conducted with Mr J, Mr V and a senior representative from the bank who was empowered to commit the bank to any agreement that could be reached.

At the conciliation both parties agreed to an acceptable settlement of the complaint.

In the ensuing months the parties also reached an agreement between themselves to resolve the trust complaint.

The result of this conciliation was not only to resolve the complaint, but to do it in a way that satisfied both parties' primary needs as identified before and during the conciliation. It also meant that we did not have to write two very complex and time consuming assessments that may have resulted in a formal resolution of the complaints but would most probably have left both parties dissatisfied.

When a complex case is dealt with by conciliation it helps if the individual issues can be separated and discussed.

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Mr O believed he was wrongly advised by the bank. Given the sharp decline in the value of the funds after September 2000, he believed that he was badly advised when he invested his money ...

Investment – managed funds – adviser’s obligation to determine risk profile – advice on risk – outdated information – failure to keep customer informed of market events

In September 2000 Mr O invested approximately \$100,000 in five managed equity funds through his bank. At the end of six months, dissatisfied with the performance of the investments, whose value had dropped by over \$15,000, he withdrew the investments from the bank’s management. He sold two of them and took over management of the remaining three. The three investments never returned to their original value.

Mr O believed he was wrongly advised by the bank. Given the sharp decline in the value of the funds after September 2000, he believed that he was badly advised when he invested his money and was sold products which were overpriced. He sought compensation for loss of income and capital.

It was reasonably easy to establish that the investments were suitable for Mr O’s 10 year investment timeframe, were suitably diversified and were managed by reputable fund managers. It was not so easy to establish whether his risk tolerance had been accurately assessed.

Because of the passage of time, documents about the process for assessing Mr O’s risk profile were no longer available. There was conflict between the adviser’s recollection of Mr O as an aggressive investor, and Mr O’s own assessment of himself as more risk averse. However, it seemed clear from Mr O’s immediate reaction to the events of September 2000 that he was not prepared for, or willing to accept, a sharp downturn. This suggested that, while he may have been an enthusiastic investor, he was not an aggressive investor and there may have been some deficiencies in the assessment carried out by the adviser. An accurate assessment could well have determined that the risk of capital depreciation, inherent in any investment in the equities market, was not a risk Mr O was prepared to tolerate.

It also seemed likely that the risks of the investment had not been clearly explained, and in particular Mr O had not been advised that, if an adverse market event occurs soon after an investment is made, it is quite possible that its value will drop below that of the original investment.

I considered Mr O’s claims that the market was overpriced when he made the investment, and that the information he relied on was out of date. The information available to him was dated April 2000, but the investment was made in September 2000. While there was no evidence that the availability of later information would have been likely to impact on Mr O’s choice of investments, and no one could have predicted the extent of the downturn that followed, Mr O should have been given more up-to-date information on which to base an informed decision about investment.

Similarly, in the six months after Mr O made the investment, he could have expected the bank to keep him informed about any significant events, such as the downturn that occurred. It did not do this. The bank acknowledged the inadequacy of its information and offered to refund the management fee.

I concluded that Mr O would not have made the investment if he had been fully informed about the risks of the investment and the current state of the market. I recommended the bank should pay him the difference between the cost of the two investments purchased in September 2000 and the amount realised when these investments were sold in August 2001, together with the management fee. The bank could not, however, be held responsible for the performance of Mr O’s portfolio after he decided to remove the investments from its control. Both parties accepted my recommendation.

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Mrs S complained that the bank had pressured her into joining the KiwiSaver scheme and had given her incorrect and inadequate information about the scheme.

Complainant opted in to KiwiSaver – unable to withdraw from scheme – bank failed to advise that KiwiSaver members cannot opt out – compensation for inconvenience

In March 2008 Mrs S visited her bank. During her visit, Mrs S met with a personal account manager to discuss the bank’s KiwiSaver scheme.

At the meeting, Mrs S partially completed and signed a KiwiSaver enrolment form. She also signed a direct debit authority, which allowed the bank to debit her fortnightly contributions to the scheme from her business account.

Mrs S was unable to give the bank her IRD number at the meeting. For this reason, the bank held both the enrolment form and the direct debit authority pending receipt of the IRD number.

Mrs S gave the bank her IRD number ten days later. The bank then processed her KiwiSaver enrolment form and loaded her direct debit authority.

Several weeks later, Mrs S contacted the bank to advise that she wanted to opt out of the KiwiSaver scheme and cancel the direct debit.

Mrs S contacted the bank again the following day to check that her request had been actioned. The bank confirmed that the direct debit had been cancelled, but told her that she could not legally opt out of KiwiSaver.

Mrs S then complained to my office. She said that:

- the bank had pressured her into joining the KiwiSaver scheme
- the bank had misled her by giving her incorrect and inadequate information about the KiwiSaver scheme.

After investigation, I concluded that:

- the bank did not pressure Mrs S into joining its KiwiSaver scheme. There was no evidence that she was rushed into joining the scheme at the meeting. In addition, Mrs S had time to reconsider her decision to join the scheme between the meeting and the time she gave the bank her IRD number
- the bank probably failed to tell Mrs S that she would not be able to opt out of the scheme once she had joined
- the bank’s failure to tell Mrs S that she would not be able to opt out of the scheme caused her stress and inconvenience.

My formal recommendation was that the bank should pay Mrs S the sum of \$500 compensation for inconvenience. My recommendation was accepted by both parties.

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Miss J approached the bank to say that she wanted to opt out of the KiwiSaver scheme, but was told that she could not exit the scheme because she had become a member by opting in.

Complainant unknowingly opted in to KiwiSaver – unable to withdraw from Kiwisaver scheme – compensation for inconvenience

In April 2008, Miss J met with a bank officer to update her insurance policy details. During their meeting, the bank officer discussed the bank's KiwiSaver scheme with her. Before she left the meeting, Miss J completed and signed a KiwiSaver enrolment form.

According to Miss J, the bank officer told her that she would not become a member of the KiwiSaver scheme until her employer had completed the relevant form. She said that the bank officer gave her a copy of the relevant form to take away with her.

A month later, Miss J approached the bank to say that she wanted to opt out of the KiwiSaver scheme, but was told that she could not exit the scheme because she had become a member by opting in.

Miss J complained to the bank that she had been given incorrect and inadequate information about the KiwiSaver scheme. The bank disagreed with her account of events, but offered to pay her \$1,000 compensation for stress and inconvenience. Miss J did not accept the bank's offer and complained to my office.

After the complaint was taken up by my office, the bank made a new offer of \$2,000. Miss J and the bank agreed to settle Miss J's complaint for a payment of \$2,000 and a written apology from the bank.

Miss J complained to the bank that she had been given incorrect and inadequate information about the KiwiSaver scheme.

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On the understanding that their entitlement to superannuation would not be adversely affected, Mr A and Ms B broke the term deposit and invested the money as suggested by the bank.

Investment advice – New Zealand Superannuation entitlement – inheritance – advice on investing in superannuation scheme – effect of Kiwisaver investment – deprivation of income – abatement of superannuation – bank entitled to rely on WINZ advice

Mr A receives New Zealand Superannuation. His partner, Ms B, was not eligible for superannuation. Mr A had opted to receive superannuation at the rate for a married couple, and a benefit income test applies to this option. For every dollar of income over \$4,160 that Mr A and Ms B receive each year, his superannuation is reduced by 70 cents.

In August 2006, Ms B inherited money which she placed on term deposit for five years.

When the Kiwisaver scheme was established, Mr A contacted WINZ. WINZ advised him that an investment in Kiwisaver would not affect his superannuation entitlement.

In October 2007, Mr A and Ms B discussed their investment requirements with their bank with a view to investment in the bank's Kiwisaver scheme. The bank recommended that Mr A and Ms B reinvest the money in another superannuation fund that it administered, because Ms B would be able to access her money from age 55. Under the rules of Kiwisaver, an investor cannot access the scheme's funds until the age of 65. The bank confirmed that otherwise the same rules applied to both Kiwisaver and the bank's recommended superannuation fund.

On the understanding that their entitlement to superannuation would not be adversely affected, Mr A and Ms B broke the term deposit and invested the money as suggested by the bank.

The bank then paid the interest earned on the term deposit into Mr A and Ms B's account. As the interest payment was over \$4,160, Mr A discussed it with WINZ. WINZ advised Mr A that the interest payment would not affect his superannuation if the

money was reinvested immediately. On this advice, Mr A added the interest payment to the investment.

At his annual review with WINZ in November 2007, Mr A was told that the information WINZ had given him was wrong and that the interest payment would be taken into account as part of his annual income. As a result, his NZ superannuation was reduced.

WINZ then also decided that Mr A's investment in the bank's superannuation fund was deprivation of income under the Social Security Act 1984. As a result, Mr A's superannuation has since been abated to take into account the estimated income from the funds invested in the bank's superannuation fund.

Mr A complained to my office that he was given misleading advice by the bank when he enquired about investment in its superannuation fund.

After investigation, I found that:

- the reduction in Mr A's income was the result of the advice given to him by WINZ, not the bank. Mr A told the bank that he had consulted with WINZ and had been advised that an investment with Kiwisaver would not affect his entitlement to superannuation
- it was not unreasonable for the bank to rely on the advice WINZ gave to Mr A.

Mr A reluctantly accepted my proposed recommendation that he withdraw the complaint.



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