



# NEWSLETTER

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## More about investment complaints

The first half of 2003 has seen a continuation of the 2002 influx of complaints about investment advice and investment products. I currently have 37 such disputes under investigation, and they make up 16% of my total caseload. Before mid 2001, it was unusual to have more than two or three investment complaints under investigation at any one time, and they usually made up less than 1% of the total caseload.

It is stating the obvious to say that the recent poor returns on many managed funds lies behind the high level of complaints. It is also fair to say that in some cases the complaint is little more than an expression of the customer's disappointment and there is no evidence to support a finding of any failure on the part of the bank. In a substantial number of cases, however, it is clear that customers did not understand the nature of their investment and believe that their banks either misrepresented the risks or recommended them to put their funds into an investment that was not suited to their needs.

The fact that a customer does not understand an investment is not of itself proof of misleading advice on the part of the adviser who recommended it. In some of the cases that have come to me, the assumptions underlying the complainant's beliefs about the investment were quite bizarre and so far from reality that they are unlikely to have been identifiable to an adviser. However, there are some common (but false) assumptions of which advisers should be aware, such as the assumption that an investment in managed funds offered by a bank is somehow different from and more reliable than a similar investment made through another type of institution, and the very common assumption that references to variations in the value of an investment relate to returns on the investment and not to the original sum invested.

If an inexperienced investor is to understand the main features of an investment in managed funds, several unfamiliar concepts may have to be assimilated. In some cases the investor has made the decision to invest after a single meeting with the investment adviser and in reliance on the information and explanations given at that meeting. The customer is usually given the printed material to take away and read, but assumes that it confirms or repeats the information given by the adviser and either reads it in that context or fails to read it at all. If the investor is to make a fully informed decision and needs to consider the printed material to be fully informed, then it is important that he or she has the opportunity to read and digest that material at leisure before making the investment decision.

## Credit card chargebacks

Chargeback is a process whereby a card-issuing bank may exercise rights under its agreement with an international card-operating organisation (usually Visa or MasterCard) and reverse a card transaction. The process is subject to strict rules, especially as regards time frames and the documentation to be supplied, and a failure to comply with the rules will mean that the chargeback fails.

A transaction is usually charged back because the cardholder claims that he or she did not authorise it and if fraud is involved, this often means that the merchant who provided goods or services to the offender is left to carry the loss. Case 1 illustrates this point, and also highlights one of the differences between card transactions that take place face-to-face when the merchant has the opportunity to see the card and the customer, and transactions made by telephone, mail order and Internet.

If the cardholder has authorised the transaction and received the goods or services, then chargeback rights are very limited (Case 2).

It is generally accepted to be good banking practice for a bank to exercise any chargeback rights it may have when its customer disputes a transaction and to credit the customer's account with any funds received if the chargeback is successful.

The chargeback process is part of the relationship between the card-issuing bank and the international organisation and does not by itself confer any rights on the bank's customer. The customer's rights and obligations are found in his or her contract with the bank, usually in the standard terms and conditions on which the bank issues credit cards.

Unless the terms of the customer's contract with the bank are identical to the chargeback rules of the relevant international organisation, there may be circumstances in which a bank has an obligation to credit the customer's account with the value of a disputed transaction even though it is unable to charge the transaction back through the international system. This is most likely to occur when the conditions on which the card was issued do not require the customer to observe the time constraints of the international rules.

#### Case 1

A customer phoned Mr F's shop and arranged to buy a stereo worth \$8000. Mr F says the customer provided him with his credit card number and asked if Mr F could make sure there was enough credit in the account to cover the purchase. The customer said he would visit the shop later that day to collect the stereo. Mr F entered the credit card details manually into his Eftpos machine. The transaction was accepted and a receipt was issued.

Two hours later, the customer visited the shop with the credit card. The customer signed the receipt produced earlier by the Eftpos machine, and two staff members checked the signature on the receipt against the signature on the card.

Two weeks later, Mr F received a visit from the Police who advised that the customer had used a stolen credit card to buy the stereo. The credit card had been stolen from a mailbox, and the offender had signed the back of the card.

The bank advised Mr F that he was liable for the transaction as the cardholder had not authorised the transaction. The transaction was charged back to Mr F's account.

Mr F lodged a complaint with my office stating that the bank acted incorrectly in charging back the transaction.

The issue raised was whether the transaction was a "*card present*" transaction made in the presence of the person purporting to be the cardholder or a "*card not present*" transaction made by telephone. If the transaction was a "*card not present*" transaction not authorised by the cardholder, Mr F would be liable as the merchant credit card agreement placed liability for such transactions on the merchant.

Mr F said the transaction was a "*card present*" transaction as the customer came into the shop and presented the card. The bank said it was a "*card not present*"

transaction which occurred when the details were processed electronically through the Eftpos system.

I found that the transaction was a “*card not present*” transaction. The merchant operating guide indicated that for a valid electronic “*card present*” transaction to occur, the card must be present during the processing of the transaction through the Eftpos terminal. The requirements for a valid electronic “*card present*” transaction were: (a) verification by the merchant of the identity of the cardholder by seeing the PIN entered into the terminal or comparing the signature on the transaction record to that of the card, (b) the terminal printing all the details of the sale, and (c) confirmation by the terminal of acceptance of the transaction. The verification of the identity of the cardholder must occur at the

time the transaction is processed through the Eftpos terminal, and not at a later time.

The merchant operating guide indicated that the time of a sale is the time the cardholder authorises the transaction. The time of the sale in this case was recorded on the Eftpos receipt as just after the phone call from the fraudster to the shop, and not several hours later when the fraudster visited the shop. Mr F had also written ‘phone order’ underneath the printed sentence on the voucher ‘Accept with sig.’

I found that in terms of the merchant credit card agreement and merchant operating guide, Mr F was not entitled to a charge back of the transaction. I therefore recommended Mr F withdraw the complaint.

## Case 2

Mr Q agreed to buy a kitset house from an overseas supplier. He was told that the kitset was an existing unit, immediately available and offered at a special price. Using his credit card, he paid a deposit of \$7,500, representing about 20% of the final purchase price.

Some two months later, Mr Q found out that the kitset the company intended to ship to him had not yet been manufactured and the price he was charged was the standard price. He told the company that he wished to cancel the transaction. When the company refused, he succeeded in obtaining an order from the Disputes Tribunal for the refund of his deposit. Shortly afterwards, however, the company went into liquidation, and he was unsuccessful in enforcing the order.

In the meantime Mr Q asked his bank to cancel or charge back the credit card transaction by which he had paid the deposit on the house.

The bank told Mr Q that it was unable to stop or charge back the transaction. It said that the matter in dispute was the quality of the goods and/or services supplied and

that such a dispute was for resolution between the customer and the merchant.

Mr Q remained of the view that the bank should cancel or charge back the transaction and eventually complained to me that it had failed to do so.

I found the terms on which the credit card had been issued made it quite clear that a credit card transaction cannot be cancelled once it has been processed. It was also made clear that complaints about the quality of goods or services purchased using the card must be resolved with the merchant. It was noted that in limited circumstances if the goods or services had not been received and the dispute could not be resolved with the merchant the bank may be entitled to charge back the transaction and provide the account holder with a refund.

The only charge back right which the bank could have exercised in this case was the right to charge back transactions when a cardholder returns merchandise or cancels services that do not match those described on the transaction receipt or other documentation presented at the time of

purchase. There was certainly evidence in Mr Q's case that the description of the goods had been somewhat misleading, but it could not said that Mr Q had returned the goods to the supplier. He had never received them. There is a charge back right in the case of non-receipt of merchandise but it cannot be exercised in circumstances where a charge back is sought for a deposit paid on a purchase

and the balance has not been authorised for payment by the credit card or paid by any other means.

Having found that the credit card payment could not be cancelled and that the bank had no charge back rights that it could reasonably exercise, I concluded that the complaint ought to be withdrawn.

## Getting a complaint to the Banking Ombudsman

I have seen some complaint correspondence recently where a complainant has been referred by my office to a bank because the complaint had not been considered through the bank's internal complaints process, and the bank has then made an offer of settlement without making it clear that if the complainant rejects the offer, he or she is entitled to ask me to investigate the complaint.

It cannot be assumed that because a complainant is aware of the existence of the Banking Ombudsman, he or she is also aware of the circumstances in which the Banking Ombudsman will investigate a complaint.

When my staff refer a complainant to a bank, they advise that the complaint must be considered through the bank's internal complaints process and that if it remains unresolved then the Banking Ombudsman will investigate. While this is adequate for most complainants, we have had cases where a complainant does not understand that he or she is not obliged to accept a bank's offer of settlement, or is under a misapprehension as to the process once the complaint has been considered by the bank's internal complaints process. In one case, for example, the bank considered the complaint through its internal complaints process and rejected the complainant's claim without telling her that she was now entitled to refer the complaint back to the Banking Ombudsman. The complainant assumed that because the complaint had been referred to the bank by my office in the first place, the bank would refer it back to me, and waited for my staff to contact her.

While a complaint is under consideration by a bank's internal complaints process, all correspondence to the complainant should clearly state the next step in the process. If a bank requires more information before it can consider the complaint properly, it should tell the customer that it will consider the complaint further once the information has been supplied. If the bank has made an offer but is prepared to negotiate further, it should tell the customer to contact it again if the offer is not considered satisfactory. If the offer is the bank's final offer, or if the customers claim is rejected, it should make it plain that the customer is now entitled to ask the Banking Ombudsman to investigate the complaint.

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