

Biúró an Ombudsman um
Sheirbhísí Airgeadais



Financial Services
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Complaints Findings in Credit Institutions Sector*

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Financial Services Ombudsman

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****(Banks, Credit Unions, Stockbrokers and Investment Intermediaries/Brokers)***

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Credit Union's worthless investment of €1m merits €500,000 award but Union and Investment broker severely criticised

A credit union acting on the advice of an investment broker invested €1,000,000 in a *'wrapped around'* Insurance Bond. The investment turned out to be a disaster and as a result the credit union lost €1,000,000 of its members' money.

The credit union sought to be reimbursed by the broker on the grounds that they would never have bought the Bond had they known that there was a risk of losing the capital. The investment committee stated *'it never occurred to us as being remotely possible that a substantial or total loss of capital would result from the investment'*. The investment committee comprised the Chairperson, the Treasurer and the full time manager.

The broker on the other hand maintained in response to the Ombudsman's enquiries that the nature of the investment and the risk to capital involved had been fully explained to the credit union's investment committee during a meeting. The evidence was that this meeting lasted between 15 and 30 minutes at most.

Since it was clear that there was a conflict of evidence involving an issue of fact in dispute between the parties it was, in the opinion of the Ombudsman, a matter which could not be fairly resolved without hearing the oral evidence of the parties. Accordingly, the Ombudsman directed that an Oral Hearing, chaired by him, should be held. The purpose of the Oral Hearing was to establish the truth of what was said between the broker and the members of the investment committee at the meeting which led to the decision to invest in this Bond. Having had the benefit of the oral evidence given under oath by each of the parties, cross-examinations by counsel on behalf of the broker and by a representative on behalf of the credit union, as well as having reviewed the documentary evidence, the Ombudsman issued his finding.

The Ombudsman found that the broker had failed to advise the credit union of the risk of the possibility of total loss of capital; that its presentation to the credit union had been inadequate; that its own research into the Bond it was selling had not been thorough; had failed to point out to the credit union that the Bond was outside the ordinary type of investments that were typically made by the credit union; that the credit union was wrongly led to believe that the Bond was an altogether safer form of investment than was in fact the case. Although the broker in good faith regarded the Bond as low risk, the true nature of that risk should have been cogently pointed out to the credit union, given the credit union's investment philosophy as well as the fact that two members of the investment committee were not in the remotest sense experienced in investment matters.

The Ombudsman accepted that the broker acted in good faith in believing that this Bond would be a successful investment and in believing that it was relatively low risk. He found that the broker was not negligent or otherwise in breach of duty in describing the investment as *'low risk'* despite the subsequent disaster. However the Ombudsman concluded that the broker had breached its duty of care to the credit union in recommending this Bond

because it should have been made known to the credit union that the Bond provided no security of capital whatsoever, a fact which should have been explained clearly, but was not, particularly having regard to the importance that the credit union attached to security of capital before making any investment. The broker should also have been conscious that as the investment committee members placed their utmost faith in him and in the main were not financial or investment experts it behoved the broker to be clear and detailed on the risks involved so that there was no doubt whatever as to what was being invested in.

On the other hand, having heard and reviewed all the evidence, the Ombudsman came to the conclusion that the credit union's investment committee could not absolve itself from the disaster which occurred. It transpired that the application form and brochure were left with the investment committee by the broker at the conclusion of the short meeting and presentation. After the broker left the investment committee decided there and then to invest in the Bond. However, all three members of the committee admitted under oath, when specifically questioned by the Ombudsman, that they, in effect, '*blindly signed*' the application form and did not even read the brochure, or indeed the conditions under which they were investing €1million of members' monies. One of the conditions included a warning that the investment could be worthless. In effect the investment committee placed complete faith in the broker's advice and did not exercise their own necessary duty of care when investing members' funds.

The Ombudsman was not impressed, to say the least, with the actions of both the credit union's investment committee and the broker which led to the loss of €1,000,000 of members' funds. The Ombudsman is on public record on numerous occasions about the importance of everybody reading over a document and fully understanding it before signing it, but above all for sales personnel to be clear and precise on all issues when they are advising any person who is going to invest. In the circumstances, he considered that the credit union and the broker must each bear a proportion of the loss. The Ombudsman assessed that proportion at 50% and accordingly he directed that the sum of €500,000 be refunded to the credit union by the broker. In addition, he directed the broker to refund to the credit union all fees and commissions which had been paid in respect of the purchase of the Bond.

The Ombudsman has also drawn this matter to the attention of the Registrar of Credit Unions in the Financial Regulator's office as he is concerned that if this is how Credit Unions in general and brokers advising them are operating it exposes the funds of members of Credit Unions to a degree of unacceptable risk which cannot be countenanced in any financial services organisation entrusted with members' money.

Both parties have appealed the Ombudsman's finding to the High Court.

€70,000 compensation for bad investment advice loss of €110,000

Arising from the proceeds of a sale of a house, a couple who had a lump sum of €135,000 available, looked for advice at a meeting in the office of an investment broker. As a result of this meeting, the Complainants invested €110,000 in a five year insurance *'wrap around'* investment Bond. The investment in question was a complete failure and the Complainants lost the entirety of their investment. The Complainants said that they had made it clear to the broker that what they wanted was a low risk investment. The broker agreed that it had categorised the Complainants as *'low risk'* investors but that the Complainants had said they would accept some risk.

The Ombudsman found that the Complainants knew there was some risk that their capital was not 100% guaranteed and that they were attracted to this particular Bond because of the attractive dividends promised. In fairness to the broker, the Ombudsman was satisfied that it had, in good faith, regarded the Bond as low risk based on what had been told to it by the Bond issuer. However, the Ombudsman said that as financial advisor, the broker was obliged to do more than merely accept at face value the representations of those with a commercial interest in marketing this Bond.

Furthermore, the Ombudsman found that the *'reasons why'* letter drawn up by the broker to be flawed. The letter noted that the Complainants' requirements would be met by lodging €24,000 in a deposit account and recommended that €111,000 be placed in the Bond which it described as *'a secure investment'*. In the reasons why letter to the Complainants, the broker said *'the Bond is simple, straightforward and transparent in how it works. While it is not 100% risk-free several major financial houses would have to default before the Bond would be in danger ... therefore it is extremely unlikely that there is any issue with your capital investment'*. The Ombudsman considered the foregoing passage from the reasons why letter to be extraordinary in that it totally understated the level of risk associated with this Bond, and that it was imprudent and ill-advised of the broker to present the Complainants with a risk analysis couched in this language. It amounted to a breach of duty of care.

In general the Ombudsman considered that the evidence disclosed in the case established a failure by the broker to discharge its professional duty and failed to deliver the level of professional service that the Complainants were reasonably entitled to expect. In deciding on a remedy the Ombudsman considered that while the broker should pay financial compensation to the Complainants, nevertheless the evidence showed that the Complainants knew that the Bond in question was not 100% guaranteed and therefore must be considered to have accepted a degree of risk. In the circumstances the Ombudsman directed the broker to pay compensation to the Complainants in the sum of €70,000.

The broker has appealed the Ombudsman's finding to the High Court.

€1m investment in bond was worthless but complaint not upheld

A man who sold land and buildings for €2,700,000 sought investment advice from an investment intermediary. As a result of the advice, he invested €1,000,000 in a Bond. He lost the entirety of his investment when the Bond in question became worthless. He brought a complaint to the Ombudsman to have his investment restored to him on the grounds that he had been misled by the intermediary as to the true nature of the Bond and that, in effect, the Bond had been miss-sold.

The Ombudsman's investigation revealed that prior to engaging with the intermediary two banks had already furnished proposals to the complainant which involved an investment in managed funds. The complainant was not happy with these proposals and he wished the intermediary to look at other options to provide his income requirements. The Complainant had told the intermediary that he wanted to have an annual income from the investment of approximately €80,000 over a 5-7 year period and that the capital sum be returned to him on maturity. The Ombudsman was satisfied on the evidence that during the discussions with the complainant, the intermediary had stated clearly that it would not be possible to achieve this objective by simply investing the money in traditional deposit-type accounts and that it would be necessary to explore other options. In the event, the intermediary recommended that 63% of the Complainant's funds be invested in high yielding deposit accounts with another bank and that the remaining 37% be invested in an insurance type investment Bond.

The intermediary suggested the fatal Investment Bond to the Complainant and provided him with a copy of the brochure in respect of it. The Ombudsman found as a fact that the Complainant knew that there was an element of risk to his investment in this particular Bond. However, the Complainant insisted that he was never properly advised as to the nature of the risk attaching to the Bond. Nevertheless, the Ombudsman noted that in the application form (which was completed by the Complainant) he acknowledged and understood '*that there is a risk that the price of the fund falls to zero and hence I receive nothing back*'. On the other hand, the intermediary included a statement which said '*the Bond offers investors a return of their invested capital after seven years*'. The Complainant alleged that the intermediary was negligent in recommending that over a third of his €2,700,000 capital was to be invested in this particular Bond.

The Ombudsman said it was understandable that the Complainant should feel aggrieved about the entire loss of his investment. The investment had been an unmitigated disaster. But the question for the Ombudsman was whether the evidence in the case established a breach of duty of care on the part of the intermediary in giving the overall investment advice? The Ombudsman noted that the Complainant had elected of his own volition to invest in a product that he knew had some risk which he had freely chosen to accept while also investing in high yielding deposit accounts. Having considered all the evidence, the Ombudsman found that this was not a case of mis-selling of an investment product as the Complainant knew and signed up to an element of risk even, however remote the possibility, a risk of total loss. While in retrospect the investment advice turned out in the end to have been very bad

advice indeed, with disastrous consequences for the investor, nevertheless the evidence taken as a whole did not show negligence or breach of duty on the part of the investment intermediary.

€7,500 lost from old age pensioner's bank account by fraudulent ATM withdrawals

An old age pensioner opened a deposit account with a bank and placed her life savings of €7,500 in the account. She stated in evidence that although she said she did not want one, the bank official dealing with her lodgement insisted that she must take an ATM Card. A PIN was subsequently sent to her in the post and she put it with the ATM Card. Six months later her Card was stolen. Subsequently over a period of eleven days €700 a day was withdrawn from her account until the account was empty. The bank refused to accept any responsibility for the loss because it had not been notified that the Card had been stolen.

In arriving at his Findings, the Ombudsman accepted that the Complainant did not want a Card, had never used it and had made no transactions on the account since it was opened. A bank's primary duty is to protect depositors' money. The Ombudsman took the view that the sudden pattern of withdrawals should have alerted the bank that something was wrong. The bank's system did not pick up on this, no enquiries were made and the withdrawals continued day after day until the money was gone.

The Ombudsman held that the bank could not be found to be at fault for the fraudulent withdrawals on the first two days but should be held liable for the subsequent withdrawals and he directed that the bank credit the customer's account with the sum of €6,100.

The account opening and fraudulent withdrawals in this case occurred in 2006 but the complaint was not made to the Ombudsman until 2008. The Ombudsman, after making findings in 2006/7 on similar type complaints, had raised with banks in 2007 his concerns about protection for elderly and vulnerable depositors and he requested them to put in place fraud preventative measures. He welcomes the fact that these have or are being put in place as this complaint clearly indicates the need for these improved measures to be not alone in place but above all to be operating effectively.

Overdraft facility not requested by person receiving 'Social Welfare' benefit

A bank customer who was on weekly 'Social Welfare' benefit of €185 got into debt which he claimed was as a result of getting an overdraft facility of €1,000 which he did not request and that his Social Welfare benefits had been wrongfully appropriated by the bank to repay the debt on the overdraft. In the course of the investigation the bank acknowledged that it had been unable to locate any application for the overdraft facility but insisted that an overdraft would not have been set up on the account without an instruction from a customer.

Nevertheless, the fact was that overdraft facilities had been put in place and while the Ombudsman acknowledged that the Complainant had drawn down the money and made use of it, the fact remained that he had been given a credit facility which he had not applied for and had got into debt as a result.

In apportioning blame, the Ombudsman held that the bank was 60% responsible for what had happened and he therefore directed that the bank should write off 60% of the outstanding debit balance (€600) on the account.

Incorrect bogus non resident account notification which led to a subsequent tax settlement of €200,000 merits only €12,500 award

A couple, whose names were submitted by the bank to the Revenue Commissioners (pursuant to Section 908 of the Taxes Consolidation Act 1997) as bogus non-resident account holders, complained to the Ombudsman that they had no such account. They further complained that as a result of the bank's notification, a Revenue investigation followed which found that there was a liability to income tax on the part of the Complainants which liability was discharged in settlement with Revenue of €200,000 and the Complainants' names were also published in the Defaulters' List.

The Complainants sought a refund of the €200,000 and compensation from the bank as a result of public humiliation being suffered after being named in Revenue's defaulters list. They claimed that the false information about the bogus non-resident account was the cause of the Revenue enquiries which resulted in €200,000 having to be paid over to the Revenue in arrears and penalties.

The Ombudsman found as a matter of fact that the Complainants had never had a bogus non-resident account and that the bank had been negligent and in breach of duty to its customers in supplying this incorrect information and that the customers should be compensated for this lapse.

However, the Ombudsman did not consider that the amount of compensation in the case should be pitched at a level that would be sufficient to reflect the extent of the distress that had been experienced by the Complainants in being publicly named as tax defaulters or the loss of €200,000 in tax arrears. An important point in this case was that the Complainants had a substantial undisclosed liability to the Revenue Commissioners which was not caused by any breach of duty on the part of the bank. Rather it was caused by failure and irregularities in the Complainants' own tax affairs.

As a matter of public policy the Ombudsman expressed again his publicly stated view that in assessing a fair level of compensation he will not compensate anyone for tax unpaid, concealed or understated and/or for any distress caused by being published in Revenue's defaulters list.

He directed that €12,500 compensation instead should be paid by the bank for negligently naming the Complainants as bogus non-resident account holders

when this was not in fact the case and especially for the way the Bank dealt with the matter over a lengthy period after the customers raised the issue.

Lost house title deeds merits €47,000 compensation and €20, 000 in legal fees

A boundary dispute arising between neighbours in 1989 led to the Complainants finding out that they were at a grave disadvantage in the dispute. This was because when they sought sight of the Deeds of their mortgaged property to help their case, the bank which was holding the Deeds could not find them. In fact the bank had lost them. As a result, the Complainants became involved in what they accurately described as ‘*an ongoing saga*’ with the bank, extending over a period of 20 years and ending only when the Deeds in question were found by the bank in 2008. It appears that when the branch concerned was undergoing extensive refurbishment the missing Deeds were located behind filing cabinets.

The Ombudsman felt that the manner of the finding of the Deeds itself cast a measure of doubt over the adequacy of a bank’s efforts over 20 years to effectively and thoroughly search for the said Deeds to treat the matter with the urgency that it undoubtedly deserved.

The matter was made worse in the Ombudsman’s view because, in a letter to the Complainants as late as February 2007, the bank told the complainants that the bank did not have the Deeds and that the branch in question had never received them in the first place. The Ombudsman felt that perhaps the only satisfactory feature of this sorry episode was that the Deeds had now been located, the bank accepted full responsibility for what happened and apologised to the Complainants in writing from Head Office.

There can be few more serious issues to homeowners than an inability to prove legal ownership of their property whenever it becomes necessary to do so. It was abundantly clear that the Complainants had spent considerable time, energy and money in attempting to locate their original documents and extricate themselves from this nightmare. The Ombudsman was satisfied that the lamentable facts of the case disclosed a grave breach of duty on the part of the bank, which breach of duty entitled the Complainants to substantial compensation because of the consequences for them over a period of 20 years.

In arriving at a measure of compensation the Ombudsman took into account that legal fees, in the amount of €20,000, incurred by the Complainants in trying to get the matter rectified had been paid by the bank since the case was brought to the notice of his office. There were further small legal costs incurred since then and the Ombudsman directed that the bank should also meet those costs.

Finally the Ombudsman directed that a further €30,000 in compensation as well as paying off a loan of €17,000 taken out in 2000 to redeem their mortgage should be paid to the Complainants. This was to take account of the loss, inconvenience and distress which they had undoubtedly suffered over a period of 20 years arising from the bank’s negligence in the matter.

€60, 000 losses on CFD stock broking account not upheld

An investor who opened a Contract for Difference (CDF) account with a firm of stockbrokers lost approximately €60,000 in 36 transactions over a period of fifteen months. He brought a case to the Ombudsman claiming that the losses were due to bad advice and miss-management of his account by the firm of the stockbrokers.

The Ombudsman was satisfied from his investigations that all 36 transactions complained of were undertaken on the Complainant's behalf based on pre-trade consultation in each case with the Complainant, and the ultimate decision on whether to buy, sell or hold the stock rested at all times with the Complainant and the stockbrokers acted only on his instructions in each case. The Ombudsman found that the portfolio was diversified across various sectors and was exposed to well regarded stocks. A stockbroker may recommend shares to a client and those shares may fall sharply in value but this does not necessarily establish negligence or breach of duty on the part of the stockbroker. In this particular case the Complainant chose to sell his stock himself when the losses had mounted up. However, the Ombudsman noted that even at the time that the Complainant finally exited his positions the stockbroker was of the view that there was value in those particular stocks. Indeed the stockbroker had price targets for these stocks that were well above the levels at which the Complainant chose to exit his positions by selling these stocks. The evidence did not establish that there was any failure by the stockbroker in the overall management of the Complainant's account.

In the Ombudsman's opinion it is abundantly clear that in certain instances stockbrokers may be liable to compensate their clients for trading losses which occurred if negligence is found. However, the threshold of liability is relatively high. There must be cogent evidence to demonstrate failure to discharge an acceptable level of professional service. The mere fact that shares which were recommended later fell in value is not evidence of a breach of duty.

In this case the Complainant incurred significant losses through CFD trading but this is a risky kind of trading and the Ombudsman was satisfied on the evidence that the Complainant was fully aware of the risks involved. On the totality of the evidence the Ombudsman found no negligence on the stockbroker's part, or that it failed to provide an acceptable level of professional service to the Complainant in this case and the complaint was rejected.

€1,850 repaid for €4,300 of credit and debit card transactions in a foreign nightclub

The Ombudsman receives a growing number of complaints following transactions on credit cards occurring when people are in nightclubs and especially overseas. Customers have a responsibility to be protective of their cards and PIN numbers but providers must also have appropriate fraud preventative measures in place. Each complaint is considered on its individual merit by the Ombudsman with many being rejected.

A night out on the town while on a business trip to Brussels had an unforeseen consequence for a Cardholder when he received his Credit Card and Debit Card statements at the end of the month. The Cardholder had been to a nightclub in Brussels and stated that he had *'a few beers and paid for two dances at the club at €50 each'*. He got an unpleasant surprise when he received his Credit Card statement as it showed payments on the premises of €2,550 and on his Debit Card deductions were shown at €1,750, the night therefore costing him €4,300. He claimed he was the victim of a Credit Card fraud and that the bank should be responsible for the loss.

The bank stated that the Complainant was responsible for the loss because he must have revealed his PIN numbers to the fraudsters who used his own Cards in combination with these PIN numbers to carry out the fraudulent transactions. Furthermore, the bank did not accept that the Complainant's PIN numbers were fraudulently copied but rather were negligently revealed by himself, the bank pointing to the fact that there were no unsuccessful PIN attempts in or around the disputed transactions.

The Ombudsman's investigations revealed that the bank was correct in stating that each of the disputed transactions was carried out by way of a Chip & PIN transaction. The evidence also strongly suggested that for a period of time the Complainant's Cards were not in his possession (the Complainant himself believed that his wallet was stolen from him and subsequently replaced) and his statement to the Belgian police bore this out.

A review of the audit trail revealed that all the transactions were made during the timeframe while the Complainant was in the nightclub. The audit trail also revealed that two Credit Card transactions for €50 each took place at 02:75 and 03:16. A transaction for €2,350 took place at 03:28. In respect of the Debit Card, a transaction of €450 took place at 02:37 and two fraudulent transactions for €850 each took place at 02:48 and 03:21. The question which the Ombudsman had to consider was whether the fraud detection system should have intervened sooner to prevent the transaction of €2,350 which came only 12 minutes after the second €50? It was a significant amount of money to be spent at 3:28 a.m. in such a location and was also inconsistent with the small amounts of the previous transactions.

The Ombudsman felt that clearly a balance must be drawn between a system which protects customers on the one hand, and which, on the other hand allows them the use of their Credit Card without undue inconvenience. Taking this consideration into account and finding that there were circumstances in these particular transactions which ought to have given cause for alarm and fraud preventative measures to commence, the Ombudsman felt that the bank should refund a portion of the transactions.

The Ombudsman directed the bank to refund €1,850 in total - €850 in respect of the Debit Card transactions and €1,000 in respect of the Credit Card transactions. The complainant's rather expensive night out cost him €2,450.

Review of transcript of phone call regarding unauthorised credit card transactions of €6,700 while on honeymoon results in full refund

A Credit Cardholder who went on honeymoon to South Africa discovered on his return that the honeymoon had cost him €6,700 more than he had bargained for. This was because his Card had been debited with a number of transactions which he claimed he did not incur or authorise.

It turned out that the bank's fraud detection system had identified transactions taking place in South Africa that were unusual when compared with the Complainant's previous pattern of spending, furthermore the transactions in question were carried out in a region where the bank had previously experienced fraud. The next day a security watch was placed on the account until the bank could verify the transactions with the Complainant. The Complainant telephoned the bank the next day complaining that he was having some difficulty negotiating with his Card. The bank explained that a security watch had been placed on his Card pending confirmation of transactions. The bank stated that during the call the Complainant stated 'yes' after each transaction was mentioned, thereby indicating that the transactions were indeed his own. The Complainant refuted this. Clearly this telephone call was of pivotal importance in resolving this dispute.

The Ombudsman, in the course of his investigation, obtained a transcript of the said telephone call. The operator went through approximately 12 cash withdrawal transactions with the Complainant and at no time during the said telephone call did the Complainant clearly state that these transactions were not his. The Complainant said in evidence that the operator was confusing and was talking about transactions in Euro which he did not recognise. The Ombudsman accepted that the operator in question would only have had the Euro transaction amounts available to her but at no time during the telephone call did the Complainant state explicitly that any of the transactions were not his. However, there was plenty of room for confusion, for example, in relation to an attempt to withdraw €428 in Capetown the Complainant said '*it wasn't approved; yeah I wonder if I made that one, yeah*'. After that the Complainant said to the operator '*how much is used in it in the last couple of weeks €200 is it*' and the bank operator said '*around that yes*'. The Ombudsman came to the conclusion that the exchanges on the said telephone call were not so explicit as to amount to the Complainant positively verifying every disputed transaction.

The Ombudsman found that the telephone operator should have canvassed the possibility that the Complainant's Card had been skimmed. She did not do so. The Ombudsman also considered that it was somewhat unrealistic of the bank to demand of the Complainant that he should have expressly denied certain transactions allowing for the fact that he was away on honeymoon and would have been spending money in varying amounts at different places.

The crucial question was really, whether the bank was at fault in lifting the security watch which had been placed on the account and which led to the 'phone call? In the Ombudsman's opinion, the answer to this question was a hesitant 'yes'. In the circumstances, although it was a close call, the

Ombudsman came to the conclusion that the loss should lie with the bank. The Ombudsman directed that a total of €6,700 should be refunded to the Complainant.

€74,000 directed to be refunded to solicitor who was defrauded when year old cheque for €111,000 was cashed and paid out on by bank

A gullible solicitor who was defrauded of more than €111,000 by one of his clients brought a case against his bank alleging that his bank had been negligent and should make good his loss.

What happened was that the solicitor drew a cheque for €111,568 on his firm's client account and sent it to the client to an address in England. A year later the client 'phoned the solicitor and said that he had moved to Spain and that the cheque had only just reached him and that when he had tried to lodge it, it was refused for being more than six months old. The solicitor then said to his client that he would send the amount by electronic transfer and the client should then destroy the stale cheque, which he said he would do. The electronic transfer was duly made to a bank in Spain. However, six days later the original cheque was presented again and was duly paid by the bank in Dublin. The solicitor knew nothing of this and no more was heard from the client. It was not until twelve months later that the solicitor discovered on reviewing his books that the cheque had been cashed. He blamed the bank but the Ombudsman noted that he himself had never asked for any 'stop' to be placed on the cheque. He had foolishly and naively trusted his client to scrap the cheque and this trust had been betrayed.

The issue the Ombudsman had to decide was whether the bank had been negligent in paying out on a stale cheque. The Bills of Exchange Act 1882 which governs these matters does not require that cheques should be dated at all. However, it has long been the accepted practice and custom of banking that a bank will refuse to pay on a cheque which is more than six months old. In this case the evidence was that the cheque had been presented for payment with a date more than twelve months old and if normal banking practice had been applied, the cheque would not have been paid. The Ombudsman came to the conclusion that in paying out on the out-of-date cheque, the bank failed in its duty of care to his client, the Complainant.

However, the Ombudsman also noted that notwithstanding the bank's failure, the Complainant himself had a well recognised duty to mitigate his loss and he had failed to do this on a number of occasions, e.g. he had instructed his client to destroy the cheque rather than requesting that it be returned to him before making the electronic payment and he could also have placed a stop on the cheque, but he failed to do it. The Ombudsman felt that it was incumbent also on the solicitor to note that his client was not resident in the State and that therefore even greater care should have been taken. The Complainant failed to ensure that the cheque was taken out of circulation and also failed to inform the bank of the situation and gave instructions for an electronic transfer for the same amount without explaining the background circumstances to the bank.

There was also the matter that the bank sent out monthly statements to the Complainant which clearly showed that the cheque had been paid. The question was whether there was a duty imposed on customers to check their statements and report any irregularity to the bank? The law is clear that there is no such duty at common law. However, the Terms & Conditions of the current account for sole traders and partnerships provided by the bank states clearly '*on receipt of account statements the customer should check all transactions and report any discrepancies to the bank immediately*'. The Ombudsman was satisfied that this customer was bound by this term of the contract.

In arriving at a remedy, the Ombudsman was satisfied that the bank failed in its contractual obligations to the Complainant when it paid the cheque, that this was also a breach of general banking practice and indeed the bank's own Code of Practice. To that extent the bank must be held liable in principle for the sum paid out. However, this failure had to be counterbalanced by the Complainant's duty to mitigate his loss and the Ombudsman found that the Complainant had, on a number of occasions, failed to do this. This was surprising considering his professional status.

Apportioning responsibility therefore, the Ombudsman found that the Complainant should be held responsible for one-third of the loss and the bank for the remaining two-thirds. He provided a remedy accordingly by directing that the bank pay the sum of €74,000 to the Complainant. The Ombudsman further stated (though it was not his concern) that the fraudulent client should be pursued for the monies wrongfully obtained and if the Complainant recovered the proceeds of the cheque paid incorrectly by the bank then the Complainant must, both in law and in conscience, return €74,000 to the bank.