



Financial Services
Ombudsman

Significant Complaints Decisions

1 July to 31 December 2006

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Joe Meade
Financial Services Ombudsman
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Credit Institutions

Conflict of interest by mortgage broker - €16,500 compensation

Following discussions with a mortgage broker, a couple who wished to invest in a rental property in England for investment purposes, entered into the purchase of this particular property which had been located for them by the broker. The broker also arranged for mortgage finance to be provided through a bank in Dublin. The Complainants then found it difficult to rent out the property at the rate required to service the mortgage even though they had stipulated that the rental property would have to cover the mortgage repayments and other outgoings. They then tried to sell on the apartment but found they could not find a buyer. They complained to the Ombudsman that the mortgage broker had recommended an unsuitable investment and had wrongfully assured them that the market rent available would cover the mortgage repayments. The Ombudsman did not uphold these grounds of complaint.

However, it emerged that the apartment which had been found for them by the mortgage broker and which they had purchased had in fact been privately owned by the principal of the mortgage broker in question but this fact had not been disclosed to the Complainants.

The evidence was incontrovertible that the principal of the mortgage broker negotiated a number of credit institutions on behalf of the Complainants in order to arrange the finance required. This finance, when sourced, was then utilised by the Complainants to purchase an apartment which was owned by the principal of the mortgage broker concerned.

The Provider stated that the introduction to this property owned by its principal was to assist the Complainants. However, **the Ombudsman found the true position was the Secretary and Director and principal shareholder of the mortgage broker had had an undisclosed conflict of interest in offering the Complainants any advice in relation to the investment opportunity presented to them by buying this particular property.** Whilst it was the Complainants' own intention to invest in a suitable investment property, **the Ombudsman was satisfied that the transaction in question was at all times tainted by the mortgage broker's conflict of interest between his personal position as owner of the property and his position as the Company's principal.**

The Ombudsman awarded damages of €16,500 against the mortgage broker. As his decision was not appealed he has initiated court enforcement proceedings to ensure his decision is complied with. He has also referred the matter to the Financial Regulator for appropriate regulatory action.

Management of portfolio by stockbroker-€40,000 compensation

A firm of stockbrokers were given €320,000 by a couple to invest in shares and the stockbroker was to manage the portfolio. During the period of the management of the portfolio the customers lost over €90,000. The dispute was about the mix of shares in

the portfolio. The Complainants alleged that the stockbrokers were negligent in that they had invested too high a proportion in high risk/high tech shares and that this caused the big loss. The Provider on the other hand stated that the Complainants had given certain instructions to sell Irish shares at a certain point which turned out to be a big mistake as the Irish market in fact turned out to be the best performing market during the period of the investment.

The Ombudsman found that the Provider, in selling the Irish shares, was carrying out the instructions of the Complainants and could not be held responsible for the bulk of the loss which occurred. **However, the Ombudsman also found that in placing a high proportion of the portfolio in high risk/high tech shares, the stockbroker went far beyond what had been agreed with the customers as to the mix of shares.** This amounted to negligence in the management of the portfolio. The Ombudsman awarded €40,000 in compensation to the Complainants.

Credit Union account withdrawal did not respect elderly person's instructions-€24,000 awarded

A Complainant stated he had a joint account with his elderly mother at the local Credit Union which would have entitled him to the proceeds of the account on her death. Some time before his mother died she gave an authority to a third party, her daughter, to withdraw money from the account "*for my well being*". After his mother died the Complainant discovered that €57,000 had been withdrawn from the account by the third party in the last four months of his mother's life. He brought a complaint to the Ombudsman that the Credit Union had paid out money from the joint account contrary to the account mandate which it held.

The Ombudsman found that the mandate signed by the Deceased in favour of her daughter to facilitate withdrawals from the Credit Union account was limited to the purposes of the Deceased's well being. Any funds withdrawn which were not specifically for that purpose were withdrawn contrary to the mandate held by the Credit Union. The issue was complicated by the fact that there were two misapprehensions by the parties. Firstly, although the Complainant thought he had a joint account with his mother, he did not in fact have one as the Deceased had completed a nomination form in favour of the Complainant entitling him to this property in the event of her death. Secondly, the written instruction enabling the daughter to withdraw the funds was certainly not a Power of Attorney, though it purported on its face to be so.

In unravelling this matter, the Ombudsman found that the size of the withdrawals made in the last four months ought, in his opinion, to have put the Credit Union on enquiry as to the nature of this transaction but it seems that the Credit Union made no such enquiries. Since the mandate signed by the Deceased in favour of her daughter to facilitate withdrawals from the Credit Union account was specific and limited to the purpose of the Deceased's well being, therefore, any funds withdrawn that were not specifically for that purpose were contrary to the mandate.

The Ombudsman allowed that certainly some of the funds withdrawn would have been spent by the daughter on the Deceased's upkeep and well being and that this

must be acknowledged. After making various calculations and allowances, the Ombudsman directed that the Credit Union make a compensatory payment to the Complainant in the sum of €24,000.

Elderly person's bank account cleared out by ATM card- €1,500 compensation and improvements sought in ATM security systems and account monitoring

The Complainant in this case had been a customer of the Respondent Bank for more than fifty years. Then at the age of 80 she moved into a private nursing home. A nephew of the Complainant, in dealing with the Complainant's affairs, discovered that over a ten day period €700 per day had been withdrawn from the account until the account was effectively cleared out.

The investigation showed that each time the €700 was withdrawn the correct Card was used along with the correct PIN. The Courts have held that a bank is contractually obliged to pay out once the Card and PIN are correctly used unless it is on notice of theft or fraud or malfunction. In this case the Bank was not on such notice. Nevertheless, in all fairness the Ombudsman felt that the Bank should bear some of the loss suffered due to these transactions because of the exceptional nature of the withdrawals and he awarded compensation of €1,500 to the Complainant.

Though there was no finding of negligence on the part of the Bank, the Ombudsman was not satisfied to leave it at that. He found it difficult to accept that an elderly person, who had never used her Card or PIN to withdraw money from her Bank, suddenly withdrew €700 per day over a short period until her account was empty. The Ombudsman was somewhat disturbed to learn from the Bank's evidence that there was no system in place to alert the Bank to the possibility that a fraud might be taking place.

After the case was closed the Ombudsman decided to alert the Financial Regulator to what appeared to be a possible systemic problem involving the accounts of elderly people, immobilised or in care involving all financial service providers. He also decided to call in the Bank concerned and put certain proposals to it. The consequences of the Ombudsman's action resulted in a positive response from the bank and will be dealt with in detail in his 2006 annual report to be published later this year.

Inappropriate investment in derivatives by 82 year old person-€38,500 compensation

An 82 year old woman invested €30,000 in an investment product with a Bank. She died thirteen months later. The Executrix of her estate then discovered that the Bond she had purchased would not mature for a further five years and brought a complaint to the Ombudsman that the product which had been sold to the Deceased had been entirely unsuitable, having regard to her age and circumstances.

The Bank contended that the terms of the Investment Bond had been carefully explained to the Deceased and that she had known exactly what the Terms & Conditions were. The Ombudsman could find no evidence, for example, that the question of possible delay in the distribution of her estate was ever mentioned to the Deceased and he considered that this possibility should have been brought clearly before her, given her age. Furthermore the product sold to her was an extremely sophisticated one involving the use of derivatives. **It was incumbent on the Bank to fully explain the difference between derivatives and equities and there was no evidence that this had been done.** The Ombudsman thought that it was unlikely that a person of her age and financial sophistication would have understood the nature of investments based on derivatives. For example, by their very nature, derivative contracts (in nearly all cases) mean that early encashment of the investment is impossible.

Having examined the Bank's submission and all the other relevant evidence submitted to him, the Ombudsman came to the conclusion that the Bank did not discharge its duty of care to this customer and that as a matter of equity and good conscience, and having regard to the substantial merits of the Complainant's case, the complaint should be upheld. By way of remedy, the Ombudsman directed that the Bank should forthwith purchase the Bond from the Complainant's estate at a price of €38,500, to be paid for by way of Bank Draft.

The Ombudsman informed the Financial Regulator of this particular case for any action it may deem appropriate from a consumer perspective regarding the sale of such products by all financial service providers.

Entry on Irish Credit Bureau results in €3,000 compensation

A Complainant bought a photocopier from a supplier and the deal was financed by means of a bank facility. Repayments were being made quarterly by means of a direct debit- servicing was to be included. When the supplier refused to service the machine, the Complainant stopped the quarterly payments by cancelling his direct debit and informed the bank of the reason. **He alleged that the bank assured him that his action was justified and would have no affect on his credit rating.** In spite of this the Complainant subsequently found that the bank had recorded him as a defaulter with the Irish Credit Bureau.

After his investigation the Ombudsman found that when the bank became aware of the reason for the cancellation of the direct debits, it had not demurred and had at least given the impression that the Complainant was acting reasonably. The subsequent action of the bank in registering the Complainant as a defaulter with the Irish Credit Bureau was, in the particular circumstances of the case, unreasonable and unjust .He awarded €3,000 in compensation to the Complainant.

No return on Tracker Bond investment-complaint not upheld

A customer who invested €7,500 in a Tracker Bond for a period of six years with 100% of the capital guaranteed complained that at the end of six years she only received back the €7,500 that she had invested and therefore had received zero gain

over the six years. She complained firstly that the bank was negligent and secondly that it had failed to explain to her how her investment was worth no more at the end of six years than it had been at the beginning.

The Ombudsman considered all of the evidence before him, including the brochure for the investment, and he noted that the brochure stated that future returns could not be guaranteed and that they were dependent on stock market performance over the period of investment. In regard to the lack of communication, the Ombudsman noted that the investment was for a six year term and no withdrawals were permitted from the account, therefore, even if the Complainant had received letters indicating the performance in each of the Indices, she would not have been in a position to take any action in respect of the funds in this particular investment.

Having considered the evidence from both parties, **the Ombudsman was satisfied that although the Complainant did not receive any return on her investment after the six year term, this was a consequence of the performance of the world stock markets**, a matter entirely outside the control of the bank, and the evidence disclosed no fault or negligence on the part of the bank in selling or managing this investment. The complaint was not upheld.

Insurance

Increase to €140,000 of an ex gratia offer in death benefit case- insurance company commended as intermediary was at fault

The complaint related to whether the Complainant's husband was covered in respect of death benefit under a policy at the date of his death. The proposal form contained two boxes for selection of cover. The deceased policyholder ticked the Permanent Health Insurance box leaving the Life Assurance box blank. **Due to an administrative error the independent intermediary, who set up the policy, had for a time collected and forwarded to the insurance company an amount of premium in relation to life cover. However, the deceased policyholder had received a letter from the company only confirming his acceptance for Permanent Health Insurance only.**

While not admitting liability in the matter, the company had offered a series of *ex gratia* payments (the last one being €50,000) which was refused by the Complainant. The Complainant then referred the matter to the Ombudsman.

On examining the papers the Ombudsman's staff were satisfied that the evidence showed that the deceased policyholder did not apply for Life Assurance and as such the company had never been provided with an opportunity to assess the risk. Further legal opinion (submitted by the Complainant) was then considered. The legal opinion was that on contractual and equitable considerations the deceased was covered for a death benefit at the time of his death.

The Ombudsman sought the company's observation on the opinion before he came to his final decision. The company remained satisfied that it was not responsible for any error on the part of the intermediary and maintained it did not have contractual liability in respect of the death claim. However, **while conscious of the fact that the legal opinion was not acceptable nevertheless the Company offered on a strictly *ex-gratia* basis and without prejudice to all of its rights to increase its previous offer to €140,000 which represented 80% of a life cover policy.**

The generous uplift on the Company's previous offer was considered by the Ombudsman as the way forward with the dispute. Taking into consideration all the circumstances of the case, his Final Decision was that the Company's *ex-gratia* offer of €140,000 was fair and reasonable as it really had no case to answer and the aspects of the dispute were more appropriate to the intermediary.

The Ombudsman compliments the company concerned for its overall approach and offers. It need not have done so from a strictly legal and contractual perspective. It is an example of how the Ombudsman and financial service providers can mediate appropriate awards even in very difficult situations.

Only the Courts can determine whether an insured person committed or attempted to commit an illegal act - €90,000 awarded

This dispute concerned the refusal by an insurance Company to pay a claim under an Accident Cash Plan on the grounds that an exclusion under the policy applied to the circumstances of this case, namely that "*no benefit will be payable for Bodily Injury directly or indirectly resulting from the Insured Person committing or attempting to commit an illegal act*".

In the course of his investigations the Ombudsman considered, *inter alia*, Articles 34 and 38 of the Constitution.

Article 34.1 "*Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, saving such special and limited cases as may be prescribed by law, shall be administered in public.*"

Article 38.1 "*No person shall be tried on any criminal charge save in due course of law*".

The Ombudsman noted that the Insured Person had not or could not be charged or convicted of an offence in relation to the incident surrounding the claim. By attempting to rely on the policy exclusion the Ombudsman stated that the Company was in effect determining that the Insured Person had committed or had attempted to commit an illegal act.

The Ombudsman concluded that the only authority to make such a determination in this jurisdiction is a court of law. As there had been no such finding in this dispute the Company could not therefore rely on the exclusion to deny liability under the policy.

Based on the evidence submitted and the events surrounding this dispute the Ombudsman directed the Company to pay the Complainant the amount of the claim, €90,000. This was done.

Cancellation of Mortgage Protection Policies - €4,000 extra refunded

The Complainant lived outside Ireland but had a mortgage with a financial institution. He sought a refund of premiums paid under a mortgage protection policy, which was intended to be replaced by a second mortgage protection policy, from the date of the second policy. The second policy was incepted in late 2000 but the original policy was not cancelled until mid 2006. The Company stated it was on risk for both policies for a period of time and was not prepared to refund premiums covering this period. However, a €3,000 refund of some of the premiums paid was made on the first policy. The Complainants sought an additional refund of all the premiums paid under the original Policy from late 2000 up to its cancellation in mid 2006.

The Ombudsman noted that the original Policy was assigned to a Building Society and the Complainant's written instructions were required to cancel it. The Company correspondence in this case showed three copy letters to the Complainant requesting written instructions to cancel the original Policy. The Complainant stated he did not receive any such correspondence but did not have any record of his communications to cancel any policy with the relevant financial institution.

Mortgage Protection Policies can be maintained in force when the mortgage is redeemed or they are replaced by another Policy (as in this instance). Once the Company is receiving a premium they are on risk for the sum(s) assured. This was the case in this dispute and the sums assured were not insubstantial at €250,000.

It was clear that there were no firm instructions from the Building Society to cancel the Policy and the Company did remain on risk for the sums assured until mid 2006. However, following **communication by the Ombudsman with the Company, regarding particular circumstances of the dispute- the Complainant living outside Ireland and had some difficulty with communications when the cancellation requests were issued –it was agreed to refund 20% of the premiums paid since late 2000.** This amounted to an additional €4,000.

The Ombudsman considered that the additional refund was a significant gesture by the Company and was a fair outcome of this dispute.

Medical treatment abroad-prior approval needed-not upheld

The Complainant stated that his son was admitted in September 2001, at short notice, to a detoxification programme in a London hospital. He claimed that at that time there was only one specialist hospital in Ireland which offered such a programme and it had a long waiting list for admission. The Complainant explained that due to the nature of his son's illness it was necessary to act quickly. The Complainant appealed for a

reasonable response from the Company given the circumstances of his son's admission.

The Complainant did not dispute that the Questionnaire for Prior Approval for Treatment Abroad was submitted to the Company **after** his son's admission to hospital in London, and that the Questionnaire was completed in October 2001 by the Consultant treating his son in London and not by his referring Consultant in Ireland.

The Company explained to the Ombudsman that the specified criteria were not satisfied in full as prior approval was not sought, the questionnaire for treatment abroad subsequently submitted was completed by the consultant abroad and the referral was not, therefore, by a consultant recognised by the Company. In addition, the Company indicated that treatment for drug addiction was available in Ireland. The Company was satisfied that, subject to the terms and conditions of the Complainant's contract with them, no benefit was payable towards the cost of his son's treatment in London.

The Ombudsman noted that the policy provisions in this regard are clear. **Cover for treatment abroad is provided in exceptional circumstances only and subject to prior approval and satisfaction in full of specified criteria.** He also noted that the Complainant did not dispute that he did not obtain prior approval for his son's treatment in London, and that the referral was not by a consultant recognised by the Company. The Complainant acknowledged to the Ombudsman that **the treatment in question or an alternative treatment was available in Ireland at the time.**

In those circumstances the Ombudsman, though sympathetic to the circumstances of the case, decided that the Company has acted in accordance with the policy terms and the complaint was not upheld.

Long Term Care Bond insurance plan – delay in review results in €3,000 compensation awarded

The dispute here related to a Long Term Care Bond insurance plan which was sold in 1995 through an Independent Intermediary. In 2002 the Company reviewed the Bond to ascertain whether it continued to support its original target of providing the chosen level of long term care cover throughout the insured's life. The outcome of the Company's review was that the Bond would not support the original projections. The Company set out for the Complainant what the value of the Bond would support and the alternative actions that could be taken for the future.

The Complainant's complaint was that the Bond was not of the nature he was led to understand it to be when the policy was taken out in 1995. The Complainant understood that in return for the payment of the initial lump sum premium, the life term care cover would be provided throughout his life with no further premium having to be paid.

In regard to the allegations going back to 1995 and the time frame involved, the Ombudsman referred her to the Central Bank and Financial Services Authority of Ireland Act 2004 which sets out the remit of the Ombudsman. The Act provides:

“(3) A consumer is not entitled to make a complaint if the conduct complained of –

(b) occurred more than 6 years before the complaint is made”.

Despite the time frame exclusion, the complaint was investigated in particular to determine if the Company correctly carried out the review in accordance with the terms and conditions of the policy.

From the documentation submitted the Ombudsman found that no guarantees were given by the Company in relation to the growth rate that would be achieved. Indeed, the fact that there were no guarantees on this product was specifically outlined on the illustration provided from the beginning. The policy documentation also clearly outlined the nature and risk of the Bond. The life term care cover had to be paid for and the Company had the latitude in the policy to deduct the cost of same from the Bond. The result of this was that, combined with the falling markets and other deductions, over time the Fund was decreasing. The documentation given to the Complainant from inception clearly set out what charges would be deducted, the risk attached to the investment and the need to review the Bond in the future.

The Ombudsman noted that the Company committed itself in documentation given to the Complainant to carrying out a review on the fifth anniversary. While this action was not reflected in the underlying Bond conditions, the Ombudsman felt that the commitment should have been honoured. No action was taken until 2002 when it was indicated that a review would come into effect. **The Ombudsman considered that the late review deprived the Complainant of an early opportunity to assess his requirements for the future.** The Company had also significantly overstated in its review, the additional investment amount required to maintain the original projections.

Taking into consideration all the circumstances of the case and having regard to what was fair and reasonable, the Ombudsman directed the Company to enhance the Bond by €3,000.

Consequences of lapsing a policy and a new declaration of health –not upheld

The Complainant's Life assurance policy lapsed in June 2005. The Complainant apparently made a mistake in cancelling the direct debit for this insurance, which he confused with another insurance policy and this resulted in the lapse of the Life Insurance Policy. The Complainant later lodged the arrears of payment and a direct debit mandate with the Insurer. However, the insurer required the Complainant to complete a Declaration of Health to revive the Policy.

The Complainant argued that it should not be necessary for him to complete a Declaration of Health to reinstate the former Policy. He stated the issue was simply one of the payment of arrears. He contended that, by requiring the completion of the Declaration of Health, the matter was being treated as if it was an application for a new policy. On the other hand the Insurer contended that the policy terms and conditions required a Declaration of Health when life cover policies lapsed due to non-payment of premiums.

The Policy provided that the Insurer would consider the revival of a lapsed policy but stated –

“We will require ‘underwriting information’ in order to revive this policy”.

Underwriting information is defined in the policy to include *state of health/medical history*. The Policy states that such information may be required *to consider revival of cover after it has previously lapsed due to non-payment of premiums*.

The Policy wording was very specific as to the requirement to furnish information, which included the information required in the Declaration of Health, to revive the Policy. As the Ombudsman was satisfied that the Complainant had adequate notice that premiums had not been received the complaint was not upheld.

Terminal bonus on Endowment Mortgage-not upheld

This dispute arose over the Complainant’s dissatisfaction with the amount of the terminal bonus she received when her 20 year Endowment Policy matured in February 2006. She purchased her Endowment Policy in February 1986. It matured on the 1st February 2006 with a 37% terminal bonus. At a later date in February the Company announced that policies expiring in March 2006 would receive a terminal bonus of 49%. The Complainant had contributed to her Policy for 20 years and felt it was unfair that because she had fallen on the wrong side of a cut-off point by such a short time she lost out on a substantially higher terminal bonus.

In response to the Ombudsman’s inquiry the Company stated that the terminal bonus announced for 20 year policies maturing after April 2005 was 33%. This was revised upwards in October 2005 to 36% and again in January 2006 to 37%. This figure was applied to the Complainant’s Policy when it matured in February 2006. The Company announced a terminal bonus for policies maturing after March 2006 of 49%. It stated that because the Complainant’s Policy matured before March 2006, it did not enjoy the higher terminal bonus of 49%. The Company stated that increasing the Complainant’s terminal bonus would be unfair to policyholders remaining in the fund as the increased terminal bonus would have to be paid by the fund.

The Ombudsman understood the Complainant’s frustration. She had missed out on an additional 12% terminal bonus because her 20 year Policy matured in February 2006. Had it matured after March 2006 the Complainant would have received the March 2006 terminal bonus. However, **this did not alter the fact that her Policy matured on the date it did, i.e.1 February 2006.**

The Ombudsman accepted that the Company was not obliged to extend the maturity date on the Complainant’s Policy to enable her to benefit from the increased terminal bonus. The Company had the right to regulate the dates on which certain bonuses became payable. The complaint was not upheld.