

2006

# Annual Report

TUARASCÁIL BHLIANTÚIL



Financial Services  
Ombudsman

Financial Services Ombudsman

# Our role at a glance

As Financial Services Ombudsman I can investigate, in an impartial and independent manner, complaints from individual customers and small businesses who have unresolved disputes with financial service providers who are either regulated by the Financial Regulator or are subject to the terms of the Consumer Credit Act 1995.

I can award compensation of up to €250,000 where a complaint is upheld. Unlike the former voluntary ombudsman schemes for the credit institutions and insurance industry my decisions as Ombudsman are binding on both parties subject only to an appeal by either the complainant or the financial service provider to the High Court.

My role is therefore a quasi-judicial one and whether a complaint can be upheld or not is determined on the basis of evidence furnished, examined and reviewed.



## Annual Report | 2006

TUARASCÁIL BHLIANTÚIL

*Presented to the Oireachtas under Section 57BR of the Central Bank and Financial Services Authority of Ireland Act, 2004.*

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# Our Mission

To adjudicate on unresolved disputes between Complainants and Financial Service Providers in an independent and impartial manner thereby enhancing the financial services environment for all sectors.

# Chairperson's Foreword

The Financial Services Ombudsman Council is appointed by the Minister for Finance. Its main functions are to:-

- ④ Appoint the Financial Services Ombudsman and any Deputy Ombudsman;
- ④ Prescribe guidelines under which the Financial Services Ombudsman's Bureau is to operate;
- ④ Determine the levies and charges payable for the performance of services provided by the Ombudsman;
- ④ Keep under review the efficiency and effectiveness of the Ombudsman's operations;
- ④ Approve the Ombudsman's Strategy Statement.

The Council has no role regarding complaints resolution, as this is the independent function of the Financial Services Ombudsman. The first ten-member Council was appointed in 2005 for a two year period to end on 30 September 2006. In March 2006, a new member was appointed to fill a vacancy created by the resignation of a member in 2005, while another member resigned in early September 2006. The Minister for Finance reappointed all outgoing nine members of the first Council for a further two year period in October 2006. Much was achieved by the first Council, especially in ensuring that the statutory ombudsman scheme was operational from 1 April 2005, that the former voluntary ombudsman schemes and staff were assimilated into the new scheme in as seamless a manner as possible, and that the Ombudsman and his staff operate in an effective, impartial and professional way. I express appreciation to all my fellow members, both former and current, for their work and achievements. Naturally, the present Council intends to continue this progress during its term. I also acknowledge the significant contribution made by the first Secretary of the Council, Jim Bardon, and I



look forward to a continuing successful role by our current Secretary, Gemma Normile.

This second annual report presented to the Council is a record of hard work and notable achievements. As a Council, we are grateful for the impact already made by the Ombudsman and his staff. I accordingly express appreciation to the Ombudsman, Joe Meade, and his staff for the commitment and professionalism they have displayed to date. I gratefully acknowledge that the relationship with me and the other Council members is both practical and professional in every way.

**Dr. Con Power**  
Chairperson

Financial Services Ombudsman Council

27 April 2007

# Foreword from the Financial Services Ombudsman

*The size of the award, however, cannot be the major benchmark for evaluating our role; the fact that we decide on complaints in a fair and impartial manner is of greater import in fulfilling my statutory role.*



Joe Meade, Financial Services Ombudsman

I am pleased to present to the Financial Services Ombudsman Council my second annual report as Financial Services Ombudsman detailing activities for 2006.

The Financial Services Ombudsman, a statutory body, began operations on 1 April 2005 to adjudicate, in an impartial and independent manner, on complaints from consumers who have unresolved disputes with Financial Service Providers who are either regulated by the Financial Regulator or are subject to the terms of the Consumer Credit Act 1995. My decisions are binding on both parties to a complaint, subject only to an appeal to the High Court.

2005 was marked by sustained progress in establishing the organisation on a sound footing, while also delivering a high quality public service. I consider 2006 was a year of major advancement in our relatively short existence for the following reasons:

## CORE BUSINESS

- Ⓢ An increasing workload was dealt with in a capable and pragmatic way. During 2006, 10,100 telephone enquiries, 64,000 website visitors and 3,795 complaints including 230 by email were received. The office also received many personal callers.
- Ⓢ Complaints increased by 14% compared to 2005 and in general 60% of them were resolved in the Complainants favour. Overall 79% of complaints – 4,116 complaints – were concluded during 2006.
- Ⓢ Significant decisions involving substantial compensation awards were made while changes to products and policies were also effected. The first Judicial Review and High Court appeal of my decisions took place in 2006.
- Ⓢ Compensation awarded included amounts of €7.4m, €140k, €90k, €40k and €24k in specific cases. A 'look back' undertaken at my request, following a decision in a building society case, will result in significant amounts being refunded to other customers. The size of the award, however, cannot be the major benchmark for evaluating our role; the fact that we decide on complaints in a fair and impartial manner is of greater import in fulfilling my statutory role.
- Ⓢ Enforcement action was threatened against a credit union to ensure my decision was implemented while a direction was issued to an insurance company who were somewhat slow both in responses to my office and to customers' complaints in general. My actions had a positive effect.

- ⌚ Issues concerning aspects of financial services were referred to the Financial Regulator for appropriate action; matters of a systemic nature arising from investigation are outlined later in this report.
- ⌚ Financial Service Providers responded positively to concerns I raised regarding ATM card security and in resolving in a relatively short period concerns expressed by many customers about a particular mortgage issue.
- ⌚ Substantial issues regarding the privity of contract in insurance policies effected by employers and jurisdictional matters were dealt with.
- ⌚ The referral of two decisions to the Courts, in line with the statutory provisions, for judicial review and appeal has made us all aware of the importance of our adjudication processes.
- ⌚ We attended and contributed to various international conferences and liaised with our EEA colleagues through FIN-NET. I look forward to hosting the International Conference of Financial Ombudsmen – held in Australia in 2006 – in 2009. Evidence was also given to the European Parliament Committee of Inquiry into Equitable Life.
- ⌚ Staff members responded very positively to the increased demand of the work in the changed environment and practices. The move to a new location in June 2006 where all staff members are now based is a positive development both from an organisational and strategic viewpoint.

## ORGANISATION

- ⌚ Increase in enquiries, website visits, personal contacts and numbers of complaints demand continuous organisational review so that matters are capably dealt with. This is being achieved.
- ⌚ The focus of our second Strategy Statement, cooperation with the Financial Regulator and the Pensions Ombudsman, redesign of our website, public presentations and adherence to our customer charter principles significantly heightened public awareness of our role. Media profile and market awareness is favourable overall.
- ⌚ Enforcement measures had to be taken in some instances to collect our statutory levies. Our running costs overall were € 3.2m.

## CONTRIBUTION TO CONSUMER INTERESTS

Our work is contributing to providing better consumer protection for consumers of financial services while we ensure that we deal with complaints against Financial Service Providers in a fair, timely and impartial manner. I note from our dealings with Financial Service Providers that in general they are making improved efforts to treat customers fairly. The Financial Regulator's statutory Consumer Protection Code is a welcome development in this respect.

## NAMING OF FINANCIAL SERVICE PROVIDERS OR COMPLAINANTS

I have considered the extent to which published decisions of mine should name the Financial Service Provider. The particular issue is whether a Financial Service Provider found to have acted in an unfair manner towards a consumer should be named. The question also arises as to whether Complainants should be named.

*I have concerns about naming Financial Service Providers alone as Complainants may also have to be named in line with natural justice.*

Having taken legal advice, I have considered how best I can be as transparent as possible when publishing decisions. My detailed consideration of the matter is outlined at Appendix II.

In summary:

- Ⓢ As Financial Services Ombudsman, like all statutory bodies, I am a creature of statute and I have jurisdiction only to exercise those powers which have been conferred on me by legislation.
- Ⓢ There is **no clear statutory basis** for the naming of the parties to a complaint in published decisions of mine. Any report by me containing names should be statutorily protected by **absolute privilege** in line with other statutory bodies. At present this is not the position.
- Ⓢ I considered publishing summary details, by Financial Service Provider name, of the number of complaints received along with the outcome of complaints investigated and concluded by me. However, this data would have to take account of the fact that **only a small percentage** of overall transactions by Financial Service Providers fall to be adjudicated by me. This important **caveat** might not be recognised by all publications or commentaries on such published data.
- Ⓢ I have concerns about naming Financial Service Providers alone as Complainants may also have to be named in line with natural justice. This could deter Complainants from coming

forward with legitimate complaints. Accordingly, I may only name, in my annual report, a provider who does not cooperate with me, or where I consider there is a systemic or very serious issue. I find it difficult to envisage any situation where a Complainant could be named.

- Ⓢ My overriding concern as Ombudsman is to ensure that the integrity and impartiality of the Financial Services Ombudsman scheme is manifest to everyone, be it a Complainant, a Financial Service Provider, the Financial Regulator, the international financial community, the media, the general public or the legislature.
- Ⓢ The whole point of the Financial Services Ombudsman scheme under the Act is that consumers should be comfortable about making complaints to me about Financial Service Providers and obtaining redress where I deem it appropriate, while Financial Service Providers are also confident that I deal with matters in a fair, independent and impartial manner. The Courts, on an appeal or judicial review, are the ultimate safeguard to ensure that I perform my role in line with my statutory responsibilities.

## APPRECIATION

The work of my office could not have been achieved without the cooperation of Financial Service Providers, the general public, the various departmental and state agencies but

especially the Department of Finance, members of the Oireachtas, fellow ombudsman both in Ireland and abroad, the media, the Financial Regulator and the former and current Financial Services Ombudsman Council.

Finally, the staff are the greatest and most valued resource of this organisation. Their dedication, impartiality and commitment to their work in delivering a professional and courteous public service merits special and deserved appreciation. Naturally we are constantly reviewing our processes and procedures to ensure that we maintain our high standards.

I thank everyone for their support and guidance.



**Joe Meade**  
*Financial Services Ombudsman*

27 April 2007

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Part 1

# The Financial Services Ombudsman's Role and Work in 2006

# What We Do

## MISSION STATEMENT

To adjudicate on unresolved disputes between Complainants and Financial Service Providers in an independent and impartial manner thereby enhancing the financial services environment for all sectors.

## LEGISLATIVE BASIS

The Financial Services Ombudsman's Bureau<sup>1</sup> is established under the Central Bank and Financial Services Authority of Ireland Act, 2004 ('the Act'). The legislation provides for an independent, impartial investigation and resolution of disputes between consumers and Financial Service Providers. The Bureau is financed by means of levies on the Financial Service Providers as prescribed by the Financial Services Ombudsman Council.

Further to its duties under the Act, the Bureau exercises functions arising out of Ireland's obligations under EU legislation. The Bureau has an obligation under the cooperation network FIN-NET (the Cross-Border Out-of-Court Complaints Network for Financial Services) to ensure efficient exchange of information between European ombudsmen and other comparable schemes.

## THE ROLE OF THE FINANCIAL SERVICES OMBUDSMAN

The principal function of the Financial Services Ombudsman is to deal with complaints made under the Act by mediation, by investigation and by adjudication.

The Ombudsman is a statutory officer who deals independently with complaints from consumers about their individual dealings with all Financial Service Providers that have not been resolved by the providers after they have been through the internal complaints resolution systems of the providers. The Ombudsman is therefore the arbiter of unresolved disputes and is impartial. He can award compensation of up to €250,000 and his decisions are binding on both parties subject to appeal to the High Court. Broader issues of consumer protection are the responsibility of the Financial Regulator.

All personal customers, unincorporated bodies, charities, clubs, partnerships, trusts, and limited companies with a turnover of €3,000,000 or less can complain to the Ombudsman.

The Ombudsman offers a free service to the Complainant.

The Ombudsman has extensive legal powers to require Financial Service Providers to provide information, including the power to require employees to provide information under oath. If necessary the Ombudsman can enter the premises of providers and demand the production of documents etc. In the event of non-compliance the Ombudsman may seek a Court Order. Anyone who obstructs the Ombudsman commits an offence and is liable to a fine of up to €2,000, imprisonment for three months, or both.

<sup>1</sup> The Financial Services Ombudsman's Bureau is the corporate entity of the new statutory scheme and consists of the Financial Services Ombudsman, two Deputy Ombudsmen and the staff.

# How We Do It

## NEW INTEGRATED COMPLAINTS HANDLING PROCEDURES AND IT SYSTEMS

New complaints handling procedures were introduced in early 2006. The IT and case management systems of the two pre-existing voluntary schemes, while very different, were each effective and capable of both case management and the production of case statistics. That being said one system is more suited to the effective running of, what is now, one office. We extracted the best elements of the two previous systems and built upon the existing expertise of the staff to produce a new integrated complaints handling and IT system that went live in October 2006. The new systems and procedures are designed to ensure a high standard of complaint management throughout the office.

A Flow Chart of the Complaint Handling Procedures is at Appendix I.

## CO-OPERATION WITH THE FINANCIAL REGULATOR AND THE PENSIONS OMBUDSMAN

The Financial Services Ombudsman is an arbiter of disputes between customers and institutions but is not a regulator. There is close cooperation between the Ombudsman, the Financial Regulator and the Pensions Ombudsman. If a matter arises during an investigation by the Ombudsman which he feels is indicative of some kind of pattern he will inform the Regulator so that appropriate regulatory action may be taken. He also cooperates with the Pensions Ombudsman so as to avoid unnecessary overlap in the pension's area.

A Memorandum of Understanding was signed by the Financial Regulator, the Financial Services Ombudsman and the Pensions Ombudsman in March 2006. Quite apart from the Memorandum the three offices have enjoyed, and continue to enjoy, close cooperation. Meetings between the three parties are held regularly and when deemed necessary.



*Signing of the MOU: Paul Kenny, Pensions Ombudsman, Joe Meade and Pat Neary, CEO, Financial Regulator.*

Specific matters were referred to the Financial Regulator during 2006 as outlined later in this report. I note that the Regulator has sought the views of the banking industry on the following matters to which I also drew his attention:

- ④ Customers were not informed about the cancellation of standing orders by institutions following a number of instances where they had not been honoured due to insufficient funds in the account
- ④ The negotiation of crossed cheques lodged to an account other than that of the payee
- ④ ATM Inter Bank Sharing Agreement and disputes resolution.

## EEA-WIDE AGREEMENT TO CO-OPERATE

As Ireland's Financial Services Ombudsman (FSO), like the former voluntary ombudsman schemes, I am a signatory to the Memorandum of Understanding on a Cross-Border Out-of-Court Complaints Network for Financial Services in the EEA (FIN-NET). I have an obligation under FIN-NET to ensure efficient exchange of information between European ombudsmen and other comparable schemes. This is also covered by section 57CR-CU of the Act.

If I receive a complaint about a Financial Service Provider regulated by a Regulatory Authority in another EEA member state, which is comparable to the Financial Regulator here, I may refer that complaint to the Ombudsman Scheme of the appropriate EEA member state to be dealt with there. For example, if a complaint is received about a UK Financial Service Provider regulated by the Financial Services Authority in the UK, such a complaint would be referred to the Financial Ombudsman Service (FOS) in the UK for investigation.



Over 50s Show at the RDS October 2006. Staff members Meagan Gill and Marta Piekarcz with Joe Meade

Some practical working methods and challenges are identified and discussed at page 25 under “Extra Territorial Jurisdiction”.

## PUBLIC INFORMATION ROLE

The office recognises that its success is largely dependent on, among other things, a high level of public and market awareness of its role. With this in mind we have redesigned our website, adhered to our customer charter principles and engaged in a wide range of public presentations to ensure that the public are well informed on the nature of the service provided by the Financial Services Ombudsman.

In 2006 I took part in interviews on television and on radio, in newspapers and in various consumer and industry magazines. Staff attended a number of consumer shows, including the Over 50s show at the RDS in Dublin. The office also ran a website competition for transition year students.

This focus on consumers will continue in the coming year, with the aim that public and market awareness of the Financial Services Ombudsman’s role remains high. A complete list of presentations and events attended by the Financial Services Ombudsman and staff, both nationally and internationally, can be found at Appendix VI.

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# Operational Matters

## FUNDING THE BUREAU

Sections 57BE and 57 BF of the Central Bank Act 1942 (as inserted by the Central Bank and Financial Services Authority of Ireland Act 2004) provide that levies are payable by Financial Service Providers to enable the Financial Services Ombudsman to carry out his statutory functions. The levy amounts are prescribed by the Financial Services Ombudsman Council with the consent of the Minister for Finance. Levies were successfully collected from the vast majority of Financial Service Providers. In November 2006 we engaged the services of a credit management company for the collection of any outstanding levies the outcome of which was successful.

## NEW PREMISES

Though we were established on 1 April 2005 we had two separate buildings from day one. To ensure organisational cohesion it was necessary to have all staff located in one building at the earliest possible date. It did not

prove possible to secure suitable premises until late January 2006 but special efforts were made by all concerned to have the building fitted out within a very tight time frame and within budget. We took up residence at our new location at Lincoln House on 22 June 2006 with the Minister for Finance, Mr Brian Cowen TD, officially opening the premises on 19 September 2006.

## STAFF TRAINING

The Financial Services Ombudsman recognises its staff as a key resource and provides training opportunities for staff members to enable them to develop their knowledge and skills. Training and development of staff may be carried out by formal “in house” courses or by courses provided by professional external training companies. The office encourages staff to take advantage of relevant further education at all stages of their career.



Opening of new premises: Dr Con Power, Chairperson, Financial Services Ombudsman Council, Joe Meade, Brian Cowen TD, Minister for Finance.

## PARTNERSHIP

The Partnership Committee was established in March 2006. The Committee is made up of staff at all levels within the organisation. The office is committed to the partnership approach in which staff are consulted and involved in the management and development of the office.

## STAFF MEETINGS

Staff meetings are held regularly. These meetings serve to inform staff of current issues as they arise. Work programmes are also discussed and agreed upon.

## STRATEGY STATEMENT

The second Strategy Statement for the years 2007–2009 was approved by the Financial Services Ombudsman Council and published in October 2006.

## COMPLIANCE WITH LEGISLATION

### *Data Protection Acts 1988 and 2003*

The office adheres to the provisions of the Data Protection Acts 1988 and 2003 and will constantly review this adherence. Due to the sensitive nature of the information the office receives it is necessary that access to data is available only to those who are involved in the investigation of complaints.

### *Freedom of Information Acts 1997 and 2003*

The Freedom of Information Acts do not currently apply to the office but may apply to our administration function in future. Investigation files cannot be made available under FOI due to their statutory quasi judicial nature.

### *Ethics in Public Office Acts 1995 and 2001*

The office and the Council are from 1 January 2007 designated bodies under the Acts. We are committed to adhering to the Standards in Public Office Commission's Guidelines for Office Holders on Compliance with the Provisions of the Ethics in Public Office Acts, 1995 and 2001.

### *Official Languages Act 2003*

The office is fully compliant with the Official Languages Act 2003. Standard letters and documents are translated into Irish and the website has an Irish section.



Part 2

# Complaints



# Complaint trends

## OVERVIEW

The core business is complaints resolution and investigation. During 2006

- ④ **3,795 complaints were received**, comprising 2,229 for the insurance sector and 1,566 for credit institutions. This was an **increase of 14%** over 2005 with a 37% increase for credit institutions and 2% for insurance complaints.
- ④ A total of 4,116 complaints were resolved, comprising 2,565 complaints **concluded** following investigation by the Ombudsman while a further 1,551 were **resolved** after having been referred to the internal complaints procedures of the providers. At year end 1,086 complaints were under investigation.
- ④ Of the complaints investigated **44%** were upheld, **37%** were not upheld, **13%** were outside the statutory remit while **6%** were referred either to other EEA Ombudsmen - chiefly in the UK - or other agencies. When account is taken of the cases also resolved after referral to a Financial Service Provider's internal complaints procedure, some **60%** of complaints were resolved in the Complainant's favour.
- ④ Many of the complaints, especially in the insurance, medical, investment and stock broking areas, concern extremely complex issues and resolution of these complaints does of necessity take some time. Indeed during 2006 two decisions were the subject of High Court judicial review and appeal by two Financial Service Providers while a Complainant has also initiated a High Court special summons. **However, during 2006, 79% of all complaints received were resolved** - 91% of credit institutions complaints and 73% of insurance complaints.

- ④ The **highest** compensation direction was €7.4m against a credit institution - under appeal - and €140,000 against an insurance sector provider. In addition a 'look back' by an institution following a direction by the Ombudsman after a specific complaint will result in significant compensation being made to other consumers.
- ④ Circuit Court **enforcement proceedings** were threatened against a credit union for failure to pay a €4,000 compensation award made against it in February 2006. The amount was paid a week later without the necessity of Court action. It was disappointing that a **formal direction** had to be issued to an insurance company who were somewhat slow both in responses to my office and to customers' complaints in general.

It should be noted that before an investigation is carried out, a Complainant must have exhausted the internal complaints procedures of the Financial Service Provider concerned. This aspect is not fully appreciated by some Complainants though the position is improving, mainly due to our information role.

While significant decisions are published on the website on a six monthly basis I now consider it appropriate to include such decisions in my annual reports. Accordingly all published decisions for 2006 are included at Part IV of this report.

Appendix IV contains detailed complaints statistics as already published on our website on 8 January 2007.

## MAJOR DECISIONS PUBLISHED ON OUR WEBSITE DURING 2006

### Credit Institutions

- Ⓢ Conflict of interest by mortgage broker - €16,500 compensation
- Ⓢ Management of portfolio by stockbroker - €40,000 compensation
- Ⓢ Credit Union account withdrawal did not respect elderly person's instructions - €24,000 awarded
- Ⓢ Elderly person's bank account cleared out by ATM card - €1,500 compensation and improvements sought in ATM security
- Ⓢ Inappropriate investment in derivatives by 82 year old person - €38,500 compensation
- Ⓢ Entry on Irish Credit Bureau results in €3,000 compensation
- Ⓢ No return on Tracker Bond investment - complaint not upheld
- Ⓢ Bogus non resident account €900,000 tax settlement - complaint not upheld
- Ⓢ An 89 year old person's investment of €500,000 with a Building Society was made under a mistaken impression - €4,000 award
- Ⓢ Bank letter about a customer's overdrawn account sent to the wrong address - €4,500 compensation
- Ⓢ Wrong credit rating record for a twin brother results in a €2,000 award
- Ⓢ Part of an elderly widow's €1.5 m. investment portfolio was mismanaged by a leading stock broking firm - €18,500 compensation awarded
- Ⓢ Mortgage broker negligence results in €2,000 compensation

- Ⓢ Alleged misrepresentation of financial advisor fee - partly upheld.

### Insurance

- Ⓢ Increase to €140,000 of an ex gratia offer in death benefit case - insurance company commended as intermediary was at fault
- Ⓢ Only the courts can determine whether an insured person committed or attempted to commit an illegal act - €90,000 awarded
- Ⓢ Cancellation of Mortgage Protection Policies - €4,000 extra refunded
- Ⓢ Medical treatment abroad - prior approval needed - not upheld
- Ⓢ Long Term Care Bond - delay in review results in €3,000 compensation awarded
- Ⓢ Consequences of lapsing a policy and a new declaration of health - not upheld
- Ⓢ Terminal bonus on Endowment Mortgage - not upheld
- Ⓢ Company and intermediary increase offer for death benefit by €43,000 after negotiations with the Ombudsman
- Ⓢ Travel insurance and pregnancy - complaint upheld
- Ⓢ All reasonable care needed if a claim for a lost purse on a plane is to succeed - not upheld
- Ⓢ A motor insurance no claim bonus is not a no blame bonus - not upheld
- Ⓢ Road works business disruption claim could not be investigated
- Ⓢ Loss of trust in an insurance company - not upheld

## COMPLAINTS INVOLVING ELDERLY PEOPLE

### The Provision of Appropriate Investment Advice to Elderly People

I have awarded compensation in particular complaints where I felt that the investment sold to elderly people was inappropriate and where the Financial Service Provider (herein after FSP) did not exercise due care. The decisions I have published reflect these concerns. I have discussed this issue with the Financial Regulator also: the steps the Regulator has taken, as well as the requirements of the Consumer Protection Code, should improve matters going forward.

I had serious concerns during 2006 with comments that were made by the FSP during my investigation of a complaint involving a deceased 83 year old person's investment.

At 82 she invested €30,000 in an investment product with the FSP. 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 me that the product which had been sold to the Deceased had been entirely unsuitable having regard to her age and circumstances.

The FSP contended that the terms of the Investment Bond had been carefully explained to the Deceased and that she had known precisely the terms and conditions. I could find no evidence, for example, that the question of possible delay in the distribution of her estate was ever mentioned to the Deceased. Furthermore the product sold to her was an extremely sophisticated one involving the use of derivatives. It was incumbent on the FSP to fully explain the difference between derivatives and equities and there was no evidence that this had been done. I 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 FSP's submission and all the other relevant evidence submitted to me, I came to the conclusion that the FSP 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, I directed that the FSP 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.

I consider that the following comments I made in my decision merit consideration by all FSPs:

- ④ In response to questions I posed, the FSP indicated that *"it is not necessary for a customer to understand the workings of derivatives, to understand the nature of this investment, its benefits and the terms of conditions attaching to them"*. I respectfully disagreed, as I consider that all customers but above all an 82 year old person should be thoroughly and carefully informed as to what exactly could happen to an investment of this nature so that every customer understands that by its nature, it had certain restrictive conditions.
- ④ The FSP also submitted that *'the Ombudsman's finding would suggest effectively that it cannot offer a product of this nature to a customer above a certain age and that of course would be prejudicial in itself'*. In response I stated that any FSP is entitled to offer any product to any customer but only if it is suitable for that customer. However, people of advanced age should only be offered a product which is clearly explained and which the provider has taken all steps to ensure that the elderly person fully understands and, furthermore, that he or she is aware of the consequences,

be they good or bad.

- Ⓢ The FSP contended that the Deceased obtained what she wanted. I responded that what she wanted, as she understood it, necessarily depended upon explanations given to her by the FSP. I found no evidence that the question of possible delay in the distribution of her estate was ever mentioned to the Deceased. That possibility should have been brought clearly before her, given her age, in a delicate and diplomatic manner.
- Ⓢ I make no apology for taking a very strict line in ensuring that people above a certain age are offered only products which are suitable for their life expectancy and for their particular needs. Indeed, I am quite prepared to meet with senior officials of any provider to outline my thinking in this area in detail. I do not want in any way to be seen as a hindrance to FSPs offering suitable products to its customers.

Each complaint is decided on its own merits and whilst a product may be suitable for a person of particular age, it may not be universally suitable. Investments based on derivatives have considerable complexities and in my view are not very suitable products for most elderly people.

## ATM Cards – Unusual Patterns of Withdrawals, Account Monitoring and Protection for Elderly People

I am pleased to record that positive action is being taken following concerns I raised about ATM card security. I received complaints regarding unauthorised withdrawals from the accounts of people by the alleged misuse of ATM Cards. Some cases involved a vulnerable group in our society – the elderly.

In a particular complaint I considered during 2006 the Complainant had been a customer of the FSP for more than fifty years. 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 FSP was not on such notice. Nevertheless, I felt that the FSP should bear some of the loss suffered due to these transactions because of the exceptional nature of the withdrawals and I awarded compensation of €1,500 to the Complainant.

Though there was no finding of negligence on the part of the FSP, I was not satisfied to leave it at that as I was somewhat disturbed to learn from the FSP's evidence that there was no system in place to alert the FSP to the possibility that a fraud might be taking place.

After the case was closed I 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 FSPs. I also decided to call in the FSP concerned and put certain proposals to it. I am pleased to report that the FSP indicated to me in December 2006 that

*"[The FSP] plan to implement a process which will detect large withdrawals over consecutive days from accounts where the customer is aged over sixty-five (or where age is not known) and where there has been a low level of activity in the immediate past. Once highlighted, these transactions will be investigated by the Bank's fraud team.*

*"[The FSP]'s systems will not permit it to detect such activity in real time; therefore, potentially a number of withdrawals could have taken place before the Bank's fraud team is alerted.*

*"[The FSP]'s implementation timeframe is mid 2007. Once implemented, [the FSP] will monitor the output to establish its effectiveness, both operationally and as an anti-fraud measure."*

I compliment the institution concerned and I will also monitor its effectiveness. I expect that similar actions are taken by all institutions in the near future.

After raising this matter with the Financial Regulator some months later I received a complaint involving another FSP. The consumer concerned in this case was not elderly. An ATM card which had not been used during a four year period from its issue to the Complainant was utilised to make unauthorised withdrawals over a relatively short time period leading to a total withdrawal of over €10,000. However in this instance the use of the card was carried out in a comparatively sophisticated manner as compared to the usual type ATM frauds. I awarded €5,000 in compensation due to certain aspects of the FSP's actions and duty of care. I communicated further with the Financial Regulator on the need for all providers to have adequate control procedures in place and the Regulator is in dialogue with the Irish Banking Federation on this issue.

## CORPORATE INCOME CONTINUANCE AND PERMANENT HEALTH INSURANCE POLICIES

Permanent Health Insurance (PHI) plans are designed to protect the policyholder's income in the event of serious and long term illnesses.

PHI crosses a number of insurance policies and may be found in pensions, life assurance, health insurance and investment policies. PHI is an important and complex product. It is sold mainly to groups of employees through group schemes but is also sold to individuals. Providers of these policies should be fully cognisant of the need to ensure that policyholders fully appreciate the type of policy being sold while consumers should fully inform themselves before they purchase such a policy and be happy that it covers their needs.

As Ombudsman I receive and have adjudicated on complaints from individuals against Financial Service Providers in respect of a permanent health insurance and/or income continuance policies held by employers and underwritten by an insurance company. In general the employers have a policy of insurance with an insurance company generally known as a group disability scheme, the terms of which describe the employers as the policyholder. The premiums may be paid by the employer or by the employee depending on the employment contract. A claim under the policies will only arise if the employee becomes disabled. On occasion the question has arisen whether I have jurisdiction to investigate a complaint made about the policy by employees or former employees when the contract is with the employer.

The three way relationship between an employee, an employer and an insurance company in terms of group disability schemes is an unusual one for the following reasons:

- Ⓢ The primary contract is between the employer and the insurance company.

However, the employee clearly has a particular interest in that contract. In the first place, the contract is for their benefit. Indeed, they are called the “*life assured*” or “*the claimant*”. A claim under the policy will only arise if they become disabled.

- Ⓢ The manner in which such schemes normally work is that the employer pays the premium. The employer is then paid any benefit from the insurance company, and it in turn pays the benefit to its employee. It is considered by me that an exception to the privity of contract rule would apply in such circumstances and it may be the case that the employee would have a contractual cause of action against the insurance company. This would be particularly so in a scheme where employees pay some of the premium out of their own salary.
- Ⓢ In some cases the employer may be providing the scheme as a form of bonus. Indeed, effectively they may be acting simply as an agent between their employees and the insurance company in order to obtain a good premium rate.
- Ⓢ If the employer merely serves the function of collecting and passing along premiums, it is difficult to see how the employee would have any remedy against the employer and indeed they would have to turn to the insurance company for remedy.
- Ⓢ The end users of these policies of insurance are the employees and to that extent it does not appear strange or unusual to describe the end user of a product as a being in receipt of that product and thus a consumer.
- Ⓢ The legislation has chosen not to define the word “consumer”. However, on balance, I am inclined to the view that in certain circumstances an employee is an eligible consumer. This is because of the unusual nature of the three party relationships that arises in these types of insurance company/employee/employer cases.
- Ⓢ I must be prudent in terms of which complaints I decide to deal with. For example, in some circumstances it may be appropriate to accept that I have jurisdiction but to refuse to deal with the complaint on the basis that a more appropriate remedy is available. This might occur in circumstances where there is a very clear term in the contract of employment providing that it is the employer who is providing the benefit. Where there is a clear term of this nature, then if the employer decides to stop the benefit, the employee’s real complaint should be with the employer. It is difficult to see how the conduct of the insurance company could be a matter of concern to the employee in such circumstances.
- Ⓢ However, in cases where there is no obvious remedy against the employer, then it appears to me that I am entitled to assert jurisdiction over such a complaint.
- Ⓢ Obviously certain practical details might arise in this regard. For example, suppose the employee is complaining about a particular term in the contract. This may have been a term agreed between the insurance company and the employer and one which is perfectly fair as between them and which they were perfectly happy to operate. In such circumstances, it might be difficult to see how an employee who is not a party to the contract can come along and complain about a particular term. In those circumstances it is more prudent for me to focus on

Each complaint has to be considered on its individual merits, taking account of the foregoing issues and the following approach:

general considerations of fairness rather than necessarily trying to upset contractual terms which have been agreed between the employer and the insurance company.

## SUCCESSFUL RESOLUTION OF A NUMBER OF MORTGAGE COMPLAINTS ON A PARTICULAR ISSUE

In mid-2006 I received, within a few days, a cluster of complaints (18 in all) from customers of a FSP arising from unilateral action taken by the FSP in relation to the repayment terms of one of its mortgage products. For my office to receive a cluster of complaints about a particular matter is most unusual. The complaints revealed that the FSP had written to a number of customers who held mortgages of a particular type of repayment advising that this particular arrangement was to be discontinued. The Complainants who contacted my office were clearly unhappy with what had been proposed.

Having reviewed the complaints, I felt that there might be a systemic issue being revealed, and rather than deal with each case in succession I decided to call in the FSP concerned and ask for an explanation of the cause of the problem. When the FSP came to see me and the Deputy Ombudsman, it was pointed out to them that what was proposed was a material change in the terms of the mortgage contract. Without the agreement of the mortgage holders I would, in all likelihood, be upholding these complaints, one by one, as things stood.

The FSP admitted that there was a problem and that perhaps its approach had not been best practice so far. It asked for time to bring forward new proposals to put to its customers. I considered that a further eight weeks to try to resolve the issue was appropriate.

At the end of that time the FSP came back and stated that 17 of the 18 cases had been resolved amicably as a result of new proposals. I indicated that the new response was a fair and reasonable one and, if implemented, the FSP would have no further case to answer. I wrote to the Complainants accordingly and also to the FSP complimenting it on its approach to the problem.

This is a good example of a FSP recognising a mistake and, following discussion with me, developing a good resolution to what had been a difficult and complex problem to resolve.

## MORTGAGE PROTECTION POLICIES ON INVESTMENT PROPERTIES

I received a complaint that in 2000 the Complainant and his wife took out a mortgage to purchase a residential investment property. The Loan Offer stated that mortgage protection was required as part of the General Conditions of the loan. The Complainant queried at the time whether such protection was compulsory for a mortgage where the purpose of the security offered was not the family dwelling. Indeed, he stated that the FSP wanted a policy for both the Complainant and his wife. When this was queried, a policy in his name alone was accepted by the FSP reluctantly and as a concession. The Complainant stated that he was given no option but to take out the policy as the loan was contingent on it and it was clearly stated by the provider at the time that this was in fact compulsory for all mortgages.

In 2005 the Complainant discovered that this information was incorrect as it is clearly provided under the Consumer Credit Act 1995 - section 126 (2) (1) - that mortgage protection policies are compulsory only for private dwellings. On bringing this to the FSP's attention, he indicated that the FSP, with some reluctance, terminated the policy. He

then sought a refund of the premiums he had paid with some interest but the FSP was not amenable to it.

He then referred the matter to me. Following further correspondence between the FSP, the Complainant and this office, the matter was settled to his satisfaction. Accordingly, I did not have to carry out a formal investigation of this complaint.

It seemed to me, however, that this could be an area where a systemic issue could arise, not alone for this FSP, but for other FSPs. My concern was whether all commercial lending was subject to this type of mortgage protection policy when in fact it was not necessary. I fully appreciate and understand that certain conditions will apply to investment properties, be they a house or otherwise. I communicated with the Financial Regulator as it may be appropriate for the Regulator to carry out a general review of all FSPs to establish whether mortgages on investment properties (particularly houses) were inappropriately subject to a requirement that a mortgage protection policy be taken out.

## EXTRA TERRITORIAL JURISDICTION

### UK Financial Ombudsman Service Voluntary Jurisdiction

The jurisdiction of the Financial Ombudsman Service of the UK (FOS) is limited to financial services provided in or from the UK. But its voluntary jurisdiction covers certain activities, including general insurance, carried out elsewhere in the EEA if they are directed at the UK and use English, Welsh, Scottish or Northern Irish law. This was introduced primarily to cover certain general insurers owned by UK banks, which deal only or mainly with UK consumers, but are based in Ireland possibly for taxation reasons.

For example, if a UK consumer takes a personal loan from a British Bank, he/she may be sold payment protection insurance with its Dublin based subsidiary – which is a member of the FOS voluntary jurisdiction. Technically, the Dublin based bank is covered by the Irish Financial Services Ombudsman's compulsory jurisdiction in respect of the financial services it provides from Ireland into the UK. However under the EEA FIN-NET agreement I am agreeable, as is the UK FOS, for the sake of good order, to the FOS dealing with these type cases where:

- Ⓢ an Ireland-based financial services firm supplies services from Ireland to a UK consumer
- Ⓢ the financial services firm has joined the UK FOS voluntary jurisdiction
- Ⓢ the case falls within the UK FOS voluntary jurisdiction.

If for some reason a Complainant/FSP does not want to join the UK voluntary jurisdiction the complaint will be examined by me as Ombudsman in Ireland.

This was, and is, an effective way of dealing with complaints and it worked well in liaison with the former voluntary Insurance Ombudsman of Ireland scheme. The establishment of the statutory Financial Services Ombudsman scheme in April 2005 could have altered the position but as it is working well I am agreeable to its continuance.

### Policies sold from Ireland indicating that UK laws apply

I have received an increasing number of complaints from consumers who are resident in the UK about financial services products (in particular insurance policies) which were sold to them in the UK. These products may have been sold in the UK by a UK branch via an independent financial adviser from a head insurance company which is registered and

regulated in Ireland and which is authorised to sell the products into the UK market. The policies' terms and conditions include a clause providing that UK/English law applies to the policies and that the UK Courts have sole jurisdiction.

In respect of some complaints which I have received the Complainant originally brought their complaint to the FOS in the UK. The UK Ombudsman held on each occasion that it had no jurisdiction to deal with the complaint in light of the fact that the insurance company underwriting the policy is based in Ireland. Their territorial jurisdiction covers complaints about the activities of the firm carried out from an establishment in the UK and firms operating from an establishment in the UK. Although it was likely that the original sale of the product would be within the UK FOS jurisdiction, the subsequent administration of the policy by the Irish based provider was not.

As a result, the Complainants were referred to me and by focussing on the administration of the policy which was occurring from a Dublin office, I considered, after taking legal advice, that I had jurisdiction over the complaints, since they related to conduct which had occurred in the Irish jurisdiction and thus had a clear connection with the jurisdiction.

However because of the express terms in the policy stating that English law applies and giving the UK Courts sole jurisdiction over the contract, I found myself in a difficult position. In order to deal with the issue, I requested each of the Complainants and the Financial Service Providers to give their written consent that Irish law would apply to the dispute and that the Irish High Court has sole jurisdiction to hear an appeal of my final decision.

### Freedom of Service

Companies doing business in Ireland on a 'freedom of service' basis are supervised by their home country regulator. There are a number of practical issues to be examined at

the initial stage of a complaint referred to this office:

- Ⓢ It is my objective as Ombudsman to assess jurisdiction at as early a stage as possible so that a Complainant may redirect his/her complaint to a more appropriate body if necessary.
- Ⓢ In relation to insurance sold in Ireland, and underwritten by a company operating here on a freedom of service basis, it is often difficult for consumers to understand that the selling of their insurance and the repudiation of a subsequent claim may be the responsibility of two different Financial Service Providers, and that the service providers may be regulated by two different regulatory authorities.
- Ⓢ Upon receiving a complaint the policy document is requested so that the name of the firm underwriting the policy of insurance can be ascertained. If that company is regulated by a different body and operates here on a freedom of service basis then that consumer is informed of same and redirected to the relevant authority.
- Ⓢ At present the Complainant is informed of the appropriate Ombudsman who will deal with the matter and is asked to communicate directly with it. A procedure of channelling complaints from this office to the relevant Ombudsman in other EEA State has been considered after discussion with the Financial Regulator. However as the Complainants consent would be required for any documentation to be sent on to another party, it is felt that it is less time consuming for the Complainant if he/she is given the contact details of the relevant body directly.

My office is constantly looking a ways of trying to make the procedure easier for consumers. A number of policy documents

submitted by UK companies who operate in Ireland on a 'freedom of service' basis clearly state that a complaint may be referred to the Financial Services Ombudsman in Ireland and that the applicable law is the law of Ireland. Due to the number of complaints received, I decided during 2006 to examine the complaints rather than referring the Complainant to the Financial Ombudsman Service in the UK. This approach may be extended in certain circumstances; in most cases however it is better to refer the Complainant to the relevant agency in the country in which that company is regulated.

A straight forward and readily assessable complaints procedure, for cross-border as well as domestic disputes, is fundamental to the operation of this office. Our current procedures will continue to be reviewed on an ongoing basis and in consultation with the Financial Regulator where necessary.

## EUROPEAN PARLIAMENT INQUIRY INTO EQUITABLE LIFE

A Committee of the European Parliament is conducting an inquiry into the near collapse of the UK Equitable Life Insurance Society in the late 1990s when European-wide policyholders, including Irish customers, suffered substantial losses. The Parliamentary Committee is particularly interested in whether there is now an effective EEA-wide redress scheme. As part of its inquiry the Committee took evidence in October 2006 from me as Financial Services Ombudsman and from my Deputy Ombudsman in her capacity as the former Insurance Ombudsman of Ireland.

The matters discussed with the Parliamentary Committee are contained in Appendix III

## COURT CHALLENGES

### Judicial Review

The first ever High Court Judicial review proceedings against me, as Financial Services Ombudsman, were taken by the Irish Nationwide Building Society in January 2006. In the course of deciding a complaint I had directed the Society in January 2006 to change its rules and its practice of charging automatic six months interest when commercial mortgages were redeemed early. I considered that this was not a genuine pre-estimate of loss and was in effect a penal charge. I had also brought the matter to the Financial Regulator's attention for any 'look back action' it deemed necessary.

The High Court proceedings were settled in my favour in May 2006 with full costs awarded. The terms of the High Court settlement were as follows:

*"The Society undertakes that all loan termination payments will, so far as consumers (as defined in the Central Bank Financial Services Authority of Ireland Act 2004 and S.I. 190 of 2005) are concerned, be calculated as a genuine pre-estimate of the Society's loss on early termination.*

*In the light of that undertaking, the Ombudsman agrees that it is not necessary for the Society to change its rules in the manner directed by the Ombudsman.*

*The proceedings may be struck out with an Order for costs, to include all reserved costs, in favour of the Ombudsman, same to be taxed in default of agreement."*

Further it was agreed between Counsel that:

*"The Society will not seek repayment in the Y case.*

*The Society will pay as directed in the OB case.*

*Nothing in the within Settlement or Order affects the entitlement of the Society to challenge the validity of the legislative scheme.*

*The Ombudsman will, if desired by the Society, express a view on the*

*Society's formula for calculating a genuine pre-estimate of loss, but nothing in the expression of such a view will bind the Ombudsman in the determination of any particular case."*

I had also directed, in February 2006, that compensation be paid in another similar case (though it was not the subject of the judicial review proceedings it was part of the settlement terms - OB case). However I had to take further steps in June 2006 to ensure that this was in fact paid.

In July 2006 on application by my legal team the Supreme Court awarded further legal costs against the Society. This arose as I was represented and submitted affidavits in an *ex parte* appeal taken by the Society, concerning the Judicial Review proceedings, to the Supreme Court in May 2006 which the Society subsequently withdrew.

In September 2006 agreement was eventually reached between the Society and my office as to how the early redemption charge should be calculated for future and past cases, based on a formula which calculates the actual loss to the Society, if any, caused by the early redemption. The Society also agreed to do a 'look back', under the general superintendence of the Financial Regulator, going back six years from my decision, and undertook to reimburse previous borrowers in accordance with the newly agreed formula. The Financial Regulator was informed of this agreement.

I understand that many customers will get significant refunds as a result of the 'look back' exercise.

## Direction to Ulster Bank to Make Compensation to Investors

In a February 2006 decision I directed Ulster Bank Investments Funds Limited to make significant compensation to customers who invested in its International Share Portfolio. In effect I directed the Bank to make good a 15% reduction in the Fund of €7.4m that arose in November 2004. The full text of the decision is at Appendix VIII.

I consider it appropriate to include details of this direction in this Report so that the Oireachtas is apprised of this significant issue. I am very conscious of the fact that this direction was and still is the subject of appeal to the Courts. The President of the High Court gave judgment on 1 November 2006 as to the scope of the appeal. Ulster Bank served notice of appeal to the Supreme Court in late December 2006. The outcome of the Supreme Court appeal is awaited.

Part 3

# Guidance





## Recurring Issues

I understand the consumer's disappointment when, having referred a complaint to this office, I do not find in his favour, but there are many factors to be considered in adjudicating on complaints. I must assess all the facts relating to a dispute and all the evidence submitted before coming to a decision. Financial products on the market in this jurisdiction are increasingly sophisticated in the main and it follows, therefore, that references to this office are becoming increasingly complex. In that regard the requirements of the Financial Regulator's Consumer Protection Code, financial education and awareness measures, and efforts by FSPs to be more transparent should improve matters going forward. The following are some recurring issues I have noted since taking up office.

### SUPPORTING DOCUMENTATION

I expect a higher standard of record keeping from FSPs than from most consumers. It is important that FSPs submit appropriate records and documents, including paperwork specific to the Complainant as well as relevant standard documents (e.g. policy document / booklet (endorsements), credit agreement, policy schedule, proposal form, and all promotional literature/brochures).

Complainants must also submit, with their complaint, copies of all relevant documents (copies are preferable as Complainants may need to refer to the originals later) that they believe support their case e.g. all correspondence between the FSPs and themselves. As from the outset my investigation process is based primarily on the information and records or other documents provided by the parties to the dispute, additional supporting information, once a Finding has issued by this office to both parties, should be the exception. I make a Final Decision if a Finding by my staff is not accepted by either party.

### INSURER'S LANGUAGE MUST BE CLEAR AND UNAMBIGUOUS

There is a major onus on the FSP to provide information in a clear and unambiguous manner. This is very important and is an area I consider when examining complaints.

It is important that the FSP clearly expresses in documentation the nature and extent of cover provided. The FSP must clearly identify any warranties or endorsements and any charges or fees that apply.

In investigating cases my staff and I will look first to the common usage meaning of words. Unless FSPs bring exclusions and exceptions clearly to policyholder's attention, they will find it difficult to argue disputes which rely on a specific definition which would not be generally recognised by a policyholder. Insurers should use plain language.

Where a FSP chooses to adopt ambiguous words, it is best practice as well as established law that those words should be interpreted in the sense which is adverse to the party who chose and introduced them.

This approach has been approved by the Irish courts.

### IMPORTANCE OF READING DOCUMENTS

There is a responsibility on a FSP to make sure, as far as possible and in line with the Financial Regulator's Consumer Protection Code, that the products and services it offers match the consumer's requirements. There is also a duty to explain the main features of the products and services on offer. The main features for example of an insurance contract would include all of the important details of cover and benefits; any significant or unusual restrictions or exclusions; and any significant conditions or obligations which the policyholder must meet. Indeed, it may be prudent for FSPs to include a statement in the

contract to be signed by the consumer stating that this has been done.

Additionally consumers must also play their part by taking time to read the contract and supporting documentation, mindful of their needs, objectives and responsibilities. In the case of some insurance policies, a 'cooling off' period is offered to customers whereby they can cancel a policy after it is purchased. This period should be used by customers to review their policy documentation in detail.

## DISCLOSURE OF MATERIAL FACTS

Contracts of insurance are contracts *uberrimae fidei* (of the utmost good faith). This requires that an applicant for insurance has a duty to disclose all material facts to the insurer. The applicant is in the best position to know the facts and circumstances relating to the application. A failure to disclose all material facts and to answer questions fully may invalidate the insurance policy and can be grounds for my not upholding a complaint. The test for disclosure of material facts is stated by Kenny J. in the Supreme Court case of **Chariot Inns Ltd v Assicurazioni Generali S.p.a. & Ors** [1981] I.R. 199 at 226 thus-

*"It is not what the person seeking insurance regards as material, nor is it what the insurance company regards as material. It is a matter or circumstance which would reasonably influence the judgment of a prudent insurer in deciding whether he would take the risk and if so, determining the premium which he would demand. The standard by which materiality is to be determined is objective, not subjective."*

## Material fact

A material fact is any fact that influences the judgment of a prudent underwriter in his assessment of the risk. Such facts have to be disclosed. The duty of disclosure extends to cover all material facts which the proposer or applicant for insurance ought to know as well as those actually known to him. If an applicant for insurance is in any doubt as to whether a fact is material, such fact should be disclosed to the insurance company.

## Revealing relevant information

When applying for, *inter alia*, life cover, critical illness cover, or permanent health insurance, the insurance company will ask the proposer (the applicant for insurance) to tell everything relevant to *all* of the questions on the application form.

If the proposer does not reveal all relevant material facts or if any of the answers to the questions are not complete or true the insurance company may treat the policy as void and consequently there is no cover under the policy and any claim may be declined. The legal situation regarding non-disclosure is that the company may decline a claim and void the policy *ab initio* (from the outset as if the contract never existed). **Non-disclosure may be deliberate, negligent or innocent and each complaint submitted to this office is examined on its own merits and taking into consideration what is fair and reasonable.**

Information requested by an insurance company must be provided accurately and truthfully by the applicant at proposal time. Additionally, some policies require ongoing disclosure of material facts and policyholders need to be aware of this. Indeed, when a claim has been paid, for example in a Permanent Health Insurance case, an insurance company is entitled to review the claim and seek up-to-date medical information to decide whether the claimant is capable of returning to work or indeed whether the claimant is actually working.



### Companies must warn policyholders of the consequences of non-disclosure

Warnings regarding the consequences of non-disclosure should be prominent in all brochures, company literature and proposal forms. FSPs should use colour icons on their proposal forms to highlight the issue of non-disclosure and inform policyholders when they make a claim that their past history (medical or otherwise) will be investigated in full. Depending on the type of claim the company can access a myriad of information, including medical, financial and employment records.

The policyholder should **always** be given a copy of the completed and signed proposal form which should state "This information, which you gave us, will be referred to when you make a claim".

### INCOME CONTINUANCE AND PERMANENT HEALTH INSURANCE

Income Continuance and Permanent Health Insurance (PHI) policies provide cover in the event of disability where the policyholder is unable to carry out "his/her own occupation". Income Continuance and PHI cover may have a much narrower scope where the stricter definition of "disability" states that the policyholder must be unable to carry out "his own or any occupation". Following claims experience some insurance providers exclude cover for depression or back pain across a PHI group scheme or on an individual basis.

During the term of the claim the FSP may ascertain if the claimant has recovered from his illness and is healthy enough to return to work. The FSP may employ claims visitors to meet with the claimant or arrange for medical examinations.

In general FSPs assess medical evidence to decide whether to admit a claim, to decline a

claim, to continue a claim or to cease a claim. Claims are turned down where, on the basis of medical evidence, the level of disability/illness is not considered to be serious enough to prevent the policyholder from pursuing his occupation. Claims are also turned down where there has been non-disclosure of material facts on the application form.

To that end I may independently seek the services of, *inter alia*, consultant cardiologists, oncologists, rheumatologists and neurologists. I will also take account of the results of Functional Capacity Evaluation tests and GP notes. It is important to note that each complaint is assessed on its individual merits and I make my decision having considered all the advices received.

### MEDICAL EXPENSES INSURANCE

Medical expenses insurance is an annual contract providing cover for specified medical and related treatment in very precise circumstances. Cover may change from year to year as new treatments are included and others are limited. It is important to note that not all treatments and procedures are covered and Complainants are frequently disappointed when they discover that the treatment they have sought is not covered under their policy. Any changes in cover should be highlighted by the FSP.

Each year the policyholder receives the terms and conditions of the medical expenses insurance he/she has purchased. Policyholders should examine the literature provided by the insurer and make use of "help lines" to clarify any questions they may have in relation to the particular cover they have purchased.

## Waiting periods

A waiting period is a minimum period of time for which the policyholder must be insured before benefit for treatment will be paid. Criteria in respect of waiting periods may differ from company to company but two main waiting periods generally apply

- (a) an initial waiting period; and
- (b) a pre-existing medical condition waiting period.

The initial waiting period applies to new policyholders who must be insured for a specified period of time before any benefit for treatment will be paid. Normally, any accidental injury is covered within this waiting period.

The pre-existing medical condition waiting period applies to a policyholder who already has a medical condition at the time of taking out the policy. Benefit will not be paid for any claim arising from the particular pre-existing medical condition until a specific waiting period has expired. A policyholder's age has a bearing on the waiting period applicable.

The following are examples of complaints relating to declined claims arising during the *pre-existing medical condition* waiting period which were not upheld by me:

A claim for the cost of a hip replacement where the policyholder had a medically defined pre-existing history of arthritis of the hip

A claim for the cost of heart by-pass surgery where the policyholder had a pre-existing history of raised blood pressure, angina and high cholesterol.

## TRAVEL INSURANCE

A considerable and ever increasing number of travel complaints are referred to me for investigation. The most common problem is a lack of awareness of the exclusion of liability for travel claims where the claim has arisen due to a pre-existing medical condition which has not been declared to, and accepted by the insurer.

### Responsibility of the provider

It is very important that all sellers of travel insurance, be they travel agents, travel companies, intermediaries or insurance companies, bring all of the facts to the attention of the traveller before the policy is incepted and have appropriate training and procedures in place for all sales staff. Plain and simple language in all documents and discussions is desirable so that the facts as outlined do not disguise, distinguish, obscure or mislead an individual.

### Pre-existing Medical Condition

Complaints arise from a lack of awareness by policyholders of the limit or strict exclusion of liability for travel claims arising from cancellation, curtailment or other medically associated causes, when the claim has arisen due to a pre-existing medical condition. Policyholders are required to disclose to the FSP any medical conditions or set of circumstances which could reasonably be expected to give rise to a claim, e.g. the policyholder's own state of health or that of a close relative, travelling companion or other person. Failure to disclose such a fact to the insurers prior to travelling may lead to the repudiation of a claim. Many FSPs offer a service whereby individuals, who are not sure whether a fact should be disclosed or not, may ring to consult a company representative.

I note that some FSPs supply travel agents and tour-operators with a one page

document in relation to the “*Pre-existing Medical Condition*” requirement for the intended traveller to complete. This document specifically draws attention to the necessity of disclosing pre-existing medical conditions and requires the applicant for insurance to sign a declaration as to the awareness of this requirement. As there is often a time lapse between effecting insurance and receipt of the policy, this document brings the requirement to the notice of the policyholder at an early stage. It is recommended that all FSPs in the travel insurance market should issue such documentation to travel agents and tour-operators who are selling their policies.

In general, where a risk to be insured already exists prior to the taking out of insurance to cover against that risk happening, the FSP will not be liable for that risk unless it has expressly agreed to cover it.

### **Cancellation of holiday due to death of close relative**

Complaints also arise where Complainants cancel a holiday due to the death of a close relative and seek to recover the cost of the cancelled holiday under their travel policy. The FSP may repudiate the claim on the grounds of non-disclosure of the relative’s pre-existing medical condition at the time of taking out the insurance. The Complainant may allege that at no time prior to the purchase of the travel insurance was he aware that his relative suffered from a condition which might have caused him to cancel his trip.

### **Requirement to Contact Company Medical Assistance Service**

The purpose of curtailment cover under holiday or travel insurance is to compensate the policyholder for the curtailment (cutting short) of the insured trip due to specified causes. Complaints have arisen in relation to the curtailment of a holiday where the policy provides that the policyholder must contact

the FSP’s medical emergency service to obtain prior approval and confirmation from the medical emergency service that the curtailment of a holiday is a medical necessity.

### **Lost or stolen luggage – reasonable care**

Complaints arise where a policyholder’s luggage, personal items or money have been stolen from a hotel room or apartment while on holiday and a subsequent claim has been declined by the insurance company. Most travel insurance policies contain a “*reasonable care*” condition and also exclusion for unattended money and/or valuables. In order for a claim to succeed the insured must usually demonstrate that the money and/or valuables were carried on the Insured’s person or, alternatively, were placed in a safety deposit box or other similar locked, fixed receptacle at the time of the loss.

### **Claims Procedure**

Certain procedures must be followed and conditions satisfied in the event of making a claim e.g. to keep receipts of all relevant expenses incurred and to make formal reports to the appropriate authorities in the event of theft or money and/or personal belongings, or of loss/damage to luggage whilst travelling. Policyholders must do this at the time of the loss and the FSP will look to the policyholder to provide the appropriate evidence to substantiate the claim.

## **POLICY REVIEWS**

Policy Reviews are an integral part of Unit Linked Whole of Life Policies. With policies of this nature life cover is charged for on a yearly basis and the premium rate increases according to the age of the policyholder. A Fund is built up in the early years but unless

the initial investment / premium is substantial the costs of cover in later years is higher and the fund subsidises the costs. In due course the Fund is exhausted and as a result there is a need for an increase in premium or a reduction in the cover.

The purpose of the review is to assess whether the value of the policy will be sufficient to sustain the expected life cover, throughout the life of the insured individual.

The policy review gives an opportunity to assess realistically how the policyholder's needs are being met. Furthermore, it gives the policyholders an up to date picture of their investment and level of cover and provides an indication as to how long that cover is likely to sustain. This is particularly important when there is a downturn in market performance and will allow the financial provider to discuss with the policyholder what, if any, action they might wish to take. With this type of policy it may be necessary for the policyholder to make an additional provision for cover at some time in the future, depending on investment returns and charges.

It is often argued by Complainants that they were not aware of the need for such reviews and that they believed that the premium was set for the duration of the policy. However, investigations to date indicate that the documentation provided from the outset clearly set out what charges would be deducted, the risk attached to the investment and the need to review the policy in the future. Nevertheless, it is vital that FSPs explain the review process to the policyholder at the outset. One major area of concern with these policies is that the review date is often missed by the Financial Service Provider: where this has happened in the past I have recommended an award or other remedy.



Part 4

# Case Studies



# Case Studies

## 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, entered into the purchase of this particular property which had been located for them by the mortgage broker. The mortgage 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 that the mortgage broker had recommended an unsuitable investment and had wrongfully assured them that the market rent available would cover the mortgage repayments. I did not uphold these grounds of complaint.

However, it emerged that the apartment which had been found for them by the 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 with 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, unknown to them, owned by the principal of the mortgage broker concerned.

The FSP stated that the introduction to this property owned by its principal was to assist the Complainants. However, I found that there was an undisclosed conflict of interest in the Director/Secretary/Principal Shareholder of the mortgage broker 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, I was satisfied that the transaction in question was at all times tainted by the mortgage broker's undisclosed conflict of interest between his personal position as owner of the property and his position as the company's principal.

I awarded damages of €16,500 against the mortgage broker which was not paid to the Complainants within the requisite time frame. As my decision was not appealed I instructed my solicitors to initiate court enforcement proceedings in early January 2007. Following the issue of a seven day letter to the mortgage broker's solicitors the amount was then paid without the necessity of a court action. The matter was also referred to the Financial Regulator.

### Management of portfolio by stockbroker - €40,000 compensation

A firm of stockbrokers was given €320,000 by a couple to invest in shares with the stockbroker managing 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, contrary to the instructions of the investors, and that this caused the substantial loss. The FSP 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.

I 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, I 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. I 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 that the Credit Union had paid out money from the joint account contrary to the account mandate which it held.

I 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 because what the Deceased had completed was 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, I found that the size of the withdrawals made in the last four months ought 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.

I 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, I 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 FSP for more than fifty years. 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 ATM 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 the interest of fairness I felt that the Bank should bear some of the loss suffered due to these transactions because of the exceptional

nature of the withdrawals and I awarded compensation of €1,500 to the Complainant.

Though there was no finding of negligence on the part of the Bank, I was not satisfied to leave it at that. I 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. I 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 I 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. I also decided to call in the Bank concerned and put certain proposals to it: this resulted in a positive response from the bank and is dealt with in detail at page xxx.

### **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 me 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 and conditions were. I could find no evidence that the question of possible delay in the distribution of her estate was ever mentioned to the Deceased which, I considered, should have been explained clearly to 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. I considered it 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, I 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, I directed the Bank to purchase the Bond from the Complainant's estate at a price of €38,500, to be paid for by way of Bank Draft.

I 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.

I 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. I 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.

I considered all of the evidence before me, including the brochure for the investment, and 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, I 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, I 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.

### **Bogus non resident account €900,000 tax settlement - complaint not upheld**

A customer who had a number of bogus non-resident accounts for a number of years and who ultimately had to pay €900,000 to the Revenue Commissioners in arrears and penalties, complained that the official of the bank concerned had told her, when she enquired about the tax amnesty that *"she could have nothing to worry about"* regarding the bogus non-resident accounts, and *"not to bother about the amnesty"*.

I came to the conclusion that it was highly unlikely that the bank gave any such advice in relation to the eight bogus non-resident accounts which the Complainant held. I held that even if the Bank had been actively involved in assisting and facilitating such tax evasion, public policy would preclude any finding that the Bank owed a duty of care to the Complainant to guide her in her decision as to which of two options she should follow, one of which was clearly illegal. I found that there was no sustainable evidence of negligent advice or failure in duty of care, and accordingly the complaint was not upheld.

### **An 89 year old woman's investment of €500,000 in a Building Society was made under a mistaken impression - €4,000 award**

The suitability of an investment product sold to a woman was the subject of a complaint by the Executors of the estate of the woman who subsequently died. In 2003 when the woman was 89 she re-invested the sum of €500,000 in a secure investment for a period of five and a half years. She did this on the advice of a friend of hers who claimed to have

investment knowledge and advised her accordingly.

The Building Society concerned admitted that it had reservations about the suitability of this product for this lady and told the lady's advisor accordingly. The main reservation was that the investment was a five year investment and the value would be "locked in" to the end of five years. If the customer died within the five years then the original investment only would be repaid and none of the locked in value would be paid out. Notwithstanding these danger signals, the investment went ahead.

I found it difficult to comprehend why the person advising the investor considered this particular product to be suitable, being locked in for five years and offering no income whatsoever over that period. Nevertheless, I took the view that although the Building Society had expressed reservations, it should have gone further, and in my view it had a duty to warn the customer that if she died before the maturity of the Fund, there would be no return whatsoever achieved on the investment. The Building Society did not do this and the customer was under the mistaken impression that a certain element of growth, which had already been locked in, would be paid out to the Deceased's estate.

I found that while the Building Society had partly failed in its duty of care, nevertheless the person advising the elderly lady had contributed to the situation. Though the "locked in" increase in value on the day of the death of the lady was €10,439 I directed in the circumstances that €4,000 compensation be paid to the estate.

### **Bank letter about a customer's overdrawn account was sent to the wrong address -€4,500 compensation**

A letter written by a bank concerning a customer's overdrawn account was placed in

an envelope bearing the incorrect address and was opened by an unknown third party and forwarded to the Complainant.

I found that there was a breach of duty of care owed by the Bank to the Complainant in sending letters concerning his personal details to somebody else. I was satisfied that the letter in question was opened by a third party and that it would indeed have caused embarrassment and annoyance to the Complainant. (It was not known who exactly had opened the envelope and forwarded it to the Complainant).

I upheld the complaint and awarded the sum of €4,500 in compensation for breach of confidentiality.

### **Wrong credit rating record for a twin brother results in a €2,000 award**

A customer who applied for a finance loan to buy a new car was refused a loan and was advised that there was a problem with his credit rating. This surprised him, as he was not aware of any default on his part. Having enquired at the Irish Credit Bureau, he discovered that he was recorded by the Bank in question as having defaulted on a loan, when in fact he had never had, or sought, any borrowing from this Bank previously. Further enquires revealed that the loan which had been defaulted on had been a joint loan taken out by the Complainant's father and his brother. The Complainant had had nothing to do with it.

My investigations revealed that the brother who had taken out the loan had the same date of birth as the Complainant as they were twins. It turned out that the Bank, on processing the loan application, confused the Complainant's records with that of his twin brother.

I found that the Bank had been negligent in furnishing information to the Irish Credit

Bureau which was untrue and defamatory of the Complainant, and had thereby caused him considerable embarrassment when he was refused finance for his proposed car purchase.

I directed that the relevant entry at the Irish Credit Bureau be amended by the Bank so as to show the true position. I also awarded €2,000 in compensation as a person's credit rating is an important personal attribute.

### **Part of an elderly widow's €1.5 m Investment Portfolio was mismanaged by a leading stock broking firm - €18,500 compensation awarded and no further commission to be charged**

An elderly customer (in her late 70s) of a leading firm of stockbrokers which managed her overall portfolio worth €1,500,000 complained that the firm had mismanaged her portfolio in that it failed to advise her properly how a particular Bond would operate and that it recommended a number of technology shares when she had made it clear that she did not want any high risk shares to be included.

In respect of the Bond issue, I found that the Complainant had been led to believe that she would receive a tax-free income for the ten years of the investment, whereas the income was in fact a repayment of her own money, thereby eroding the capital invested. Furthermore I found that she was also misled in that she was not told that any exit from the investment before ten years had elapsed would be subject to a penalty charge of 9%.

My finding was that the stockbroker was guilty of negligence and breach of duty to the Complainant in respect of the advice that it gave.

By way of remedy I directed that the stockbroker should refund to the Complainant all fees charged in relation to the Bond up-to-date (a figure of €17,000) and charge no

further commission or fees in relation to the holding of the Bond thereafter. In addition a €1,500 compensatory payment to the Complainant was also directed.

Furthermore I directed that the firm should make arrangements to amend its procedures immediately so as to more accurately describe any deductions for charges or commission on the periodic performance statements/valuations of the Complainant's investment.

### **Mortgage broker negligence results in €2,000 compensation**

A complaint of negligence on the part of a mortgage broker who acted on behalf of a mortgage applicant and who made an application to one provider only instead of more than one was the subject of an investigation. The mortgage approval was secured but the Complainant found that the terms were unfavourable. The Complainant then looked elsewhere for mortgage facilities but four months had now elapsed and as a result of the delay the customer was unable to close a property transaction at the agreed time and had to pay an interest penalty of €4,000 as a result. I found that while the mortgage broker was negligent in his handling of the matter some of the delay was due to the Complainant herself. I upheld the complaint and awarded €2,000 compensation.

### **Alleged misrepresentation of financial advisor fee - partly upheld**

A couple paid €1,000 to a financial advisor intending and under the impression that it was to be credited to the loan account which the advisor had negotiated for them. The advisor however dealt with it as a fee to them for their work.

I found that there was some genuine misunderstanding and that, although the

Complainants had been misled, this misrepresentation was neither intentional nor fraudulent. The Complainants knew that there would have to be some remuneration for the advisor's work but were under the impression that any such fee would come from the lender. I directed that €500 could be held by the advisor and the other €500 should be returned to the Complainants.

## 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 insurance company 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 this office.

On examining the papers I was 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.

I sought the company's observation on the opinion before I came to my 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. The company did not accept legal argument tendered but offered on a strictly *ex gratia* basis, and without prejudice to its rights, to increase its previous offer to €140,000 which represented 80% of the life cover policy.

I considered the generous uplift on the Company's previous offer as the way forward with the dispute. I found that the Company's *ex gratia* offer of €140,000 was very fair as it was not wholly responsible for the situation that came about – the intermediary had also played his part.

I compliment 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 this office and Financial Service Providers can negotiate 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 I 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, save in 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”.

I 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. I considered that by attempting to rely on the policy exclusion the Company was in effect determining that the Insured Person had committed or had attempted to commit an illegal act.

I 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 I 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 operating in this jurisdiction. 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 FSP 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 Complainant sought an additional refund of all the premiums paid under the original Policy from late 2000 up to its cancellation in mid 2006.

I noted that the original policy was assigned to a building society and the Complainant's written instructions were required to cancel it. The FSP 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 FSP 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 FSP did remain on risk for the sums assured until mid 2006. However, following communication between this office and the FSP regarding the particular circumstances of the dispute i.e. the Complainant lived 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.

I considered that the additional refund was a significant gesture by the FSP and was a fair outcome of this dispute.

### Medical treatment abroad – prior approval needed – complaint 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 FSP 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 FSP *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 FSP explained that the specified criteria under the policy 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 FSP. In addition, the FSP indicated that treatment for drug addiction was available in Ireland. The FSP 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.

I 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. I noted also 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 FSP. The Complainant acknowledged that the

treatment in question or an alternative treatment was available in Ireland at the time.

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

### Long Term Care Bond – delay in review results in award of €3,000 compensation

The dispute here related to a Long Term Care Bond which was sold in 1995 through an Independent Intermediary. In 2002 the FSP 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 FSP's review was that the Bond would not support the original projections. The FSP 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, I referred the Complainant 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 to determine if the FSP correctly carried out the review in accordance with the terms and conditions of the policy.

From the documentation submitted I found that no guarantees were given by the FSP 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 FSP 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.

I noted that the FSP 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, I 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. I considered that the late review deprived the Complainant of an early opportunity to assess his requirements for the future. The FSP 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, I directed the FSP to enhance the Bond by €3,000.

### **Consequences of lapsing a policy and a new declaration of health – complaint 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 assurance 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 I was satisfied that the Complainant had clear notice that premiums had not been received the complaint was not upheld.

### Terminal bonus on Endowment Mortgage – complaint 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 1 February 2006 with a 37% terminal bonus. At a later date in February the FSP 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.

The FSP 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 FSP 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 FSP 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.

I 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.

I accepted that the FSP was not obliged to extend the maturity date on the Complainant's policy to enable her to benefit from the increased terminal bonus. The FSP

had the right to regulate the dates on which certain bonuses became payable. The complaint was not upheld.

### FSP and intermediary increase offer for death benefit by €43,000 after negotiations with this office

The dispute concerned the refusal of a FSP to pay a death benefit claim under a Term Assurance policy on the grounds that the cover ceased on the deceased member's 70th birthday. The assured had died two weeks *after* her 70th birthday. The assured had, prior to her death, received an incorrect letter advising that she was covered for a stated period beyond her 70th birthday.

I found, in the particular circumstances of this case, that the letter to the assured could not be read as a stand alone document and that an interpretation of same could not be made without reference to the policy terms and conditions which I found were clear regarding the cessation of cover on 70th Birthday. However, I did feel that a payment was justified.

Prior to the complaint being referred to me the FSP had put forward a settlement offer of €7,000 to the Complainant. In the particular circumstances I considered that a larger payment was justified.

Following communications between this office, the FSP and the intermediary involved, the Company agreed that a sum of €50,000 should be paid to the deceased's estate. Having regard to all the circumstances of the case I considered that the FSP's increased offer was fair and reasonable.

### Travel insurance and pregnancy – complaint upheld

The Complainant booked a holiday in early 2004 and purchased a travel insurance policy

with the FSP two months later. Ten days after purchasing the policy the Complainant was informed by her doctor that she was pregnant and expecting twins. On medical advice she cancelled her holiday six weeks later. She had been due to travel in mid 2004 and her expected date of delivery was late 2004.

The Complainant had submitted a cancellation claim under her travel insurance policy to cover the cost of the cancelled holiday. Her claim was declined by the FSP on the grounds that cancellation due to pregnancy was not covered under the terms of her policy unless it was medically necessary as the policy condition stated

*“Cancellations because of pregnancy or childbirth where the expected date of delivery is less than eight weeks after your trip ends (or sixteen weeks in the case of known multiple pregnancy) unless the pregnancy was confirmed after the date your policy or travel tickets for your trip were booked and the cancellation is medically necessary”.*

I examined the dates of the events in question. It was evident that the holiday was booked and cover put in place prior to the Complainant's pregnancy being confirmed. Additionally the Complainant's doctor had confirmed that she advised the Complainant of the “need to cancel” ten days after purchasing the policy. I was satisfied in the circumstances that the Complainant's claim fell within the terms of cover and I upheld her complaint.

### Road works business disruption claim could not be investigated

The Complainant ran an interior design business which she claimed was adversely affected by prolonged road works, in particular a large hole, over a period of twenty weeks in front of her premises. She sought to be indemnified by the insurers of the contractors carrying out the road works but

this claim was unsuccessful. The Complainant subsequently contacted this office and provided figures in support of her claim for loss of business.

I advised the Complainant that I may only investigate complaints by ‘eligible consumers’ and drew her attention to section 57BA of the Central Bank and Financial Services Authority of Ireland Act 2004 which provides that an ‘eligible consumer’, in relation to a regulated Financial Service Provider, means a consumer –

*“(a) who is a customer of the Financial Service Provider, or*

*(b) to whom the Financial Service Provider has offered to provide a financial service, or*

*(c) who has sought the provision of a financial service from the Financial Service Provider.”*

In this case, as the complaint related to a third party claim, the Complainant was not an eligible consumer within the meaning of the Act and accordingly I could not investigate her complaint.

### A motor insurance no claims bonus is not a no blame bonus – complaint not upheld

This motor insurance dispute related to the loss by the Complainant of her 50% no claims bonus following a claim for damage to her parked car caused by an unknown third party vehicle. The Complainant maintained that her car was legally parked and locked, and argued that that it was most unfair that she should be penalised in this way as she did not in any way contribute to the damage and had no responsibility in the matter.

A no claims bonus is a reduction of premium allowed at the time of renewal or quotation stage to an insured that has made no claim

affecting the previous period of insurance. It is important to remember that a no claims bonus is not a 'no *blame* bonus'. Once a claim, or potential claim, is notified, the insurer is committed to a potential outlay and the policy provisions will apply. An insured's no claims bonus will be affected, unless it has been protected against the loss.

A policyholder may choose to guard against the loss of its no claims bonus by purchasing 'protected no claims bonus' cover. Depending on the quantum of the claim a no claims bonus when protected is not automatically lost or reduced following a claim under a motor policy. An extra premium is payable by the policyholder for this benefit.

The Complainant in this case did not elect to have this benefit on her policy and accordingly, her claim under her motor insurance cover led to her no claims bonus being affected at renewal.

### **All reasonable care needed if a claim for a lost purse on a plane is to succeed – complaint not upheld**

The Complainant left her purse on a flight when she arrived at her destination in Spain. She reported her loss at the airport and also to the airline. Her claim under her travel insurance policy for the lost purse and the €700 it contained was declined by the FSP on the grounds that she had not taken the normal precautions required under the terms of the policy to secure the safety of her personal baggage. The Complainant disagreed with the FSP's claim that she had not taken "*all reasonable care*" with her purse and felt it unfair to suggest that "*normal precautions*" to protect her property were not taken. She argued that she had been more than responsible in looking after her purse and reporting its loss.

I accepted that the Complainant had acted responsibly in reporting her loss and in attempting to recover her purse. However the

reality was that she had left her purse unsecured, unattended and beyond her reach on the seat of a plane and other people could have had access to it. I found that in doing this she was in breach of the terms and conditions of her policy and I could not uphold her complaint.

### **Loss of trust in an insurance company – not upheld**

The Complainant had a mortgage endowment policy. He claimed that he was baffled by the figures in his annual statement and had received no clarification from the FSP. He felt that his account was poorly managed by the FSP and was concerned by the FSP's failure to convince him otherwise.

Upon investigation it became clear that the problem in this case stemmed from the FSP's failure to implement a premium increase in late 1999. I accepted that the FSP had acknowledged its mistake and rectified matters by adding units to the plan at no cost to the Complainant.

However, I noted that the Complainant had never felt satisfied on the basis of the annual statements received that the premium error had been corrected. Having examined all the documents submitted in this case, including additional information sought from the FSP, I was satisfied that there was nothing untoward in the figures provided.

In reality the problem in this case was clearly one of loss of trust. The Complainant no longer had confidence in the FSP's management of his account. I noted that he had entered into a mortgage endowment policy with the FSP and had entrusted the management of his fund to the FSP. Although it appeared that he no longer felt confident about the management of the policy, on examination of the FSP figures I found that I could not uphold the complaint.

Part 5

# Financial Statements



# Report of the Comptroller and Auditor General for presentation to the Houses of the Oireachtas

I have audited the financial statements of the Financial Services Ombudsman's Bureau for the year ended 31 December 2006 under the Central Bank Act 1942 as amended by the Central Bank and Financial Services Authority of Ireland Act 2004. The financial statements, which have been prepared under the accounting policies set out therein, comprise the Statement of Accounting Policies, the Income and Expenditure Account, the Balance Sheet and the related notes.

## RESPECTIVE RESPONSIBILITIES OF THE OMBUDSMAN AND THE COMPTROLLER AND AUDITOR GENERAL

The Ombudsman is responsible for preparing the financial statements in accordance with the Central Bank Act 1942 as amended by the Central Bank and Financial Services Authority of Ireland Act 2004, and for ensuring the regularity of transactions. The Ombudsman prepares the financial statements in accordance with Generally Accepted Accounting Practice in Ireland. The accounting responsibilities of the Ombudsman are set out in the Statement of Responsibilities of the Financial Services Ombudsman.

My responsibility is to audit the financial statements in accordance with relevant legal and regulatory requirements and International Standards on Auditing (UK and Ireland).

I report my opinion as to whether the financial statements give a true and fair view, in accordance with Generally Accepted Accounting Practice in Ireland. I also report whether in my opinion proper books of account have been kept. In addition, I state whether the financial statements are in agreement with the books of account.

I report any material instance where moneys have not been applied for the purposes intended or where the transactions do not conform to the authorities governing them.

I also report if I have not obtained all the information and explanations necessary for the purposes of my audit.

I review whether the Statement on Internal Financial Control reflects the Bureau's compliance with the Code of Practice for the Governance of State Bodies and report any material instance where it does not do so, or if the statement is misleading or inconsistent with other information of which I am aware from my audit of the financial statements. I am not required to consider whether the Statement on Internal Financial Control covers all financial risks and controls, or to form an opinion on the effectiveness of the risk and control procedures.

I read other information contained in the Annual Report, and consider whether it is consistent with the audited financial statements. I consider the implications for my report if I become aware of any apparent misstatements or material inconsistencies with the financial statements.

## BASIS OF AUDIT OPINION

In the exercise of my function as Comptroller and Auditor General, I conducted my audit of the financial statements in accordance with International Standards on Auditing (UK and Ireland) issued by the Auditing Practices Board and by reference to the special considerations which attach to State bodies in relation to their management and operation. An audit includes examination, on a test basis, of evidence relevant to the amounts and disclosures and regularity of the financial transactions included in the financial statements. It also includes an assessment of the significant estimates and judgments made

in the preparation of the financial statements, and of whether the accounting policies are appropriate to the Bureau's circumstances, consistently applied and adequately disclosed.

I planned and performed my audit so as to obtain all the information and explanations that I considered necessary in order to provide me with sufficient evidence to give reasonable assurance that the financial statements are free from material misstatement, whether caused by fraud or other irregularity or error. In forming my opinion I also evaluated the overall adequacy of the presentation of information in the financial statements.

Without qualifying my opinion I draw attention to note 9 of the financial statements which outlines the uncertainty regarding the ultimate financing and recognition of the pension liability.

## OPINION

In my opinion, the financial statements give a true and fair view, in accordance with Generally Accepted Accounting Practice in Ireland, of the state of the Bureau's affairs at 31 December 2006 and of its income and expenditure for the year then ended.

In my opinion, proper books of account have been kept by the Bureau. The financial statements are in agreement with the books of account.



**John Purcell**  
*Comptroller and Auditor General*

3 May 2007

# Statement on the system of internal financial control

The Financial Services Ombudsman (Ombudsman) acknowledges as Ombudsman that he is responsible for the Financial Services Ombudsman's Bureau (Bureau) system of internal financial control.

The Ombudsman also acknowledges that such a system of internal financial control can provide only reasonable and not absolute assurance against material error.

The Ombudsman sets out the following key procedures designed to provide effective internal financial control within the Bureau:

- ④ As provided for in Section 57BP of the Central Bank 1942 as inserted by Section 16 of the Central Bank and Financial Services Authority of Ireland Act 2004, the Ombudsman is responsible for carrying on, managing and controlling generally the administration and business of the Bureau. The Ombudsman reports to the Financial Services Ombudsman Council (Council) at their meetings which are generally held on a bi-monthly basis.
- ④ The Council and the Bureau have adopted a "Code of Practice for the Governance of the Financial Services Ombudsman Bureau" based on the Department of Finance "Code of Practice for Governance of State Bodies".
- ④ The Council have adopted "Rules in relation to the Procedure and Business of the Meetings of Financial Services Ombudsman Council" for their meetings.
- ④ The Ombudsman has also put in place a set of Financial Procedures setting out the financial instructions, notes of procedures and delegation practices. An Audit Committee has been appointed by the Ombudsman to take an overview of financial procedures generally. Its reports are also made available to the Council. The Committee met on three occasions in 2006. The Ombudsman monitors and

reviews the efficiency of the system of its internal procedure.

- ④ The Ombudsman carried out a risk assessment analysis of the Bureau and its business during 2006; implications of any such potential risks were evaluated and reviewed in 2006. It was agreed that the identified potential risks were being managed in an appropriate manner. A detailed internal audit programme of work was put in place and carried out in 2006.
- ④ The Council and staff of the Bureau were designated from January 2006 under the Ethics in Public Office Acts, 1995 and 2001.

## REVIEW OF INTERNAL CONTROLS

I have reviewed the effectiveness of the system of controls. I have examined the internal audit reports and the minutes of the audit committee meetings. I note that certain control deficiencies were highlighted but that remedial action has since been taken.

We have installed a computerised accounting system including debtors and creditors for 2007 onwards. This will enhance systems further.

I also note that the internal audit programme of work is ongoing and I will ensure that any recommendations arising out of deficiencies it may bring to light will be implemented.



**Joe Meade**  
Financial Services Ombudsman

27 April 2007



# Statement of Responsibilities of the Financial Services Ombudsman

Sections 57 BP and BQ of the Central Bank Act 1942 as inserted by Section 16 of the Central Bank and Financial Services Authority of Ireland Act 2004 require the Financial Services Ombudsman to prepare financial statements in such form as may be approved by the Financial Services Ombudsman Council after consultation with the Minister for Finance. In preparing those financial statements, the Ombudsman is required to:

- ⌚ Select suitable accounting policies and then apply them consistently;
- ⌚ Make judgements and estimates that are reasonable and prudent;
- ⌚ State whether applicable accounting standards have been followed, subject to any material departures disclosed and explained in the financial statements;
- ⌚ Prepare the financial statements on the going concern basis unless it is inappropriate to presume that the Bureau will continue in operation.

The Ombudsman is responsible for keeping proper books of account, which disclose in a true and fair manner at any time the financial position of the Bureau and which enable it to ensure that the financial statements comply with Section 57 BQ of the Act. The Ombudsman is also responsible for safeguarding the assets of the Bureau and for taking reasonable steps for the prevention and detection of fraud and other irregularities.

**Joe Meade**  
Financial Services Ombudsman

27 April 2007

# Statement of Accounting Policies

The significant accounting policies adopted in these financial statements are as follows:

## BASIS OF ACCOUNTING

The financial statements are prepared in accordance with generally accepted accounting principles and under the historical cost convention and comply with the financial reporting standards of the Accounting Standards Board.

## LEVY INCOME

Council regulations made under the Central Bank and Financial Services Authority of Ireland Act 2004 prescribe the amount to be levied for each category of financial service provider. Levy income represents the amounts receivable for each service provider calculated in accordance with the regulations and based upon providers identified by the Bureau and information supplied to it. Bad debts are written off where deemed irrecoverable.

## EXPENDITURE RECOGNITION

Expenditure is recognised in the financial statements on an accruals basis as it is incurred.

## TANGIBLE FIXED ASSETS

Tangible fixed assets are stated at cost less accumulated depreciation. Depreciation, charged to the Income and Expenditure Account, is calculated in order to write off the cost of fixed assets over their estimated useful lives, under the straight-line method, at the annual rate of 5% per annum for building refurbishment, 33 1/3% for computer equipment and 25% for all other assets. A full year's depreciation is charged in the period of the acquisition.

## CAPITAL ACCOUNT

The capital Account represents the unamortised value of income used for capital purposes.

## FOREIGN CURRENCIES

Transactions denominated in foreign currencies are converted into euro during the year at the rate on the day of the transaction and are included in the Income and Expenditure Account for the period. Monetary assets and liabilities denominated in foreign currencies are converted into euro at exchange rates ruling at the balance sheet date and resulting gains and losses are included in the Income and Expenditure Account for the period.

## FINANCING LEASE

Lease payments are dealt with in the Income and Expenditure Account in the year to which they relate.

## SUPERANNUATION

For certain staff members the Bureau is in discussion with the Department of Finance regarding the future financing and management of a defined benefit superannuation scheme. Pending a decision on the matter a provision calculated as a percentage of relevant salaries has been made. (See note 9)

For other staff members the Bureau makes contributions to a defined contribution scheme. (See note 9). These amounts are charged to the Income and Expenditure Account as they fall due.

## COMPARATIVE FIGURES

These financial statements relate to the twelve months ended 31 December 2006. The comparative figures relate to a nine month period only.



# Income and Expenditure Account

FOR THE YEAR ENDED 31 DECEMBER, 2006

	Notes	2006 €	April – December 2005 €
Income Receivable	2	3,499,816	2,751,312
Transfer (to)/from Capital Account	3	(66,860)	(31,056)
		<hr/>	<hr/>
		3,432,956	2,720,256
Administration Costs	4	3,295,383	1,812,430
		<hr/>	<hr/>
<b>Surplus for the year</b>		<b>137,573</b>	<b>907,826</b>
<b>Balance at 1st January</b>		<b>907,836</b>	<b>0</b>
		<hr/>	<hr/>
<b>Balance at 31st December</b>		<b>1,045,409</b>	<b>907,826</b>

**Joe Meade**  
Financial Services Ombudsman

27 April 2007

The Bureau has no gains or losses in the Financial Year other than those dealt with in the Income & Expenditure Account.

The Statement of Accounting Policies and notes 1 to 14 form part of these Financial Statements.

# Balance Sheet

AT 31 DECEMBER 2006

	Notes	2006 €	April – December 2005 €
<b>Fixed assets</b>			
Tangible assets	5	589,425	31,056
		<b>589,425</b>	<b>31,056</b>
<b>Current assets</b>			
Bank and Cash		188	43,411
Bank Deposit Accounts		2,082,958	1,542,920
Debtors and Prepayments	7	23,366	155,304
		<b>2,106,512</b>	<b>1,741,635</b>
<b>Creditors (amounts falling due within one year)</b>			
Creditors and accruals	8	1,020,377	833,799
Bank		40,727	0
Loan		77,091	0
Lease		23,803	0
		<b>1,161,998</b>	<b>833,799</b>
<b>Net current assets</b>		<b>944,514</b>	<b>907,836</b>
<b>Creditors (amounts falling due after one year)</b>			
Loan Account	6	353,168	0
Lease Account	6	37,446	0
		<b>390,614</b>	<b>0</b>
<b>Net assets</b>		<b>1,143,325</b>	<b>938,892</b>
<b>Represented by</b>			
Capital Account	3	97,916	31,056
Accumulated surplus at 31 December		1,045,409	907,836
		<b>1,143,325</b>	<b>938,892</b>



**Joe Meade**  
Financial Services Ombudsman

27 April 2007

The Statement of Accounting Policies and notes 1 to 14 form part of these Financial Statements.

# Notes

(FORMING PART OF THE FINANCIAL STATEMENTS)

## 1. ESTABLISHMENT OF THE COUNCIL AND BUREAU

The Financial Services Ombudsman's Bureau, **established under the Central Bank and Financial Services of Ireland Act 2004**, is a corporate entity and consists of the Financial Services Ombudsman, each Deputy Financial Services Ombudsman and the staff. It is a statutory body funded by levies from the financial service providers. The Bureau deals independently with complaints from consumers about their individual dealings with financial service providers that have not been resolved by the providers. It began operations on 1 April 2005 in line with the provisions of Statutory Instrument 455 of 2004. The existing private sector ombudsman schemes for the Insurance and Credit Institutions were subsumed into the Bureau on 1 April 2005.

**The Financial Services Ombudsman Council** is appointed by the Minister for Finance. Its functions as laid down in the Act are to:

- ④ appoint the Ombudsman and the Deputy Ombudsman
- ④ prescribe guidelines under which the Ombudsman is to operate
- ④ determine the levies and charges payable for the performance of services provided by the Ombudsman
- ④ approve the annual estimate of income and expenditure as prepared by the Ombudsman
- ④ keep under review the efficiency and effectiveness of the Bureau and to advise the Minister on any matter relevant to the operation of the Bureau
- ④ advise the Ombudsman on any matter on which the Ombudsman seeks advice.

The Council has no role whatsoever regarding complaints resolutions.

### Council and Bureau Expenses

The expenses of the Council are met from Bureau Funds. The accounts reflect the full cost of Council and Bureau's expenses for the year ending 31 December 2006.

## 2. INCOME LEVY

Section 57 BD of the Central Bank Act 1942 as inserted by the Central Bank and Financial Services Authority of Ireland Act 2004 provides for the payment of an income levy by financial service providers to the Bureau on terms determined by the Financial Services Ombudsman's Council. The Central Bank Act 1942 (Financial Services Ombudsman Council) Regulations, 2006 set the actual rate for the year ending 31 December 2006.

Income for the period is as follows:

	2006	April – December 2005
	€	€
Levy	3,463,682	2,746,200
Other Income	1,001	0
Bank Interest	35,133	5,112
<b>Total</b>	<b>3,499,816</b>	<b>2,751,312</b>

### 3. CAPITAL ACCOUNT

	2006	April – December 2005
	€	€
Opening balance	31,056	0
Transfer from/(to) Income and Expenditure Account		
Funds allocated to acquire fixed assets	82,110	44,500
Repayment of capital element of finance lease	11,729	
Repayment of capital element of loan	54,741	0
Amortisation in line with depreciation	(81,720)	(13,444)
	66,860	31,056
Balance at 31 December 2006	<b>97,916</b>	<b>31,056</b>

## 4. ADMINISTRATION COSTS

	2006	April – December 2005
	€	€
Salaries and Staff Costs	1,438,050	999,136
Staff Pension Costs	405,581	117,265
Staff Training	23,415	6,001
Bad Debts	44,748	0
Council Remuneration	194,166	173,073
Council Expenses	20,885	85,064
Rent and Rates	217,242	136,250
Relocation Expenses	86,785	0
Building Loan / Lease	14,867	0
Maintenance	26,746	32,178
Conference and Travel	60,747	18,671
Consultancy Fees	190,016	33,319
Information Activities	108,079	59,882
Cleaning	16,670	14,029
Legal Fees	105,111	10,000
Insurance	4,692	3,842
Stationery Costs	70,998	46,616
Other Administration Costs	155,818	51,660
External Audit	19,590	12,000
Internal Audit	9,457	0
Depreciation	81,720	13,444
<b>Total</b>	<b>3,295,383</b>	<b>1,812,430</b>

### Staff Numbers

The number of persons employed (permanent) in the financial year 2006 was 25 (22 in 2005) this total includes 4 permanent part time staff.

## 5. TANGIBLE FIXED ASSETS

	Computer Equipment	Office Fitting Furniture & Equipment	Building Refurbishment	Total
	€	€	€	€
<b>Cost</b> At 1 January 2006	<b>27,826</b>	<b>16,674</b>	0	<b>44,500</b>
Additions during period	63,049	92,040	485,000	640,089
At 31 December 2006	<b>90,875</b>	<b>108,714</b>	<b>485,000</b>	<b>684,589</b>
<b>Accumulated Depreciation</b>				
At 1 January 2006	9,275	4,169	0	13,444
Charge for period	30,292	27,178	24,250	81,720
At 31 December 2006	<b>39,567</b>	<b>31,347</b>	<b>24,250</b>	<b>95,164</b>
<b>Net Book Value</b>				
At 31 December 2006	<b>51,308</b>	<b>77,367</b>	<b>460,750</b>	<b>589,425</b>
At 31 December 2005	<b>18,551</b>	<b>12,505</b>	0	<b>31,056</b>

## 6. BANK LOAN AND FINANCED LEASE

The Refurbishment of the new office was financed by bank loan of €485,000 over a 5 year period and 3 year lease agreement in the amount of €78,949 for office fittings.

The liabilities of the loan and lease are broken down as follows

	Loan €	Lease €
<b>Current Liabilities</b>	77,091	23,803
<b>Long Term Liabilities</b>	353,168	37,446
	<b>430,259</b>	<b>61,249</b>

## 7. PREPAYMENTS AND ACCRUED INCOME

	2006	April – December 2005
	€	€
Debtors	1,000	
Accrued income	8,694	87,624
Prepayments	13,672	67,680
	<b>23,366</b>	<b>155,304</b>

## 8. CREDITORS (AMOUNTS FALLING DUE WITHIN ONE YEAR)

	2006	April – December 2005
	€	€
Trade creditors and accruals	77,393	35,359
Levy Advance Payments	0	360,642
Pension Contributions	942,984	437,798
	<b>1,020,377</b>	<b>833,799</b>

## 9. SUPERANNUATION

In accordance with Section 57BN of the Central Bank Act 1942, as inserted by Section 16 of the Central Bank and Financial Services Authority of Ireland Act 2004, the Council has drafted a superannuation scheme which has been submitted to the Minister for Finance for approval. The scheme is a contributory defined benefit superannuation scheme based on the Department of Finance Model Public Sector Scheme. Pending approval, the scheme is being operated on an administrative basis with the consent of the Minister.

The Bureau is in discussion with the Department of Finance regarding the future management and financing of the scheme. The Bureau has proposed that the liability for benefits paid under the Scheme will be assumed by the State in return for payment annually of a percentage of the salaries of scheme members. Pending a decision on the matter there is an uncertainty regarding the ultimate financing and recognition of the pension liability. A provision of relevant salaries has been made which amounts to €942,984 at the 31 December 2006. The Department of Finance intends to finalise its decision in 2007.

In addition, staff who transferred from the former Insurance and Credit Institutions Ombudsman offices on the date of establishment could opt to continue with their existing defined contribution scheme. These schemes, which include life cover benefit, are administered by private pension providers. Once employee and employer contributions are paid over the Bureau has no further liability. Alternatively, transferred staff could opt to become members of the Bureau scheme from the date of transfer. In these cases the

Bureau received amounts on surrender of the employee's entitlements under the defined contribution schemes. The amount will be used for the purchase of added years under the Bureau scheme in accordance with the provisions of Department of Finance Model Public Sector Scheme.

Employee contributions and amounts received in respect of entitlements surrendered by transferred employees are retained by the Bureau pending a decision by the Minister for Finance as to how the scheme should be managed. These amounts are included in creditors (see note 8).

The provisions of FRS 17 have not been complied with pending a decision by the Minister for Finance as to how the scheme is to be managed.

## 10. FINANCIAL COMMITMENTS

- (i) There are no capital commitments for capital expenditure at 31 December 2006.
- (ii) The Ombudsman has commitments payable in the next 12 months under non cancellable operating bank loan / lease as follows:
  - ④ The loan for office refurbishment of €485,000 expires after 5 years.
  - ④ The lease for office fittings of € 78,949 expires after 3 years.

## 11. CONTINGENT LIABILITIES

There were no contingent liabilities at 31 December 2006.

## 12. LEGAL ACTIONS

At the 31 December 2006 an appeal to the Supreme Court has been made by a Financial Service Provider against a High Court judgement which considered matters following a decision made by the Ombudsman. The Ombudsman is defending this action.

## 13. COUNCIL MEMBERS - DISCLOSURE OF INTERESTS

The Council adopted procedures in accordance with guidelines issued by the Department of Finance in relation to disclosure of interests by Council members and these procedures have been adhered to in the period. There were no transactions in the year in relation to the Council's activities in which the Council members had any beneficial interest.

## 14. APPROVAL OF FINANCIAL STATEMENTS

The Financial Statements were approved by the Financial Services Ombudsman on 27 April 2007.

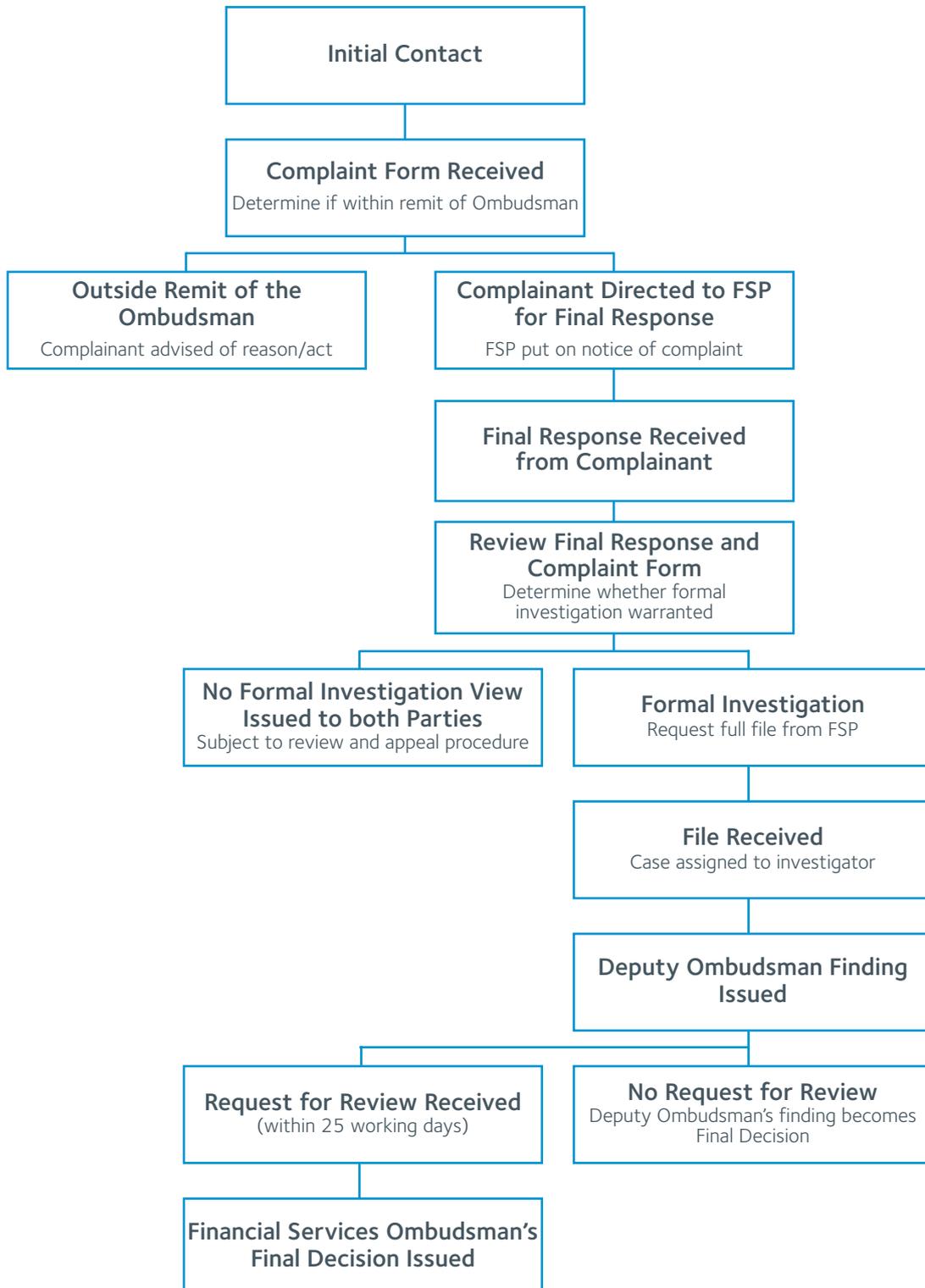
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# Appendices



# Appendix I

## PROCEDURES FOR DEALING WITH COMPLAINTS



# Appendix II

## NAMING OF FINANCIAL SERVICE PROVIDERS OR COMPLAINANTS IN DECISIONS MADE BY THE FINANCIAL SERVICES OMBUDSMAN

### INTRODUCTION

I, as Financial Services Ombudsman, have considered, in view of comments made by various media personnel and other commentators, the extent to which published decisions of mine should name the Financial Service Provider. The particular issue is whether a Financial Service Provider found to have acted in an unfair manner towards a consumer can be named. The question also arises as to whether Complainants should be named.

As Financial Services Ombudsman, like all statutory bodies, **I am a creature of statute** and I only have jurisdiction to exercise those powers which have been conferred on me by legislation. I act in a quasi judicial manner in that I can award compensation up to €250,000 and my decisions are binding subject only to appeal by either party to the High Court. (The Pensions Ombudsman can also award compensation). This places me in a somewhat different position to other statutory Ombudsman schemes. Obviously the position is different when a decision ends up in the High Court on appeal, since under the Constitution court proceedings are to be held in public, save in those limited cases where statute states otherwise.

Having taken legal advice I have considered how best I can be as transparent as possible when publishing decisions. My overriding concern as Ombudsman is to ensure that the integrity of the Financial Services Ombudsman scheme is manifest to everyone, be it a Complainant, a Financial Service Provider, the Financial Regulator, the international financial community, the media, the general public or our legislators.

### THE LEGISLATIVE SITUATION

Section 57 BB (a) (i) of the Central Bank and Financial Services Authority of Ireland Act 2004 (the Act) provides that the object of the Ombudsman is to “investigate, mediate and adjudicate complaints made in accordance with this Part”. Section 57BF(1)(b) provides that the Financial Services Ombudsman Council can make regulations which are necessary or convenient for the purpose of enabling me to perform the functions conferred on me by the legislation. In particular Section 57BF(2)(d) provides that a regulation so made may:

*“specify the place or places at which the Financial Services Ombudsman is required to make available copies of any report that that Ombudsman is, by a provision of this Part, required to prepare or publish”.*

Section 57 BK (2) gives me such powers as are necessary to enable me to perform my function of dealing with complaints by mediation and, where necessary, by investigation and adjudication. It is not clear that a power to publish the identities of the parties to a complaint could be described as being necessary to enable me to perform the function of resolving complaints. Section 57BR provides that I shall prepare and publish an annual report, specifying my activities during the year and this report must deal with such matters as the Council has notified me to include.

Section 57BS provides that within three months after the end of the year I shall publish a report containing:

- “(a) a summary of all complaints made to that Ombudsman during the preceding financial year and of the results of the investigations into those complaints; and*
- (b) a review of trends and patterns in the making of complaints to that Ombudsman”.*

There is nothing in this to suggest whether the publishing of the summary and the result is or is not to include the identity of the parties. In practice I publish this report and significant decisions I make every six months, as I feel it is necessary to inform everybody at suitable intervals of my actions.

Section 57BS (3) provides that “*the Financial Services Ombudsman may, with the approval of the Council, publish reports on other matters relating to the operation of the bureau*”.

Section 57CC provides “*the Financial Services Ombudsman shall ensure that investigations are conducted in private*”. This is the clearest statutory provision in Part VII B and confers privacy on the investigation. It does not expressly refer to the position in respect of the result of the investigation. However it is arguable that if the investigation is to be conducted in private one would need to see an express power granted in legislation before the identities of the parties could be published once the investigation has concluded.

Section 57 CI (7) provides that when I have made a finding in respect of a complaint, I shall give a copy of the finding to the Complainant and to the regulated Financial Service Provider in question.

## INVESTIGATIONS TO BE CONDUCTED IN PRIVATE

It can therefore be seen that legislation has very little to say on this subject, other than indicating that investigations are to be conducted in private.

One reason why the investigation is to be conducted in private is that if ultimately the complaint proves to be unfounded, the financial services provider will not have had their reputation damaged for no reason. Also Complainants might not avail of the scheme if I was to consider matters in a public manner.

Obviously if a large number of people make complaints against a particular provider then the bad publicity that would result from publishing the fact of the complaints being made could seriously damage the good reputation of that provider. Even if months later all the complaints were found to be frivolous or to be unfounded, it would be too late at that stage for the Financial Service Provider to rescue its reputation. That is another reason that the investigation is required to be held in private.

## OTHER STATUTORY PROVISIONS

It is relevant to observe that normally in disciplinary, regulatory or tribunal contexts the question of publication is specifically addressed in the relevant legislation. For example, Section 89 of the Veterinary Practice Act 2005 provides:

- (1) *The annual report referred to in section 30 shall include a report of all matters referred to in section 86 that have occurred since the last such report, and in the case of the first such report, since the appointment of the Preliminary Investigation Committee and the Fitness to Practice Committee.*
- (2) *The report shall identify all relevant particulars in relation to each matter in the report, such as the name and address of each person affected, term of suspension, and conditions attached or removed.*

The clear provisions of the Veterinary Practice Act 2005 should be compared to Part VIIB of the Central Bank Act as it contains no such power.

Section 23 of the Solicitors (Amendment) Act, 1994, as amended by Section 17 of the Solicitors (Amendment) Act, 2002 provides that:

*“Where, on the completion of an inquiry by the Disciplinary Tribunal, held under Section 7(3) of the Act of 1960, the Disciplinary Tribunal have:*

- (a) made an Order under Section 7(9),*
- (b) served on the Society a copy of the Order pursuant to Section 7(10); and*
- (c) sent to the Society a copy of their report pursuant to Section 7(5),*

*of that Act, then, subject to sub-section (2) of this Section, the Society may arrange to publish the order or notice of the making of the order and its effects, together with a summary of the report in such a manner as the Society thinks fit”.*

Section 23(2) provides that no such information shall be published until at least 21 days have passed, in other words until the period of time as the Solicitor can appeal to the High Court has expired. If the High Court rescinds the order of the Disciplinary Tribunal it is not to be published. Where the Court makes an order against a Solicitor, Section 23(3) provides for publication of the order in the Gazette of the Law Society. Therefore, Section 23 provides a detailed code as to when the Society can and cannot publish the results of disciplinary investigation into a Solicitor.

Even in the Central Bank Act 1942 itself, as amended by the Act of 2004, Parts of it deal with the question of publicity. For example, Section 33AZ deals with the conduct of disciplinary inquiries and provides that:

- (1) Except as provided by subsection (2), the Regulatory Authority shall hold its inquiries in public.*
- (2) The Regulatory Authority and the Financial Service Provider or other person to whom an inquiry relates may agree that the inquiry should be held in private, but even if they do not agree, that Authority may nevertheless decide to hold an inquiry in private if it is satisfied that-*
  - (a) evidence may be given, or a matter may arise, during the inquiry that is of a confidential nature or relates to the commission, or to the alleged or suspected commission, of an offence against a law of the State, or*
  - (b) a person’s reputation would be unfairly prejudiced unless that Authority exercises its powers under this section.*
- (3) The Regulatory Authority may at any time vary or revoke a decision made under subsection (2).*

Section 33BC provides:

- (1) If on the holding of an inquiry under section 33AO the Regulatory Authority has found that-*
  - (a) a regulated Financial Service Provider is committing or has committed a prescribed contravention, or*

(b) a person concerned in the management of the Financial Service Provider is participating or has participated in such a contravention,

it shall publish the finding, and details of any sanction imposed in consequence of the finding, in such form and manner as it thinks appropriate.

(2) If the Regulatory Authority has, in accordance with section 33AR, imposed—

(a) a sanction on a regulated Financial Service Provider in respect of the commission of a prescribed contravention, or

(b) a sanction on a person concerned in the management of a Financial Service Provider in respect of the person's participation in the commission by the Financial Service Provider of such a contravention,

it shall publish details of the sanction imposed, in such form and manner as it thinks appropriate.

(3) Subsections (1) and (2) do not apply to findings or details that the Regulatory Authority determines—

(a) to be of a confidential nature or to relate to the commission of an offence against a law of the State, or

(b) would unfairly prejudice a person's reputation.

(4) The Regulatory Authority shall publish annually, in a summary form, information on its actions under this Part.

The fact that one Part of the Act expressly confers a power of publication in respect of the finding while Part VIIIB (**this is the part that gives me my statutory remit**) does not, makes it difficult to see how such a power could be said to reside in Part VIIIB.

The publication of decisions made by the Equality Tribunal is specifically provided for in Section 89 of the Employment Equality Act 1998 and Section 30 of the Equal Status Act 2000 as amended

## Employment Equality Act

89.—(1) A copy of every decision of the Director under this Part shall be given—

(a) to each of the parties, and

(b) to the Labour Court,

and every such decision shall be published and a copy thereof made available for inspection at the office of the Director.

(2) A copy of every determination of the Labour Court under this Part shall be given to each of the parties; and every such determination shall be published and a copy thereof made available for inspection at the office of the Labour Court.

(3) In this section “the parties” has the same meaning as in section 88.

- (4) *Any reference in this section to a decision or determination includes a reference to any statement of reasons included in the decision or determination as mentioned in section 88(1).*
- (5) *The contents of any document which is published or made available by virtue of this section shall be protected by absolute privilege.*

## Equal Status Act 2000

30.—(1) *A copy of every decision of the Director under this Part shall be given to the Complainant and the respondent and every such decision shall be published and a copy thereof made available for inspection at the office of the Director.*

- (2) *Any reference in this section to a decision includes a reference to any statement of reasons included in the decision as mentioned in section 29(1).*
- (3) *The contents of any document published or made available by virtue of this section shall be protected by absolute privilege.*

## ISSUES CONSIDERED

Accordingly what is not so clear is whether or not I have the power to publicly identify the name of the Financial Service Provider or a Complainant where a complaint is upheld or indeed rejected.

In the absence of an express statutory power the following matters were considered by me

- ④ In general the number of complaints referred to me is a small but significant percentage of the overall total of transactions handled by a Financial Service Provider.
- ④ Where a large amount of compensation or a point of principle is involved the provider or indeed the Complainant may refer the matter to me if only to get some clarity on the issue.
- ④ In general my decisions are accepted by the providers without recourse to appeal to the High Court. However an appeal is statutorily provided for.
- ④ As I only publish a sample of decisions it could be argued that it would be grossly unfair to a Financial Service Provider whose decision happened to be selected for publication.
- ④ Conversely some providers may feel that they are all being classed as 'guilty' when a particular published decision is in their sector. However while I accept that this may cause some distress I consider providers are more than capable of defending themselves in those circumstances.
- ④ Publishing all decisions is not a viable option as I consider it would not add value to my role and anyway would not be cost effective organisationally.
- ④ A large award made by me does not necessarily mean that the provider was unfair as the circumstances of the case and the complexity of the issues involved must be taken into consideration. It could also be a once off issue.

- Ⓢ From a practical point of view Financial Service Providers may obviously take a more combative approach to dealing with my office if matters are done in a public manner and thus if their reputations are on the line.
- Ⓢ A Financial Service Provider could argue that if they are being named, the Complainant should also be named. Furthermore a case could be made that Complainants should be named if they have acted totally irrationally and in some instances with malign intent to the provider.
- Ⓢ If Complainants know they can be named, this might obviously make them reluctant to come forward as many people would not particularly like their name to appear in the newspapers or other publications particularly where they had genuine complaints upheld.
- Ⓢ Even where a Complainant was not named the details in the published decision could inadvertently identify a Complainant. Accordingly before decisions are published at present extreme care is taken to protect the identity of the Complainant.
- Ⓢ Any report by me containing names should be statutorily protected by absolute privilege in line with other statutory bodies. At present this is not the position.
- Ⓢ The legislature should take these matters into account if it considers it necessary to amend my current statutory reporting systems.
- Ⓢ A public consultation may also be advisable and is one I would welcome.

## CONCLUSION

I am not convinced that a power to publish a summary of complaints and results within three months of the end of the year or otherwise (*which is the power I have*) equates with an express power to publish a finding and sanction after it has been made in the context of a public hearing. The latter is clearly intended to permit the use of names; the former does not appear to be.

The power to publish a summary of complaints and results within three months of the end of the year or at other intervals seems to be more related to the provision of statistical information and the providing to the public of an overview of what the Financial Services Ombudsman is doing, rather than being related to the formal publishing of the result of a particular case along with the names of the parties.

I am of the view that as there is no clear statutory basis for the naming of the parties to a complaint in published decisions of mine it could cause unnecessary problems for a scheme which is working well as I generally continue to get cooperation from all parties to a complaint.

Even publishing summary details on the number of complaints received together with the outcome of complaints investigated and concluded by me for individual named providers would have to take account of the fact that only a small % of overall transactions by FSPs fall to be adjudicated on by me. I am not confident that this important caveat would be recognised by all publications or commentaries on such published data and could therefore be unfair.

Any report by me containing names should be statutorily protected by absolute privilege in line with other statutory bodies. At present this is not the position. However I may name in my annual report a provider who does not cooperate with me or where I consider there is a systemic or very serious issue. Naturally I will give detailed reasons why I do so name and the provider may be made aware of my intentions beforehand.

I find it difficult to envisage any situation where a Complainant could be named.

In reality the whole point of the Financial Services Ombudsman scheme under the Act is that consumers be comfortable about making complaints to me about FSPs and obtaining redress where I deem it appropriate while FSPs are also confident that I deal with matters in a fair, independent and impartial manner. The Courts, on an appeal or judicial review, are the ultimate safeguard to ensure that I perform my role in line with my statutory responsibilities.

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# Appendix III

## EVIDENCE GIVEN TO THE EUROPEAN PARLIAMENTARY INQUIRY INTO THE MATTER OF EQUITABLE LIFE

### BACKGROUND

The Equitable Life matter arose before the establishment of the statutory Financial Services Ombudsman on 1 April 2005. Complaints regarding Equitable Life matters were dealt with in general under the former Insurance Ombudsman of Ireland scheme (IOI). All told 86 complaints were received including 7 since 1 April 2005.

The IOI Scheme was a voluntary Scheme to which the member firms signed up. The member firms were bound by the Insurance Ombudsman's decision; the Complainants were not and could pursue their legal rights elsewhere. All member firms in Ireland who were carrying out business in Ireland signed up to that Scheme and accordingly any complaints which were received against those member firms were investigated under that Scheme. When a complaint was received it was assessed as to whether it could be investigated by the IOI Scheme or whether it was appropriate for the UK Financial Ombudsman Service (FOS). Where a complaint was more appropriate to the FOS, the Complainant was advised that he/she should contact that office and was given the necessary details. Similarly the FOS would refer cases to IOI. Either body could only investigate the particular case if it was within its remit.

Any complaint to be considered by the former IOI Scheme, or indeed the current Financial Services Ombudsman Scheme, would have to take account of the fact that the amount of compensation claimed should not exceed a certain figure; the Complainant had, beforehand, availed of the internal complaints procedure of his/her provider, the matter was not the subject of legal proceedings before a court and was not time barred.

The establishment of the Financial Regulator, its recently published Consumer Protection Code, as well as the creation of a statutory Financial Services Ombudsman have enhanced consumer interests in Ireland. The Ombudsman, as did the IOI, cooperates on an

EEA basis with the FIN-NET scheme. FIN-NET is a very useful method for exchanging information and for ensuring that complaints can be dealt with on a European-wide basis. However it suffers from the fact that, unlike in Ireland and in the UK, most of the Schemes are voluntary and therefore do not have the statutory powers of enforcement which the Irish and UK Schemes have.

### COMPLAINTS INVESTIGATED

Prior to the establishment of the statutory Financial Services Ombudsman on 1 April 2005, Irish policyholders brought a number of complaints regarding Equitable Life to the IOI scheme, totalling 79 up to 31 March 2005.

Cases submitted to the IOI related to

- ⌘ allegations of mis-selling of Equitable Life policies in Ireland,
- ⌘ the issue of application of market value adjustments (MVAs),
- ⌘ customer care,
- ⌘ bonus rates,
- ⌘ policy terms,
- ⌘ settlement amounts,
- ⌘ whether there were guarantees regarding encashment at dates other than on plan anniversary dates and
- ⌘ surrender values.

## JURISDICTIONAL MATTERS

Disputes were dealt with on a case by case basis. While some cases were within the jurisdiction of the IOI scheme, a number fell outside the jurisdiction of the scheme for the following reasons:

- Ⓢ Claims were in excess of the monetary jurisdiction of the scheme which was €160,000 (clause 2 (g) of the Terms of Reference of IOI)
- Ⓢ The UK Court Case re the GAR (guaranteed annuity rate) arrangements (July 2000)
- Ⓢ The “Scheme of Arrangement” sanctioned by the UK courts which took effect in February 2002 (clause 4 (b) of the Terms of Reference of IOI).

## OUTCOME OF INVESTIGATIONS BY OMBUDSMAN

All 79 cases were dealt with by the IOI on an individual basis. Some complaints were upheld for the Complainant on the grounds of

- Ⓢ inadequate information regarding the application of MVAs (time lag in information being passed from UK to staff in Dublin)
- Ⓢ incorrect surrender values
- Ⓢ delay in payment following encashment (interest awarded)

Complaints were not upheld either where there were no guarantees about bonuses or the “Scheme of Arrangement” sanctioned by the UK courts applied.

A further 7 complaints were received since the Financial Services Ombudsman was established on 1 April 2005. These complaints were not upheld as they were either excluded

under the 6 year rule (section 57BX) or were or had been the “subject matter of legal proceedings” (section 57BX (3) (a)).

## SUMMARY

The outcome of the investigation into the 86 complaints was

Decisions in favour of Complainant	15
Decisions in favour of Company	18
Bound by the Scheme of Arrangement	13
Advisory Referrals to other agencies	14
Outside both Ombudsman’s jurisdictions	15
Clarifications sought or cases not pursued	11



## Appendix IV

### REPORT BY THE FINANCIAL SERVICES OMBUDSMAN UNDER SECTION 16 AND 57 BS OF THE CENTRAL BANK AND FINANCIAL SERVICES AUTHORITY OF IRELAND ACT 2004.

The Act provides that the Financial Services Ombudsman shall publish a report within three months after the end of each financial year containing

- ④ a summary of all complaints made during the previous financial year and of the results of the investigations into complaints
- ④ a review of trends and patterns in the complaints.

The Act also provides that the Ombudsman may publish such a report more frequently than once a year if the Ombudsman thinks it would be in the public interest to do so. In that regard complaints trends data for the six months to June 2006 were already published in July 2006.

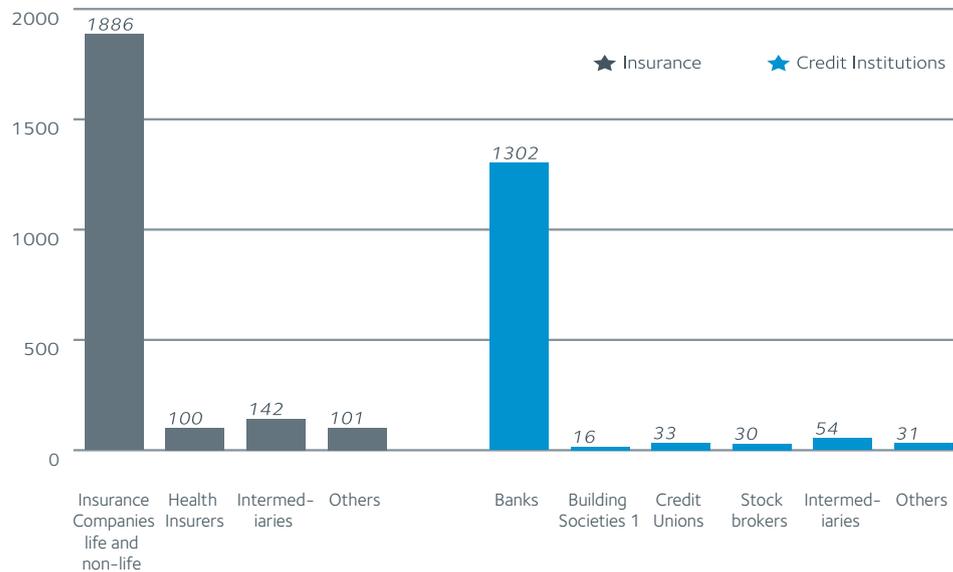
This current report fulfils the requirements of the Act at the end of the financial year ending on 31 December 2006.

**Joe Meade**  
Financial Services Ombudsman

8 January 2007

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## 1. COMPLAINTS RECEIVED IN 2006



## 2. SUMMARY OF OMBUDSMAN'S INVESTIGATIONS

### (a) Complaints for investigation at 1 January 2006

Insurance	1159	
Credit Institutions	215	<b>1374</b>

### (b) New complaints received

Insurance	2229	
Credit Institutions	1566	<b>3795</b>

### (c) Complaints concluded after investigation by Ombudsman

Insurance	1864	
Credit Institutions	701	<b>2565</b>

### (d) Complaints resolved after initial referral by Ombudsman to Financial Service Providers

Insurance	621	
Credit Institutions	930	<b>1551</b>

### (e) Complaints for investigation at 31st December 2006

Insurance	903	
Credit Institutions	150	<b>1053</b>

### 3. COMPLAINTS INVESTIGATED AND CONCLUDED BY OMBUDSMAN IN 2006

	Insurance	Credit Institutions	Total
<b>Resolved after initial referral by Ombudsman to financial providers</b>			
	621 -25%	930- 57%	1551
<b>Complaints concluded after investigation by Ombudsman</b>			
Upheld	291-16%	181 - 26%	
Mediated Settlements	548 -29%	109 - 16%	
Not Upheld	678-36%	278 - 40%	
Outside Remit	214 -12%	115 - 16%	
Advisory Referrals	133 - 7%	18 - 2%	
	<b>1864</b>	<b>701</b>	<b>2565</b>
<b>Total</b>	<b>2485</b>	<b>1631</b>	<b>4116</b>

### 4. COMPLAINTS TRENDS BY AREA OF BUSINESS

<b>(a) Credit Institutions</b>		
Account Transactions	367	
Mortgages	308	
Credit Card Disputes	217	
Lending Problems	212	
Investment Disputes	179	
Service Issues	81	
ATM Disputes	69	
SSIAs	64	
Foreign Exchange	53	
Other	16	<b>1566</b>

**(b) Insurance****Non Life (59%)**

Travel	501	
Motor	345	
Household Buildings	112	
Payment / Loan Protection	84	
Household Contents	32	
Savings policy / SSIs	32	
Personal Accident	24	
Mobile Phones	22	
Hospital Cash Plan	21	
Commercial	28	
Computer	2	
Educational	1	
Miscellaneous	106	<b>1310</b>

**Medical (5%)**

Medical Expenses	104	<b>104</b>
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**Life (36%)**

Life Assurance including PHI	231	
Investment Policy	202	
Pension	100	
Endowment Policy	85	
Mortgage Protection	76	
Salary Protection or Income		
Continuance	69	
Critical / Serious Illness	52	<b>815</b>

<b>Total</b>		<b>3795</b>
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## 5. COMPLAINTS TRENDS BY NATURE OF COMPLAINT

### (a) Credit Institutions

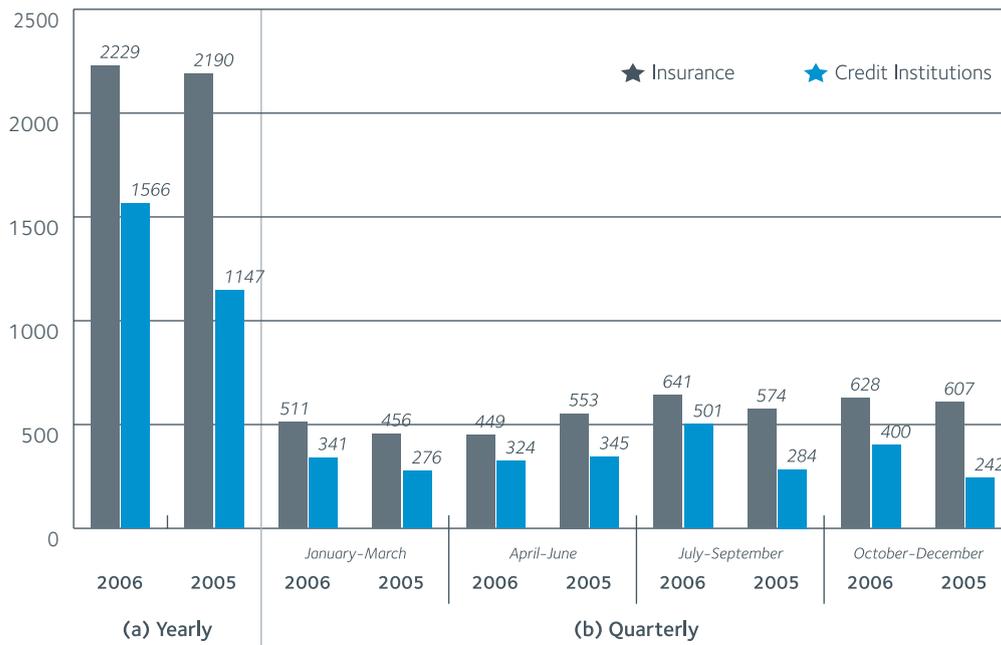
Maladministration	556	36%	
Unfair Treatment	442	28%	
Breach of Contract	224	14%	
Negligence	174	11%	
Fees and Charges	115	7%	
Misrepresentation	28	2%	
Breach of Confidentiality	22		
Interest Rates	5	2%	1566

### (b) Insurance

Repudiation of Claim	574	26%	
Claims Handling issues	211		
Customer Care	194		
Maladministration	132	24%	
Mis-selling	119		
Policy Terms	94		
Misrepresentation	85	13%	
Settlement Amount	80		
Lapse/cancellation of policy	77		
General Advice	67		
Pre-existing Condition	65		
Policy Reviews	64		
Premium Rates	52		
Non Disclosure	52		
Surrender Value	51		
Paid Up Policy values	51	25%	
Direct Debit	33		
No Claims Bonus	23		
Third Party Insurers	18		
Commission / Charges	16		
Subrogation	16		

Bonus Rates	16		
Policy renewal	14		
Declined Quotation	13		
Pre Accident Value	13		
Unfair Treatment	11		
Share allocation	9		
Premium Collection	8		
Fraud	4		
Unclassified	67	12%	2229
<b>Total</b>			<b>3795</b>

## 6. COMPLAINTS RECEIVED - QUARTERLY COMPARISONS WITH 2005



# Appendix V

## FINANCIAL SERVICE PROVIDERS SUBJECT TO THE FINANCIAL SERVICES OMBUDSMAN REMIT

### (a) Regulated by the Financial Regulator

Credit Institutions	79
Life Insurance Companies	53
Non Life Insurance Companies	135
Investment Business Firms	1,100
Retail Intermediaries	2,400
Collective Investment Schemes	3,000
Fund Service Providers	230
Credit Unions	435
Bureaux de Change	14
Moneylenders	50
Stock Exchange Members	14
Finex Trading Members	38
Futures and Options Exchanges	2
Money Brokers	6
Approved Professional Bodies	3

### (b) Voluntary Health Insurance

1

### (c) Consumer Credit Act regulated firms including pawn brokers, hire purchase firms and others

400

**Total** **7,960**

# Appendix VI

## PUBLIC INFORMATION ROLE

### PRESENTATIONS

ACCA Financial Services Panel

Association of Compliance Officers

British and Irish Ombudsman Association annual conference

Credit Unions

Longford/Roscommon/Offaly Chapter

Cork Chapter

Dublin Chapter

UCC Credit Union Summer School

Credit Union Managers annual conference

Financial Services Ireland-regulation 360 conference

Irish Banking Federation and Institute of Bankers - Consumer Protection Code

Law Society

One Source Irish Life annual conference

Serious Illness –Insurance conference

Trinity College

### INTERNATIONAL

USA Ombudsman annual conference

Annual International Conference of Financial Ombudsman -Australia

Council of Europe alternate dispute resolution conference

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## MEETINGS

Professional Insurance Brokers Association

League of Credit Unions

Irish Insurance Federation

Irish Banking Federation

Society of the Irish Motor Industry

IFSC based Financial Service Providers

Individual Financial Service Providers

Individuals

## MISCELLANEOUS

Articles in many consumer and Financial Service Providers magazines

Media interviews

Over 50s show at RDS

Website competition for transition year students

Attendance at various financial services functions

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# Appendix VII

## COUNCIL DETAILS

### 1. MEMBERS OF COUNCIL

The Financial Services Ombudsman Council is appointed by the Minister for Finance.

#### **First Council**

The members of the first Council appointed for the period 1 October 2004 until 30 September 2006 were

##### **Dr Con Power, Chairperson**

*John Colgan (resigned 5 September 2006)*

*Crozier Deane (resigned 31 December 2005)*

*Dermott Jewell*

*Paul Joyce*

*Paddy Leydon*

*Paul Lynch*

*Paddy Lyons*

*Jim McMahon*

*Caitriona Ni Charra*

*Frank Wynn (appointed 1 March 2006 to replace Crozier Deane).*

**Jim Bardon acted as Secretary to this Council**

#### **Second Council**

The Minister for Finance on 17 October 2006 appointed the following outgoing members of the first Council as members of the Financial Services Ombudsman Council for a two year period.

##### **Dr Con Power, (Chairperson)**

*Dermot Jewell (Consumers' Association)*

*Paul Joyce ( Free Legal Advice Centres)*

*Paddy Leydon (National Irish Bank)*

*Paul Lynch (formerly Irish Brokers Association)*

*Paddy Lyons (former Chair of Competition Authority)*

*Jim McMahon (Irish League of Credit Unions)*

*Caitriona Ni Charra (Money Advice and Budgeting Service)*

*Frank Wynn (Irish Life Assurance plc)*

**Ms. Gemma Normile is Secretary to this Council**

## 2. COUNCIL SUB-COMMITTEES.

### AUDIT COMMITTEE

Members: - Paddy Lyons, Chairperson, Dermott Jewell, Noel O'Connell.

### FINANCE COMMITTEE

**Members:** - Paddy Lyons, Chairperson, Caitríona Ní Charra, Dermott Jewell, Paul Lynch, Dr Con Power.

## 3. MEETINGS

### (a) Council

During 2006 the first Council held 6 formal meetings to end September while a further 2 formal meetings were held by the new Council to end December 2006. Attendance was as follows.

	<b>Meetings</b>
Con Power	8
John Colgan (resigned 5 September 2006)	4
Dermott Jewell	8
Paul Joyce	7
Paddy Leydon	6
Paul Lynch	8
Paddy Lyons	8
Jim McMahon	8
Caitriona Ni Charra	7
Frank Wynn (appointed 1 March 2006)	6

### (b) Council Sub-Committees

#### AUDIT COMMITTEE

Met on three occasions

#### FINANCE COMMITTEE

Met on three occasions

## 4. COUNCIL REMUNERATION

Under the terms of the Central Bank and Financial Services Authority of Ireland Act 2004 which established the Bureau, the Minister for Finance decides the level of fees to be paid to the Council members. On 14th January 2005, the Minister for Finance approved the following as appropriate levels of fees which should be paid annually to the members of the Council from its establishment:

- €10,158 for each of the members
- €15,237 for the Chairperson

In line with a general revision of fees for all state board members the fees were revised with effect from 1 January 2006 to €14,000 and €24,000 respectively by the Minister

The fees are taxable and are paid through the PAYE/PRSI system of the Bureau. No additional fees are payable to any member of the Council.

## 5. EXPENSES PAID TO COUNCIL MEMBERS

The Bureau, as a statutory body, does not have the autonomy of commercial semi-state bodies, and, accordingly, is bound by public service rates for expenses. Claims for reimbursement of travel and subsistence expenses at current rates and for other appropriate expenses are submitted quarterly to the Chairperson for approval.

## Appendix VIII

### DIRECTION TO ULSTER BANK

I reached this decision following investigations of nine complaints I received from various disgruntled investors about a reduction in the value of their investments following a 'deferred tax asset' adjustment by the Bank in November 2004. I asked the Financial Regulator to look at this Bank and indeed any other Financial Service Provider who may have operated a similar type investment policy from a regulatory perspective.

### WHAT WAS THE BACKGROUND TO THE COMPLAINTS?

People invested since 1997 in the International Share Portfolio, forming part of the Ulster Bank Global Strategy Fund, in good faith and having been made aware of normal investment risks. When the investments were originally made neither the term 'deferred tax asset' nor how it could impact on an investment fund were included in the literature or advice given to investors.

A deferred tax asset is an accounting mechanism under a Financial Reporting Standard (FRS 19) to provide for timing differences arising between the profits computed for taxation purposes and profits as stated in the financial accounts to the extent that such differences are expected to reverse in the foreseeable future. The standard requires that the asset is to be included to the extent that it is regarded as more likely than not that it will be recovered in the future. It can have a major impact on the valuation of an investment fund's assets and is also a factor, from an investor's perspective, as to whether the fund is performing well or otherwise at the time it is included in the Funds accounts.

### 2002 AND 2004 INVESTMENT DECISIONS BY THE BANK AND THE FUND'S MANAGERS

In November 2002 the valuation of the assets in this Fund was significantly **increased** by an amount representing the 'deferred tax assets' ('deferred tax assets' were included for the first time in 2001 for a mere €117,000). The 2002 inclusion had the effect of increasing the value of the Fund by 14%. Investors were *only* informed of this when they received the annual financial statement in May 2003 when it was included as a note to the accounts. However in November 2004 investors were informed that the value of the assets **had already been reduced** in October and November 2004 by the elimination of an amount for the 'deferred tax assets'. As a result of this elimination, the value of the investors holdings decreased by on average 14.6%

### OMBUDSMAN'S FINAL DECISION

- ④ I agree fully with Mr. Justice Kelly who, in a 2005 High Court judgement, stated *inter alia* that Banks and Financial Service Providers occupy a special position in society. They are licensed to carry out financial transactions which ordinary corporate entities are not. The edifice of banking is built on a foundation of trust.
- ④ Ordinary people, some with a long relationship with the bank, invested in the fund and, in my opinion trusted Ulster Bank to act in their best interests and to keep them informed in plain and simple language. Not everybody understands or indeed is expected to understand complex

accounting statements and it behoves any Financial Service Provider to be conscious of this when making and informing investors of major decisions it takes with the moneys entrusted to their care.

- ④ I concluded that the poor performance of the Fund in 2002, when the significant 'deferred tax asset' was included under FRS 19, was in effect masked by the inclusion of this figure. Its significance was not clearly explained or communicated to investors thereby denying them an opportunity to review their investment strategy. Its inclusion had a major impact on the valuation of the investment fund's assets and was a factor in determining whether the fund was performing well or otherwise at that time.
- ④ The value of a unit in the Fund at 31 December 2001 was €3.909. At 31 December 2002 it would have been ordinarily valued at €2.344 but when the 'deferred tax asset' adjustment was made this value increased to €2.725 per unit.
- ④ The inclusion of the 'deferred tax asset' did not take account of future redemption patterns of the Fund and the Fund was closed to new investors from early 2004. The actions of the Investment Manager were not appropriate in that the effect of redemptions was not taken into account.
- ④ By its nature it was a decision made which was expected to be recovered going forward but it was, as acknowledged by the Bank, of unknown duration. As it transpired the asset had not been recovered within two years and the Fund and ultimately the investors bore the loss. In my opinion this was not a sound investment decision considering it represented 14% of the Fund's assets when it was included in 2002.
- ④ The unit holders were not informed in a proper manner at the appropriate time of what was happening, its possible consequences and thereby not given an opportunity to consider alternative investment options. I decided accordingly that, because a 'deferred tax asset' is of a technical and accounting standards nature, an ordinary investor cannot be expected to be aware of its import if it is only referred to in the interim or annual financial statement and/or is not explained in a separate communication in simple and plain language. While the disclosure in the annual accounts was in line with accounting standards it was not sufficient to discharge the bank's duty of care to an ordinary investor. It is not the usual form of asset investment that a consumer expects when it entrusts its money to be invested with due care by a Financial Service Provider.
- ④ I did not find that the use of 'deferred tax assets' was inappropriate but I did find that, in this case, the method of its implementation and notification was unreasonable, and improperly discriminatory in its applications to the Complainants and against the investors' best interests. The bank thereby failed in its duty of care to its customers.
- ④ So as to rectify and mitigate these consequences and in accordance with my findings I directed that the bank pay to the Complainants in question a sum based on the difference between the value of the holdings before and after write down.

## DIRECTION

While I received twelve formal complaints about this Fund, I considered that there were no doubt other consumers who had not complained but who were also affected in a similar manner. Section 57 CI (4) of the Central Bank and Financial Services Authority of Ireland Act 2004 - the Act which outlines my role and duty as Financial Services Ombudsman and provides that I may direct the Financial Service Provider

(a) *to review, rectify, mitigate or change the conduct complained of or its consequences.*

I considered that a direction under the Act was necessary because of my decision and as other investors were also affected. So as to rectify and mitigate these consequences and in accordance with the finding outlined above, I directed that the bank pay to all eligible consumers under the Act a sum based on the difference between the value of the holdings before and after write down. This computed amount must of course take account of any gains investors made if and when they redeemed the investment after November 2004.

## FINANCIAL REGULATOR REFERRAL

In line with section 57 CQ (2) of the Act of 2004 I considered it appropriate to refer the matter to the Financial Regulator for any regulatory action the Regulator may deem necessary not alone for this Bank but for any other Financial Service Provider who may have operated similar type trusts. I was particularly concerned that fully accurate information was not supplied by the bank to me during my investigation and this matter has been referred to the Financial Regulator also.

## HIGH COURT JUDGMENT

An appeal was initiated by Ulster Bank against my decision in February 2006. Initial legal argument was heard before the then President of the High Court on 31 May 2006- at the request of Ulster Bank - as to the nature and scope of the appeal.

The Bank argued that it should be allowed to introduce evidence in the High Court which had not been put before the Ombudsman when he decided the case, i.e. that there should be a hearing *de novo*. My counsel argued that the High Court should consider the appeal solely on the evidence of each of the parties which was before me when the decision was made.

In his judgment delivered on 1 November 2006 the President of the High Court stated that it is desirable that there should be consistency in the Courts in the standard of review on statutory appeals. Accordingly unless the words of the statute mandate otherwise it is appropriate that the standard of review in this case be that enunciated in other cases which were considered by the Courts. The President saw nothing in the wording of the statute with which he was concerned to mandate a different approach to the statutory appeal under section 57CL of the Act.

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To succeed on this appeal the Plaintiff must establish as a matter of probability that, taking the adjudicative process as a whole, the decision reached was vitiated by a serious and significant error or a series of such errors. In applying the test the Court will have regard to the degree of expertise and specialist knowledge of the Defendant (i.e. the Financial Services Ombudsman).

Having regard to the President's decision on the standard of review the Court held that it was appropriate that the appeal should proceed on the basis of the materials which were before the Financial Services Ombudsman only. The Court however has discretion on application to permit further evidence to be introduced where it is satisfied that this is necessary or appropriate to do so in the interest of justice.

**This judgment is now the subject of an appeal to the Supreme Court by Ulster Bank.**







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