

INSURANCE LAW AND THE FINANCIAL OMBUDSMAN SERVICE. *Judith P Summer PhD. Informa, London (2010) xxiv and 194 pp, plus 220 pp Appendices and 10 pp Index. Hardback £280.*

Consumer insurance law since the formation of the Insurance Ombudsman Bureau in 1981 has largely been shaped by the approach taken by ombudsmen to the myriad cases referred to it for arbitration. Now that all regulated insurers are subject to the compulsory jurisdiction of the Financial Ombudsman Service, even fewer consumer insurance cases reach the courts. The ombudsman's remit is to decide cases based on what an ombudsman considers to be "fair and reasonable" in all the circumstances, taking into account the relevant law, regulations, regulators' rules, guidance and standards, codes of practice and (where appropriate) what the ombudsman considers to have been good industry practice at the relevant time. This gives ombudsmen greater flexibility when deciding cases where the strict law might result in a harsher approach.

There has been a number of insurance law books that seek to explain the ombudsman's approach. Some contain a section on the Financial Ombudsman Service, for instance, Legh-Jones, Birds and Owen (eds), *MacGillivray on Insurance Law*, 11th edn (London, 2008). Others, including Heather Thomas, *The Regulation of Insurance Brokers and Intermediaries* (London, 2004), and Peter Tyldesley and Saira Paruk, the Chartered Insurance Institute's fact file publication *The Financial Ombudsman Service and general insurance* (London, 2006), have attempted to provide an overview of the procedure and practice. The Law Commission has also recently, in its consultation papers on the reform of insurance law, summarised the ombudsman's approach across a number of areas in considerable depth. Although the Financial Ombudsman Service itself publishes case studies and articles in *ombudsman news*, setting out its approach to the wide variety of insurance products it deals with, and its website contains technical guides and fact sheets on many aspects of its work, to date there has been no definitive book that brings it all together in one volume.

*Insurance Law and the Financial Ombudsman Service* is far more comprehensive than any reference work produced thus far. The book is divided into chapters on each major insurance product area. Each chapter begins with an overview of the law, including a detailed discussion of cases. The law is then compared and contrasted with the approach of the ombudsman. This is followed by commentary on the relative merits of the two. Most of the time, as the book identifies, the ombudsman's approach is to follow the law. Sometimes, though, the ombudsman's approach makes more concessions to the imbalance of power between the parties (consumer versus insurer), an imbalance which does not usually exist in the leading court cases, which are mostly between two legally-advised commercial entities, acting at arm's length. Because of this, there is sometimes divergence between the jurisprudence developed by the courts and that by the ombudsman. The book, however, does not often view this divergence as a necessary or good thing. This is somewhat surprising given the enthusiasm of the Law Commission (now shared by the industry) for reforming the law based on real ombudsman case decisions, where those decisions depart from the strict letter of the law.

Overall, this book is useful for bringing together all the relevant case law and ombudsman jurisprudence in one place, in conveniently divided chapters. However, it would have been useful to include more about the complex interactions of the many layers of insurance rules, codes and guidance interposed between the law and the ombudsman. Another drawback is that the explanation of the ombudsman's approach seems to be based entirely on case studies contained in *ombudsman news*, without access to actual decisions (unlike the Law Commission). The book is critical of the lack of references to court cases in the case studies, but it does not seem to take into account that *ombudsman news* is designed to be a publication accessible to the wider public, and so jargon and unnecessary case references are avoided where possible. The lack of citations, therefore, is not indicative of any ignorance of the law on the part of insurance ombudsmen, as the book seems to suggest.

Indeed, as far as consumer insurance law is concerned, the ombudsman has largely eclipsed the courts as the source of developments in this area. However, by citing case studies from very early editions of *ombudsman news*, the book seems to overlook that the ombudsman does not have a doctrine of precedent. Its approach necessarily evolves, given the rapidly changing regulatory landscape (which has seen the Insurance Conduct of Business rules come and go, the introduction of successive versions of the Unfair Terms in Consumer Contracts Regulations, and even the planned demise of the regulator in its current form). Against this background, newer case studies ought to, and do, represent the most up-to-date approach of the ombudsman. The book's emphasis on perceived inconsistencies of approach between older and newer cases therefore appears to be misplaced.

There are also some significant inaccuracies. For instance, ombudsmen do not always issue provisional decisions before final decisions. Provisional decisions are used only where an ombudsman, having reviewed the file, is likely to reach a different conclusion from that recommended by the adjudicator (or the same conclusion but for different reasons). Also, the chapter on non-disclosure still cites the categories of "reckless" and "inadvertent" non-disclosure, terminology which, since the advent of the Association of British Insurers' *Guidance* (now *Code of Practice*) on *Non-Disclosure and Treating Customers Fairly* in 2008, is no longer in use, especially in relation to health and protection-related insurance. Indeed, the whole chapter on non-disclosure seems to be based on a misapprehension that the current stance of the ombudsman is at odds with the Law Commission's proposed bill, when in fact it is largely on all fours. Also, the section on immaterial fraud suggests that the ombudsman diverges from the law in this area, whereas, according to the Law Commission's Issues Paper on the post-contractual duty of good faith, the ombudsman's approach follows the leading case of *Agapitos v. Agnew* [2002] EWCA Civ 247. All these inaccuracies are a shame, since this book is likely to be the only one of its kind for some time.

Nevertheless, *Insurance Law and the Financial Ombudsman Service* fills a gap as a reference book covering both insurance law and the ombudsman's approach in one volume. It also contains handy

appendices of *ombudsman news* case studies, extracts from relevant statutes and regulations, and the Law Commission's draft bill on non-disclosure. Subject to the caveats above, it would be a useful source of reference for those practitioners who interact with the Financial Ombudsman Service.

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