



Financial
Ombudsman
Service

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Judith Evers
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30 June, 2011

Dear Ms Evers

Response to CP6/2011 – Solving Disputes in the County Courts

Following our meeting with Catherine Lee earlier this month, please find attached the ombudsman service's response to your consultation on solving disputes in the county courts.

I appreciate that our experience is slightly outside the original scope of your consultation, and we would obviously be very happy to discuss the issues raised in more detail if that is helpful.

Yours sincerely,

Tony Boorman
Principal Ombudsman

Financial Ombudsman Service response to the Ministry of Justice's Consultation "*Solving disputes in the county courts*"

Summary

The Financial Ombudsman service welcomes the review of the county court system and supports the Government's intention to create a simpler, quicker and more proportionate system. There are obvious synergies with the approach taken by the ombudsman service when it handles complaints as an alternative to the courts.

We would encourage the Government to develop a wider strategic vision for the resolution of civil disputes which recognises more directly the role of ombudsman schemes. They have an important part to play in delivering fair and cost effective access to justice.

About the Financial Ombudsman Service

The Financial Ombudsman Service is the statutory-based scheme for the resolution of complaints that have not been settled between financial businesses and their customers. We are established under the Financial Services and Markets Act 2000 but are based on the predecessor schemes, most of which were established by industry. We are an impartial body that provides an informal alternative to the courts, resolving complaints by individual consumers and small businesses who remain dissatisfied after complaining unsuccessfully to a financial firm. Like the courts, the ombudsman service is independent of the parties in dispute, and operationally independent of government and regulators. We are funded entirely by the industry via an annual levy and case fees.

The Government has recently endorsed the basis of our model in its white paper *A new approach to financial regulation: the blueprint for reform*.

Specialist expertise allows the ombudsman service to resolve individual disputes effectively, at a fraction of the costs incurred by the court system, and with no charge to the public purse. The availability of the ombudsman service - and the information made publicly available - empowers consumers, helps financial businesses that want to treat their customers fairly and improves access to justice.

In addition to solving individual complaints, we also have a crucial role in sharing insights from the complaints we see. This gives consumers greater confidence in financial services – and helps businesses prevent future problems by learning from situations where things have gone wrong. We seek to be as transparent as possible about our approach so that consumers and businesses can take the responsibility to resolve their complaints themselves – we plan to consult on the publication of our decisions in the autumn. We also work to resolve complaints at the earliest possible stage, so while we had over a million enquiries last year, only just over 200,000 progressed to be cases, often because our experienced consumer consultants are able to help people resolve disputes informally at the earliest possible stage, preventing the escalation of cost.

We are currently under pressure from some industry bodies and parts of the legal profession to take a more legalistic approach, for example, more hearings and a right of appeal to the courts. This risks compromising our informal approach and would

seem to be contrary to the government's proposals for simpler, quicker and more proportionate dispute resolution. Both UK and European courts have endorsed our approach.

Key Facts about the ombudsman

- The Financial Ombudsman Service is the largest ADR scheme in the world, and the model on which many other schemes have been based
- We handle over **200,000** cases a year – that represents 200,000 consumers who would otherwise have had the expense of going to court or been denied access to justice
- Since we were set up in 2000 we have received over **1.2 million** cases
- Our average cost per case resolved over the last three years is between £500 and £640 – this is paid for by a levy on the financial firms we cover and a case fee of **£500** (frozen for the last three years)
- The service is **free** to consumers and small businesses
- Last year we handled **1,012,371** initial enquiries and complaints from consumers - around 4,000 each working day
- We provided information and handled enquiries in **49** different languages and formats – from British Sign Language to Sinhala, mpeg to Braille
- **74%** of people whose complaints we handled said they would recommend us to family and friends (**91%** of consumers who felt they had “won”)

The Ombudsman's approach

Simple, proportionate, effective

We are an informal alternative to the civil courts – and take a different approach to resolving disputes. We have no power to compel the attendance of witnesses, take evidence on oath or test evidence by cross-examination. We rarely consider oral hearings to be necessary or helpful. By law, we are required to resolve complaints fairly. This means we set the pace and decide what questions to ask to get to the bottom of things.

We focus on encouraging early informal resolution wherever possible. So in nine out of ten cases we resolve matters to the satisfaction of both sides by making informal recommendations, without having to issue formal ombudsman decisions. We seek to be as easy to use as possible and do not charge consumers a fee so we are able to offer access to justice to many who would not otherwise approach the courts.

The ombudsman service handles a wide variety of complaints, from low to very high value claims – our award limit is currently £100,000 but is rising to £150,000 in 2012.

Financial firms are not charged a case fee for their first three claims in any year, so the ombudsman service is also a very cost-efficient way for smaller firms to deal with claims. We are working on a major e-enablement project which will help us to further streamline our processes and resolve cases even more quickly and cheaply. Overall we resolve cases at an average cost of around £600 per case. And because the parties are not normally represented (and we do not normally make cost awards) the costs to the parties is also low.

Guided mediation

90 per cent of our cases are settled at the informal adjudication stage – this means that both sides to a complaint have agreed to our recommendation. As an ombudsman service we can go beyond the mediation of a complaint and provide an impartial view as to what we consider to be fair and reasonable in all the circumstances of the case. This “guided mediation” supports the unrepresented parties to come to a fair resolution, as well as one both parties can agree to. The fact that in nine out of ten cases we resolve matters to the satisfaction of both sides by making informal recommendations, without having to issue formal ombudsman decisions, helps to illustrate how effective the model is.

If an adjudicator brings the two sides to agreement, that agreement closes the case. If, however, someone disagrees, we can make a final Ombudsman determination which binds the financial firm if the consumer agrees, and allows the consumer to go to court if they do not.

We can concentrate on the actual facts of the case, rather than the complaint as presented or who can present the most polished legal arguments. We are not limited to looking only at the issues the consumer has focused on in their complaint. Our approach is "inquisitorial" which provides us with a large scope to achieve a fair resolution of complaints

It is important to note that the customer can choose whether or not to use the ombudsman service. They remain free at all times to use the courts, either if they do not wish to use the ombudsman or do not agree with his/her decision. In practice, however, our presence has meant that very few financial services disputes now find their way to the civil courts. Those that do tend either to be very high value (and hence not for the county courts) or involve the exercise of powers like possession.

But unlike the courts we can resolve matters without the extensive use of hearings, external technical experts or legal representation. And by dealing with large volumes of cases (in a single location) we have built up an unrivalled expertise in and knowledge of the issues behind financial services disputes. Increasingly our decisions are recognised by the Law Commission and the courts as shaping new law in retail financial services based on our up to date experience of industry-consumer interactions.

In the words of Lord Justice Rix in June 2008 [HME CA para 89] *“the following values are all to be appreciated and brought into a pragmatic balance: that an efficient and cost-effective and relatively informal type of alternative dispute resolution should not be stifled by the imposition of legal doctrine; that the opportunity for the development of new ideas fitting financial service industries operating in consumer markets should be appreciated for the benefits they can bring; that on the other hand transparency, consistency and accessibility as to the principles which inform the ombudsman’s determinations remain virtues in this new setting; and that publicity as to those principles and determinations can assist in that regard.”*

Scope for improvement

The ombudsman model is working effectively to deliver dispute resolution outside of the courts in the simple, efficient manner that the consultation paper envisages.

The Financial Ombudsman, through its existing jurisdiction, deals with the subject matter of a wide range of civil disputes including car repairs, building work, faulty goods as well as areas such as assessing ill-health under insurance claims and other matters more clearly associated with financial services. Indeed as “e-money” and the expansion financial services and consumer credit generally mean that the range of issues the Financial Ombudsman covers already encompasses large areas of civil disputes – albeit only through the particular window of financial services.

If the Government would like a more ambitious programme to reduce reliance on formal court processes in civil disputes – whilst recognising the benefits for consumers and businesses of access to cost effective and prompt dispute resolution - the wider use of ombudsman schemes should be considered.

Introducing mediation before court action has had a mixed record in trials. Two problems emerge. First, the mediation is not normally “guided mediation” – that may disadvantage unrepresented parties and deter early settlement. In contrast in the ombudsman’s guided mediation model experienced staff can advise the “losing” party that their position is not a good one and that the ombudsman is unlikely to support them.

Second by definition the parties have already chosen a path that leads to court action. Their minds are already attuned to formal legal process and costs. So the spirit of the mediation effort is more “are we sure there isn’t anything that can be done to avoid court action” rather than “what would be a fair way to settle this dispute”.

So whilst the proposals in the consultation paper may assist at the margin they would not achieve the radical change that has been possible in sectors with effective ombudsman schemes. Ombudsman schemes provide a mechanism whereby informal resolution is the expectation and the norm, but where formal powers to reach binding determinations add bite to that informal settlement environment.

Greater use of ombudsman schemes would provide a valuable and more accessible alternative to the courts. This would assist consumers to access justice where necessary, without undue costs to industry and without burdening the court system.

Present development of the ombudsman system in civil disputes is somewhat piecemeal and fragmented. Most schemes are based around regulatory structures (for examples legal services, and utility regulation) with little by way of an overall vision for the scope and number of such schemes. Our own Financial Ombudsman scheme was created out of a merger of 6 previous schemes and we have demonstrated the benefits of the economies of scale and scope that this provides.

At the moment, the wide variety of ombudsman schemes can be confusing for complainants and blurred jurisdictions can result in unintended underlaps and overlaps. There may be scope to consider how ombudsman schemes could be

better integrated to form a stronger network of protection and justice for consumers and hence remove existing burdens from the courts. You might consider whether it would be useful to create enabling powers for the development of ombudsman schemes, something which the European Commission is currently considering for their forthcoming proposal for a directive on ADR.

Below we have provided answers to those questions which are relevant to our experience of dispute resolution.

Q33: Do you agree with the proposal to introduce automatic referral to mediation in small claims cases? If not, please explain why.

It is not for the ombudsman service to comment on what should be done, but it is our experience of handling over 200,000 new complaints a year that it is possible to solve complaints simply, proportionately and effectively in a way that increases access to justice by using alternatives to the court like the ombudsman service. You could consider the automatic referral to ADR schemes applying more broadly, including ombudsman schemes as appropriate.

Q34: If the small claims financial threshold is raised (see Q25), do you consider that automatic referral to mediation should apply to all cases up to (i) £15,000, (ii) the old threshold of £5,000 or (iii) some other figure? Please give reasons.

Again, it is not for the ombudsman to comment on the merits of this, but our service handles complaints up to £100,000, rising to £150,000 in January 2012.

Q35: How should small claims mediation be provided? Please explain with reasons.

Again, it is not for the ombudsman to comment on the merits of this, but you could consider the use of ombudsman schemes as an alternative to mediation.

Q36: Do you consider that any cases should be exempt from the automatic referral to mediation process? & Q37: If your answer to Q36 is yes, what should those exemptions be and why?

If a consumer rejects our formal Ombudsman determination, as they are entitled to do, they remain free to pursue their case through the courts. Thought should be given to whether they would then be required to go through mediation, when they have already used an ADR scheme.

Q39: Do you agree with the proposal to introduce compulsory mediation information sessions for cases up to a value of £100,000? If not, please explain why.

Again, it is not for the ombudsman to comment on the merits of this but our experience is as an ADR scheme that is designed to handle complaints up to £100,000. In our experience, whether ADR is appropriate is influenced more by the complexity of the case, rather than simply the amount of money involved. There is no intrinsic reason why alternatives to court cannot work in high value cases.