

INSURANCE LAW
AND THE
FINANCIAL
OMBUDSMAN
SERVICE

DR JUDITH P. SUMMER

Lloyd's List

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BY

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FOREWORD

This pioneering book breaks new ground. It represents the first serious attempt to analyse the work of the Financial Ombudsman Service, and it does so by putting it in the context of insurance law. Given that the private ombudsman model originated with the establishment of the Insurance Ombudsman Bureau in 1981, it is entirely appropriate that insurance law should be its focus. The history and background of the Service as an alternative dispute resolution mechanism is traced as well as its development over the past ten years. The body of case examples published by the Service over this period is extensively and carefully analysed to draw out the approaches that the ombudsmen have adopted towards both some of the familiar insurance principles – non disclosure, breach of warranty, fraudulent claims, measurement of loss; and also the main personal lines products: travel, household, motor (with a separate section on the contentious “keys in car” cases), life and personal accident, medical and legal expenses.

The Ombudsman Service has become, by virtue of the cost-free consumer access, *de facto* almost the exclusive forum for the adjudication of insurance disputes. The courts rarely if ever see such cases. This can be said to have the disadvantage that authoritative case law precedents are no longer set by the judiciary. The alternative view is that the benefits outweigh the disadvantages. As Rix LJ observed,

“For some years the insurance ombudsman (now within the FOS scheme) has been developing a new common law of insurance for consumer contracts, without which the courts would have been constrained to find, or alternatively to reject, solutions to problems from which they have been in the main shielded.” R (on the application of Heather Moor & Edgecomb) v Financial Ombudsman Service [2008] EWCA Civ 642.

It is therefore all the more important that legal researchers and commentators take serious note of the ombudsman jurisdiction. While some have criticised ombudsman decision-making as inherently unpredictable and lacking in transparency, this book demonstrates clearly that the ombudsmen have succeeded in developing broadly consistent approaches to commonly seen issues (mostly applying insurance law principles) and that these are not difficult to observe from the material published by the Service. The author not only brings these to life in an organised framework and in a thematic manner, but also adds a scholarly critique and commentary, pointing the way to possible future policy and legal developments. Of particular interest, against the background of the work of the Law Commissions on consumer insurance law reform, is the treatment of non-disclosure where the Commissions have adopted some of the approach developed by the ombudsman.

One of the objectives of the Ombudsman Service has always been to feed back to its stakeholders in the industry and the consumer world the results of its work, from which insurers can learn better how to evaluate claims, and consumers can be advised how to avoid common pitfalls. It can be argued that although the Service’s regular newsletters and topical

FOREWORD

website material can perform some of this function, the lack of a consolidated and easily referenced sourcebook has left this objective well short of achievement. In many ways this book will help to fill the gap, and for the public it has the advantage that it is written by an independent scholar and rather than by the Service itself.

This will not only be an extremely useful work of reference for legal and industry insurance practitioners, law students and other commentators, it will also be valuable for the Financial Ombudsman Service itself. I hope that it will challenge and inspire others to study the work of the Service in the fields of banking, credit and investment, thus providing a comprehensive documentation and analysis of what may be the “new common law of financial services consumer contracts”.

WALTER MERRICKS

Chief Ombudsman, Financial Ombudsman Service 1999–2009

PREFACE

This book was inspired through frustrating years as a solicitor advising clients about insurance claims going before the Financial Ombudsman Service without any text book guidance or discussion being available. It has taken shape after three and a half years studying the Financial Ombudsman Service for a PhD and comparing its approach in insurance cases to that of the courts. The essential point is that the Financial Ombudsman Service does not have to follow the law, so its decisions and considerations may be different to those of a court. This book is aimed at solicitors, insurance claims handlers and consumer advisers who need to know how the two tend to differ.

I have analysed every available piece of information issued by the Financial Ombudsman Service, along with material from the Financial Services Authority and other sources, to try to portray an accurate picture of current Financial Ombudsman Service approaches. One major caveat is that the Ombudsman's approach to any particular matter can change without warning either in general, or simply in light of the circumstances of an individual case, so that what is written below in relation to the Ombudsman's approaches cannot be treated as a court precedent would be. The Financial Ombudsman Service's near monthly publication, *Ombudsman News* gives its own caveat to the information that it publishes there, saying that it gives general information on the position at the date of publication, that it is not a definitive statement of the law, the Ombudsman's approach or procedure and that the illustrative case studies are based broadly on real-life cases, but are not precedents and that individual cases are decided on their own facts.

Nevertheless, this book provides much-awaited guidance as to the likely Ombudsman approach, as it collates all the Ombudsman information publicly available. For ease of reference, all the insurance case studies published in *Ombudsman News* have been collated into the appendices to this book, along with other useful and relevant material. The book is up to date to 1 June 2010.

Throughout the book, in the interest of economy of paper and ink, the Financial Ombudsman Service will be referred to as the FOS, although it does not like the acronym and would prefer its name to be referred to in full.

I must acknowledge the support, encouragement and inspiration that Professor Robert Merkin has provided both as my former PhD supervisor, and as my current friend. Thanks must go to Walter Merricks CBE, the FOS's founding Chief Ombudsman, who has taken time to write the foreword to this book in the middle of a busy schedule as chair of the Office of the Health Professions Adjudicator, to Chris Betney, Liz Lewis and the team at Lloyd's List Law for their editorial input and to the FSA for giving copyright permissions. Warm appreciation needs to go to my husband and family who have given further encouragement and helped with childcare whilst I have written this book and who are so very proud of whatever I do. Finally, I dedicate my efforts to my gorgeous sons who have been so understanding of the need to lock myself away to write this book and who have provided just the right amount of cuddles whilst I work.

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TABLE OF CASES

Absalom v TCRU Ltd [2005] EWCA Civ 1586	5.26
AC Ward & Sons Ltd v Catlin (Five) Ltd [2008] EWHC 3585 (Comm); [2009] EWHC 3122 (Comm); <i>affmd</i> [2009] EWCA Civ 1098, CA	14.11
Aerospace Publishing Ltd v Thames Water Utilities Ltd [2007] EWCA Civ 3	10.18
Agapitos v Agnew [2002] EWCA Civ 247	12.5, 12.7, 12.19, 12.23, 12.24, 12.33, 12.36, 12.38–12.40
Alfred McAlpine plc v BAI (Run-Off) [2000] 1 Lloyd's Rep 437	12.32, 14.1
Anders & Kern Ltd v CGU Insurance plc [2007] EWCA Civ 1481	5.55
Anderson v Norwich Union [1977] 1 Lloyd's Rep 253	8.1
Andrews & Kern Ltd v CGU Insurance plc [2007] EWCA Civ 1481	5.3
Ansari v New India Assurance Ltd [2009] EWCA Civ 93	13.99
Assicurazioni Generali v Arab Insurance Group [2002] EWCA Civ 1642	13.14
Axa General Insurance Ltd v Gottlieb [2005] EWCA Civ 112	12.6, 12.21, 12.23, 12.40–12.42
Axa Insurance UK v Cunningham Lindsey UK [2007] EWHC 3023 (TCC)	3.8
Baghbadrani v Commercial Union Assurance Co plc [2000] Lloyd's Rep IR 94	12.21
Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd (The Good Luck) [1992] 1 AC 233; [1991] 2 Lloyd's Rep 191	14.5, 14.8
Bankers Insurance Co v South [2003] EWHC 380	6.15
Banque Financiere v Westgate Insurance Co [1991] 2 AC 249; [1990] 2 Lloyd's Rep 377	3.9
Barnett & Block v National Parcels Insurance (1942) 73 Ll L Rep 17	13.35
Bartoline Ltd v Royal & Sun Alliance Insurance plc, unreported, November 2006	8.33
Baybut (Margaret) & 73 Ors v Eccle Riggs Country Park Ltd, <i>The Times</i> , 13 November 2006	5.66
Beacon Life v Gibb (1862) 1 Moo PCC (NS) 73	5.22
Berkeley Community Villages Ltd & Ors v Fred Daniel Pullen & Ors [2007] EWHC 1330 (Ch)	5.54
Berkley v Poulett and Ors (1977) 261 EG 911	8.39
Blackburn Rovers Football and Athletic Club plc v Avon Insurance plc [2005] EWCA Civ 423	7.26
Blackburn Rovers Football and Athletic Club plc v Avon Insurance plc (No 2) [2007] Lloyd's Rep IR 1	7.26
Blackett v Royal Exchange (1832) 2 G & J 244	5.27
Blascheck v Russell (1916) 33 TLR 74	5.22
Bolam v Friern Hospital Management Committee [1957] 1 WLR 582	2.61
Bolton MBC v Municipal Mutual Insurance Ltd [2007] Lloyd's Rep IR 233	5.26
Botham v TSB Bank plc, unreported, CA, 30 July 1996	8.39–8.41
Bradley and Essex & Suffolk Accident Indemnity Society, Re [1912] 1 KB 415	14.2
Brotherton v Aseguradora Colseguros SA [2003] Lloyd's Rep IR 758	13.82
Bunney v Burns Anderson plc [2007] EWHC 1240 (Ch)	3.3
Burts & Harvey v Vulcan & General Insurance Co [1966] 1 Lloyd's Rep 161	8.35
Campbell v BMW Insurance Co [2001] EWCA Civ 1660	2.56
Carlingford Australia General Insurance Ltd v EZ Industries Ltd [1988] VR 349	5.17
Carlsberg-Tetley Brewing Ltd v Gilbarco Ltd, LTL 4/5/99	5.54
Carter v Boehm (1766) 3 Burr 1905	13.37, 13.41
Cementation Piling and Foundation Ltd v Commercial Union Insurance Co [1995] 1 Lloyd's Rep 97	8.35
Charlton v Fisher [2001] Lloyd's Rep IR 387	5.9
Charman v Gordian Runoff Ltd [2004] Lloyd's Rep IR 373	5.15
Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38	5.4
Chelsea Yacht & Boat Co Ltd v Justin Pope [2000] 1 WLR 1941	8.39
Clark v New Hampshire Insurance Company, unreported, 27 June 1991	2.56
Clements v National General Insurance Co (1910) <i>The Times</i> , 11 June	8.26
Commercial Union Assurance Co Ltd v Sun Alliance Insurance Group plc [1992] 1 Lloyd's Rep 475	5.22

TABLE OF CASES

Commonwealth Smelting v Guardian Royal Exchange Assurance Ltd [1984] 2 Lloyd's Rep 608	5.13
Computer & Systems Engineering plc v John Lelliott (Ilford) Ltd (1990) 54 BLR 1	8.5, 8.6, 8.8
Connecticut Mutual Life Insurance Co of Hartford v Moore (1881) LR 6 App Cas 644	13.35
Cook v Financial Insurance Co Ltd [1998] 1 WLR 1765; [1999] Lloyd's Rep IR 1	7.16–7.19
County Homeseach Co (Thames & Chilterns) Ltd v David Cowham [2008] EWCA Civ 26	5.66
Cox v Orion Insurance Co Ltd [1982] RTR 1	12.28
Danepoint Ltd v Underwriting Insurance Ltd [2005] EWHC 2318 (TCC)	12.19, 12.20
Dawsons Ltd v Bonnin [1922] 2 AC 413; (1922) 12 Ll L Rep 237	13.25, 13.37
Dean v Andrews, <i>The Times</i> , 25 May 1985	8.39, 14.6
David Allen & Sons Billposting Ltd v Drysdale [1939] 4 All ER 113; (1939) 65 Ll L Rep 41	8.15
Debenhams Retail plc v Customs & Excise Commissioners [2004] EWHC 1540 (Ch)	5.54
Derry v Peek (1889) LR 14 App Cas 337	13.22
Direct Line Insurance plc v Khan [2001] EWCA Civ 1794	12.21
Direct Line Insurance plc v Fox [2009] EWHC 386 (QB)	12.25
Director-General of Fair Trading v First National Bank plc [2000] 1 All ER 240; [1999] Lloyd's Rep Bank 427	5.54
Doe d Pit v Lanning (1814) 4 Camp 73	13.35
Doheny v New India Assurance Co Ltd [2004] EWCA Civ 1705	13.15, 13.36
Dominion Mosaics v Trafalgar Trucking Co [1990] 2 All ER 246	10.18
Drake Insurance Co v Provident Insurance Co [2004] Lloyd's Rep IR 277	13.82
Drinkwater v London Assurance (1767) 2 Wils 363	5.17
Duffield (Alfred James) v The Pensions Ombudsman, <i>The Times</i> , 30 April 1996	2.65
Durham v BAI (Run Off) Ltd [2008] EWHC 2692 (QB)	5.8
Eagle Star Insurance Co Ltd v Cresswell [2004] Lloyd's Rep IR 537	5.22
Eagle Star Insurance Co Ltd v Games Video Co (GVC) SA (The Game Boy) [2004] EWHC 15 (Comm)	12.26
Economides v Commercial Union Assurance plc [1998] QB 587; [1998] Lloyd's Rep IR 9	13.37, 13.107
Elitestone Ltd v Morris [1997] 1 WLR 687	8.39
England v Guardian Insurance Ltd [2000] Lloyd's Rep IR 404; [1999] 2 All ER (Comm) 481	3.6, 3.7
Eshig v UNIQA Sachversicherung AG [2009] EUECJ, Case C-199/08	15.7
Euro London Appointments Ltd v Claessens International Ltd [2006] EWCA Civ 385	5.54
Ewing (Alma Kearney) v Trustees of the Stockham Valve Ltd Staff Retirement Benefits Scheme, LTL 01/03/2000	2.65
Farley v Skinner No 2 [2001] UKHL 49; [2002] BLR 1	3.8
Farr v Motor Traders Mutual Insurance [1920] 3 KB 669	14.11
FOS v Heather Moor & Edgecomb Ltd [2008] EWCA Civ 643	2.20
Forsikringsaktieselskapet Vesta v Butcher [1989] 1 All ER 402; [1989] 1 Lloyd's Rep 331	5.22, 14.3
Fraser v Furman (Productions) Ltd [1967] 2 Lloyd's Rep 1	13.46
Friedlander v London Assurance (1832) 1 Moo & R 171	13.35
Friends Provident Life & Pensions v Sirius International Insurance [2005] EWCA Civ 601	14.1
Galloway v Guardian Royal Exchange (UK) Ltd [1999] Lloyd's Rep IR 209	12.21, 12.23
Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] Lloyd's Rep IR 291	5.15
GE Frankona Reinsurance Ltd v CMM Trust No 1400 (The Newfoundland Explorer) [2006] EWHC 429 (Admlty)	5.17
Gerling General Insurance Co v Canary Wharf Group plc [2005] EWHC 2234 (Comm)	8.34
Gillin (Michael James) v Lloyds TSB Bank plc, LTL 3/7/2007, unreported	5.66
Glen's Trustees v Lancashire & Yorkshire Accident Insurance Co Ltd (1906) 8F (Ct of Sess) 915	5.22
Good Luck, The. Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd [1992] 1 AC 233; [1991] 2 Lloyd's Rep 191	14.5, 14.8
Goshawk Dedicated Ltd v Tyser & Co Ltd [2005] Lloyd's Rep IR 379; [2007] Lloyd's Rep IR 284	5.27
Grimaldi v Sullivan, unreported, 1997	10.30, 10.31, 10.35
Hales v Reliance Fire Assurance [1960] 2 Lloyd's Rep 391	14.7
Hamishmar Insurance Agency Ltd v FirstCity Partnership [2009] EWHC 256 (Comm)	5.3
Hamp v Bygrave (1983) 266 EG 720	8.39
Hare v Barstow (1844) 8 Jur 928	5.17
Hayward v Norwich Union [2000] Lloyd's Rep IR 382; <i>revsd</i> [2001] EWCA Civ 243; [2001] Lloyd's Rep IR 410, CA	9.25–9.29, 9.30, 9.31–9.33, 9.36, 9.37, 9.39, 9.42, 9.46–9.48
HIH Casualty & General Insurance Ltd v AXA Corporate Solutions [2002] Lloyd's Rep IR 325; <i>affmd</i> [2003] 1 Lloyd's Rep IR 1, CA	14.8

TABLE OF CASES

HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co [2001] Lloyd's Rep IR 234; <i>affmd</i> [2001] EWCA Civ 735; [2001] Lloyd's Rep IR 596, CA	5.50, 14.5, 4.8
Holland v Hodgson (1872) LR 7 CP 328	8.39
Hooper v Accidental Death Insurance Co (1860) 3 H & N 546	7.31
Howells v IGI Insurance [2003] Lloyd's Rep IR 803	7.31
Hussain v Brown [1996] 1 Lloyd's Rep 627	14.11
Hussain v Brown (No 2), unreported, 1996	8.26, 13.99
Ingleton Ltd v General Accident Fire and Life Assurance Corporation [1967] 2 Lloyd's Rep 179	9.15, 9.22, 9.30
Insurance Corporation of the Channel Islands v McHugh [1997] LRLR 94	3.7
Insurance Corporation of the Channel Islands v Royal Hotel (No 2) [1998] Lloyd's Rep IR 151	13.82
Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433	5.45, 5.52–5.56, 5.68, 7.11, 7.18
Investors Compensation Scheme v West Bromwich Building Society [1998] 1 All ER 98	5.3, 5.4, 5.8, 5.15
Italia Express, The. Ventouris v Mountain [1992] 2 Lloyd's Rep 281	3.7
James v CGU Insurance [2002] Lloyd's Rep IR 206	8.37, 12.11
Jean F Jones v University of Warwick [2003] EWCA Civ 151	4.2
Johnson v IGI Insurance Co Ltd [1997] 6 CL 358	7.31
Jones v Environcom Ltd (No 2) [2010] EWHC 759 (Comm)	5.28, 5.29, 13.72
J Spurling v Bradshaw [1956] 1 WLR 461; [1956] 1 Lloyd's Rep 392	5.54
Kaltenbach v Mackenzie (1878) LR 3 CPD 467	10.38
Kaufmann v British Surety Insurance Co Ltd (1929) 45 TLR 399	5.22
Kausar v Eagle Star Insurance Co Ltd [2000] Lloyd's Rep IR 154	13.38
King v Travellers' Insurance Association (1931) 48 TLR 53	5.10
Kler Knitwear v Lombard General Insurance Co [2000] Lloyd's Rep IR 47	14.11
K/S Merc-Scandia XXXXII v (1) Underwriters of Lloyd's Policy & Ors (The Mercandian Continent) [2001] EWCA Civ 1275; [2001] 2 Lloyd's Rep 563	12.4, 12.23, 12.31–12.33, 12.38
Lagden v O'Connor [2004] 1 AC 1067	3.25
Laker Vent Engineering Ltd v Templeton Insurance Ltd [2009] EWCA Civ 62	14.2
Langford v Legal & General Assurance Society [1986] 2 Lloyd's Rep 103	9.16, 9.17, 9.30
Law Debenture Trust Corporation plc v The Pensions Ombudsman [1997] 3 All ER 233	2.65
Lawrence v Accident Insurance Co (1881) 45 LT 29	7.36
Legal & General Assurance Society Ltd v CCA Stationery Ltd [2003] EWHC 2989	2.65
Legal & General Assurance Society Ltd v The Pensions Ombudsman [2000] 2 All ER 577	2.65
Lek v Mathews (1927) 9 Ll L Rep 141	12.27, 12.29
Lewis v Norwich Union Healthcare Ltd [2009] EW Misc 2 (EWCC)	2.56, 5.28, 13.72
Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd [1918] AC 350	8.2
Limit No 2 Ltd v Axa Versicherung AG [2008] EWCA Civ 1231	13.92
Litsion Pride, The [1985] 1 Lloyd's Rep 437	12.37
Loyaltrend Ltd v Creechurch Dedicated Ltd [2010] EWHC 425 (Comm)	14.2
Macaulay (Neil John) v The Pensions Ombudsman, LTL 04/02/98	2.65
Mander v Equitas Ltd [2000] Lloyd's Rep IR 520	5.27
Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd (The Star Sea) [2001] UKHL 1; [2001] 1 Lloyd's Rep 389	12.3, 12.4, 12.36, 12.37, 12.38
Margate Theatre Royal Trust Ltd v White [2005] EWHC 2171 (TCC)	2.56
Marzouca v Atlantic and British Commercial Insurance Co [1971] 1 Lloyd's Rep 449 (PC)	8.26
McGeown v Direct Travel Insurance [2004] Lloyd's Rep IR 599	7.33
Melik v Norwich Union [1980] 1 Lloyd's Rep 523	14.11
Midland Mainline Ltd & Ors v Commercial Union Assurance Co Ltd & Ors [2004] EWCA Civ 1042	7.39
Miller (James) & Partners v Whitworth Street Estates (Manchester) Ltd [1970] AC 583; [1970] 1 Lloyd's Rep 269	5.26
Mopani Copper Mines plc v Millennium Underwriting Ltd [2008] EWHC 1331 (Comm)	5.51
Morley and Morley v United Friendly Insurance [1993] 1 Lloyd's Rep 490	5.15
Munkenbeck & Marshall v Michael Harold [2005] EWHC 356 (TCC)	6.8
Munro, Brice & Co v War Risks Association Ltd [1918] 2 KB 78	4.5
National Company for Co-operative Reinsurance v St Paul Reinsurance Co Ltd, unreported, 1998	12.13
National Employers Mutual General Insurance Association Ltd v Haydon [1980] 2 Lloyd's Rep 149	8.45
National Farmers Union Mutual Insurance Society Ltd v HSBC Insurance (UK) Ltd [2010] EWHC 773 (Comm)	8.45

TABLE OF CASES

Newsholme Brothers v Road Transport and General Insurance Co Ltd [1929] 2 KB 356; (1929) 34 Ll L Rep 247	13.53, 13.58, 13.62
Noblebright Ltd v Sirius International Corporation Ltd [2007] EWHC 868 (QB)	13.15, 13.35, 13.36
Normhurst Ltd v Dornoch Ltd [2005] Lloyd's Rep IR 27	3.6
North Star Shipping Ltd v Sphere Drake Insurance plc [2006] EWCA Civ 378	13.15, 13.82
Norwich Union Insurance Ltd v Meisels [2006] EWHC 2811 (QB)	13.82
Nsubuga v Commercial Union Assurance Co plc [1998] 2 Lloyd's Rep 682	12.21
Ocean Chemical Transport Inc & Ors v Exnor Craggs Ltd <i>sub nom</i> The Julius Hammer [2000] 1 Lloyd's Rep 446	5.55
O'Donoghue v Harding [1988] 2 Lloyd's Rep 281	9.19–9.22, 9.30
Office of Fair Trading v Abbey National & Ors [2008] EWHC 875 (Comm); [2008] EWHC 2325 (Comm)	5.67
Orakpo v Barclays Insurance Services Ltd [1995] LRLR 443	12.19, 12.21
Otto Chan v Barts & The London NHS Trust [2007] EWHC 2914 (QB)	5.54
Outokumpu Stainless Ltd v Axa Global Risks (UK) Ltd [2007] EWHC 2555 (Comm)	5.11
Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1995] 1 AC 501; [1994] 2 Lloyd's Rep 427	13.14, 13.26
Parker v South Eastern Railway (1876) LR 2 CPD 416	5.54
Photolibary Group Ltd v Burda Senator Verlag GmbH [2008] EWHC 1343 (QB)	5.54
Pilkington United Kingdom Ltd v CGU Insurance plc [2004] Lloyd's Rep IR 891	8.33
Plaistow Transport Ltd v Graham [1966] 1 Lloyd's Rep 639	9.13, 9.14, 9.30
Pocock v Century Insurance Co Ltd [1960] 2 Lloyd's Rep 150	7.33, 7.34
Pratt v Aigaion Insurance Co (The Resolute) [2008] EWHC 489 (Admlty); <i>revsd</i> [2008] EWCA Civ 1313, CA	5.17, 14.11
Prenn v Simmonds [1971] 1 WLR 1381	5.3
President of India v Lips Maritime Corporation (The Lips) [1988] AC 395; [1987] 2 Lloyd's Rep 311 ...	3.6
Pride Valley Foods Ltd v Independent Insurance Co Ltd [1999] Lloyd's Rep IR 120	3.6
Printpak v AGF Insurance Ltd [1999] Lloyd's Rep IR 542	14.11
Provincial Insurance Co v Morgan [1933] AC 240; (1932) 44 Ll L Rep 275	14.11
Quantum Processing Services Co v Axa Insurance UK plc [2008] All ER (D) 152	6.14
Quorum AS v Schramm (No 1) [2002] Lloyd's Rep IR 292	8.35, 10.2
R (on the application of Cook) v FOS [2009] EWHC 426 (Admin)	2.44
R (on the application of Garrison Investment Analysis) v FOS [2006] EWHC 2466 (Admin)	2.67
R (on the application of Heather Moor & Edgecomb Ltd) v FOS (1) Simon Lodge (2) (Interested Party) [2008] EWCA Civ 642	2.42, 2.43, 2.60, 2.61, 2.66, 2.69
R (on the application of Heather Moor & Edgecomb Ltd) v FOS & Ross (Interested Party) [2009] EWHC 2701 (Admin)	2.42, 2.43, 2.69, 2.72
R (on the application of IFG Financial Services Ltd) v Financial Ombudsman Services Ltd (1) Mrs Jenkins (Interested Parties) (2) [2005] EWHC 1153 (Admin)	2.60, 2.66
R (on the application of Keith Williams) v FOS [2008] EWHC 2142 (Admin)	2.59
R (on the application of Kenneth Green (t/a Green Denman & Co)) v FOS Ltd & Julie Waring (Interested Party) [2003] EWHC 338 (Admin)	2.68
R (on the application of Sunspell Ltd (t/a Superlative Travel)) v Association of British Travel Agents, unreported, 12 Oct 2000	2.64
R (on the application of Thompson) v Law Society [2004] EWCA Civ 167	2.69
R (on the application of Towry Law Financial Services plc) v FOS Ltd [2002] EWHC 1603 (Admin)	2.47, 2.70
R v Deputy Insurance Ombudsman, <i>ex parte</i> Francis, unreported, 20 May 1998	2.64
R v FOS Ltd, <i>ex parte</i> Norwich & Peterborough Building Society & David Robert Jones [2002] EWHC 2379 (Admin)	2.67
R v IOB, <i>ex parte</i> Aegon Life Assurance Ltd [1994] CLC 88; [1995] LRLR 101	2.64
R v Panel of the Federation of Communication Services Ltd & Anr, <i>ex parte</i> Kubis, unreported, 3 Sep 1997	2.64
R v Personal Investment Authority Ombudsman Bureau Ltd, <i>ex parte</i> Johannes Mooyes [2001] EWHC 247 (Admin); [2002] Lloyd's Rep IR 45	2.64
R & R Developments Ltd v Axa Insurance UK plc [2009] EWHC 2429 (Ch)	13.15, 13.35
Ramco (UK) Ltd v International Insurance Co of Hannover Ltd [2004] Lloyd's Rep IR 606	5.1
Reardon Smith Line Ltd v Yngvar Hansen-Tangen (The Diana Prosperity) [1976] 1 WLR 989; [1976] 2 Lloyd's Rep 621	5.3
Rendall v Combined Insurance Company of America [2005] EWHC 678 (Comm)	13.107
Revell v London General Insurance Co Ltd (1934) 50 Ll L Rep 114	13.35

TABLE OF CASES

Rohan Investments Ltd v Cunningham [1999] Lloyd's Rep IR 190	8.6, 8.8–8.12
Sanger (t/a SA Jewels) v Beazley [1999] Lloyd's Rep IR 424	9.23, 9.24, 9.30
Sargent v GRE (UK) Ltd [2000] Lloyd's Rep IR 77	5.17, 7.29, 7.30
Sarwar (Imran) v Muhammad Alam [2001] EWCA Civ 1401; [2002] Lloyd's Rep IR 126	15.10, 15.14
Scottish Coal Co Ltd v Royal and Sun Alliance plc [2008] EWHC 880 (Comm)	10.18, 13.99
Seele Austria GmbH & Co KG v Tokio Marine Europe Insurance Ltd [2008] EWCA Civ 441	5.22
Sempra Metals v Inland Revenue Commissioners [2008] 1 AC 561	3.6
Shell UK Ltd v CLM Engineering Ltd [2000] 1 Lloyd's Rep 612	8.35, 8.36
Shepherd Homes Ltd v Encia Remediation Ltd [2007] EWHC 70 (TCC)	5.54
Shoot v Hill (1936) 55 Ll L Rep 29	12.26
S&M Hotels v Legal and General Assurance [1972] 1 Lloyd's Rep 157	8.1
Smit Tak Offshore Services Ltd v Youell [1992] 1 Lloyd's Rep 154	5.15
Sofi v Prudential Assurance [1993] 2 Lloyd's Rep 559	9.6, 9.9
Sprung v Royal Insurance (UK) Ltd [1997] CLC 70; [1999] 1 Lloyd's Rep IR 111	3.6, 3.25
Star Sea, The. Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd [2001] UKHL 1; [2001] 1 Lloyd's Rep 389	12.3, 12.4, 12.36, 12.37, 12.38
Starfire Diamond Rings v Angel [1962] 2 Lloyd's Rep 217 .. 9.10–9.12, 9.14, 9.15, 9.21, 9.22, 9.24, 9.27, 9.30, 9.31, 9.32, 9.36	
State Insurance Office v Bettany [1992] 2 NZLR 275	10.32
Stemson v AMP General Insurance (NZ) Ltd [2006] UKPC 30	12.19
Strive Shipping Corporation v Hellenic Mutual War Risks Association [2002] Lloyd's Rep IR 669	13.82
Sumukan Ltd v Commonwealth Secretariat [2007] EWCA Civ 243	5.54
Tarleton v Staniforth (1974) 5 TR 695	5.17
Tate Gallery (Trustees) v Duffy Construction Ltd [2007] EWHC 361 (TCC)	8.7, 8.8
Taylor v Eagle Star Insurance Co Ltd (1940) 67 Ll L Rep 136	13.35
Tektrol Ltd v International Insurance Co of Hanover Ltd [2006] Lloyd's Rep IR 38	5.17
Thor Navigation Inc v Ingosstrak Insurance (The Thor II) [2005] 1 Lloyd's Rep 547	5.27
Thornton v Shoe Lane Parking Ltd [1971] 2 QB 163	5.54
Tonkin & Toureau v UK Insurance Ltd [2006] EWHC 1120 (TCC)	2.56, 2.71, 3.6, 3.7, 4.20, 12.21
Tucker v Abbey Life Assurance Co Ltd, unreported, CA, 4 Oct 1999	2.56
Twinsectra v Yardley [2002] UKHL 12	12.1
Tyco Fire and Integrated Solutions (UK) Ltd v Rolls-Royce Motor Cars Ltd [2007] EWHC 137 (TCC); [2008] EWCA Civ 286	8.7
US Trading Ltd v Axa Insurance Co Ltd, unreported, 17 March 2008	12.8, 14.11
Ventouris v Mountain (The Italia Express) [1992] 2 Lloyd's Rep 281	3.7
Walton v Airtours plc [2004] Lloyd's Rep IR 97	7.33
Ward (Michael) v South Yorkshire Pensions Authority [2005] EWHC 2711 (Ch)	2.65
Wasa Insurance v Lexington Insurance [2009] UKHL 40; [2009] Lloyd's Rep IR 675	8.17
Watts v Morrow [1991] 1 WLR 1421; (1991) 54 BLR 86	3.8
Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corp Ltd [1974] QB 57; [1973] 2 Lloyd's Rep 237	7.39
Weddell v Road Traffic & General Insurance Co Ltd [1932] 2 KB 563; (1931) 41 Ll L Rep 69	8.45
Welch v Cunningham Hart (UK) Ltd & Another, unreported CA 26 July 1994	2.56
Weldon v GRE Linked Life Assurance Ltd, LTL 22/01/01	11.3
Westminster City Council v Haywood [1998] Ch 377	2.65
Winspear v Accident Insurance Co (1880) 43 LT 459	7.36
WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA [2004] EWHC 1706 (Comm); [2004] Lloyd's Rep 764	13.35, 13.38
Winter v Irish Life Assurance plc [1995] 2 Lloyd's Rep 274	13.11
Wulfson v Switzerland General Insurance Co Ltd (1940) 67 Ll L Rep 190	13.35
Yechiel v Kerry London Ltd [2010] EWHC 213	12.8
Yorke v Yorkshire Insurance Co Ltd [1918] 1 KB 662	13.35
Yorkshire Water v Sun Alliance & London Insurance Ltd [1997] 2 Lloyd's Rep 21	8.33
Young v Sun Alliance [1976] 2 Lloyd's Rep 189	8.1, 8.5, 8.6, 8.8, 8.10
Zeller v British Caymanian Insurance Co Ltd [2008] UKPC 4	7.22, 13.107

TABLE OF STATUTES

Compensation Act 2006	2.16	Limitation Act 1980	2.32
Consumer Credit Act 2006	2.1, 2.32	Marine Insurance Act 1906	1.20, 14.29
County Courts Act 1984		ss 17–20	14.3
s 69	3.28	s 17	3.9, 12.3, 12.4, 12.5, 13.1, 13.10
Financial Services Act 2010		ss 18–20	13.10, 13.17, 13.110
ss 18–25	2.78	s 18	13.107
ss 26–27	2.78	(1)	13.1, 13.37
Financial Services and Markets Act 2000	1.5, 1.14, 2.32, 15.1	(2)	13.14, 13.15
Part XVI	2.72	(3)(b)	13.37
s 39	13.66	s 19	13.58, 13.67
s 66	1.30	s 20(1)	13.107
s 150	13.73	(2)	13.14
s 225(1)	1.8	(5)	13.107
s 228(2)	1.8	s 32(2)	8.45
(6)	2.47	s 33(1)	14.3
s 229(2)(a)	3.1	(3)	14.3, 14.5
(b)	3.24	s 34(2)	14.5
(3)(a), (b)	3.1	s 55(1)	8.2
(5)	3.2	s 67(2)	10.7
(8)	2.48	s 84	13.32, 13.34
(a)	3.28	(3)(a)	13.1
(b)	3.29	Pensions Scheme Act 1993	
(9)	3.29	Part X	
s 230(3)	2.21	ss 146–151	2.65
(4)	2.23	Proceeds of Crime Act 2002	4.10
ss 231, 232	4.1	Rehabilitation of Offenders Act 1974	
s 404	2.44	s 4	13.85
Sched 17, Part III	2.74	(3)(a)	13.85
s 16	2.47, 3.29	s 7(3)	13.86
Fraud Act 2006	12.1	Supreme Court Act 1981	
Insurance Brokers (Registration) Act 1977	1.14	s 51	15.1
Late Payment of Commercial Debts (Interest) Act 1998	3.7	Third Parties (Rights against Insurers) Act 1930	1.34, 1.35
Latent Damage Act 1986		Unfair Contract Terms Act 1977	1.14, 1.22, 5.52
s 3	8.17		

TABLE OF STATUTORY INSTRUMENTS AND EUROPEAN LEGISLATION

Civil Procedure Rules 1998/3132	4.26	Insurance Companies (Legal Expenses Insurance) Regulations 1990/1159— <i>cont.</i>	
Commission Recommendation 98/257/EC of 30 March 1998	2.15	reg 6(1)	15.5, 15.8
Commission Recommendation 2003/361/EC of 6 May 2003	2.7	(3)	15.6
European Convention on Human Rights 1950	2.42	reg 7	15.6
Art 6	2.69	Unfair Terms in Consumer Contracts Regulations 1994/3159	2.32, 2.79, 5.52
European Directive 87/344/EEC	15.6	Unfair Terms in Consumer Contracts Regulations 1999/2083	5.52, 5.61, 5.63–5.69, 6.8, 6.15, 11.5, 13.11, 13.99, 13.102, 14.10, 14.11
arts 3, 4	15.7	reg 5(1)	5.64, 11.5
European Directive 93/13/EC	5.52	(3)	5.64
European Directive 2000/35/EC Late Payment Directive	3.7	reg 6(1)	5.65
European Directive 2002/65/EC		(2)	5.65, 5.66
art 2(d)	13.6	reg 7	5.66
European Directive 2007/64/EC Payment Services Directive	2.7	reg 8	5.64
Insurance Companies (Legal Expenses Insurance) Regulations 1990/1159		regs 10–12	5.67
reg 3	15.6	sched 2	5.65
		para 1(d)	11.5

TABLE OF DISP (UPDATED), ICOB AND ICOBS

DISP		DISP— <i>cont.</i>	
1.2.5G	2.24	2.7.5G	2.7
1.4.4R	3.29	2.7.6R	2.8
1.6	2.25	2.7.10G	2.4
1.6.2R	2.26, 2.27	2.8.1R	2.25
1.8.1R	2.32	2.8.2R	2.29
2.2.1G	2.4	2.8.2R(2)–(5)	2.31
2.3	2.4	2.8.2R(4), (5)	2.29
2.4	2.4	2.8.3G	2.26, 2.29
2.5	2.4	2.8.4G	2.29
2.6.1R	2.4	2.8.5R	2.31
2.6.3R	2.4	2.8.6G	2.31
2.6.4R	2.4	2.8.6R	2.31
2.7.3R	2.4, 2.6, 2.14	3.2.3R	2.47

DEFINITIONS/ABBREVIATIONS

DISP—cont.		DISP—cont.	
3.2.4R	2.47	3.7.10G	3.22
3.3.1R	2.44, 2.47	3.8.1R(2)	2.60
3.3.4R	2.19, 2.44	3.8.2BR	4.8
3.3.4R(10)	1.20	3.8.3R	4.8
3.3.5R	2.78	DISP 1	1.5, 2.24
3.3.6G	2.46	DISP 2	1.5, 2.1
3.5.4F	2.47	DISP 3	1.5
3.5.5R	2.42, 2.45, 2.46	DISP 4	2.3
3.5.6R	2.42	DISP TP1-1	1.5
3.5.6R(2)-(5)	2.42		
3.5.7G	2.42	ICOB	
3.5.8R	2.47, 4.1	ICOB	1.7, 1.15, 2.59, 5.28, 13.20, 14.15, 14.25
3.5.9R	2.47, 4.3, 4.8	5.3.18R	13.92
3.5.10G	2.47, 4.8	7.3	14.15
3.5.11G	2.47	7.3.6R	13.78
3.5.12G	2.47		
3.5.13R	2.47, 4.1, 4.6	ICOB	
3.5.14R	2.47, 4.6	ICOB	1.7, 1.15, 1.18, 1.23, 2.59, 5.28, 5.70, 5.71, 5.76, 6.2, 13.6, 14.13, 14.15, 14.20, 14.25
3.5.15R	2.47, 4.6	2.1.1G	14.15
3.6.1R	1.8, 2.58	2.1.1(3)	13.6
3.6.2G	1.8, 2.58	5.1.4G	13.78
3.6.4R	2.58-2.60, 2.66, 2.78	6.1.5R	13.92, 13.105
3.6.6R	2.47	6.1.6G	13.105
3.7.2R	3.1	6.1.8G	13.92
3.7.4R	3.2	6.1.12G	13.106
3.7.5G	3.2	8.1.1R	13.78, 14.16
3.7.6G	3.2	8.1.2R	13.78, 14.16
3.7.8R	3.28	8.12R(3)	14.16
3.7.9R	3.21	ICOB/S	1.7, 13.20, 13.73
		ICOB/S/EU	13.7

DEFINITIONS/ABBREVIATIONS

ABI	Association of British Insurers
CPR	Civil Procedure Rules
FSCS	Financial Services Compensation Scheme
FOS	Financial Ombudsman Service
FSA	Financial Services Authority
FSMA	Financial Services and Markets Act 2000
GISC	General Insurance Standards Council
IOB	Insurance Ombudsman Bureau
MIA	Marine Insurance Act 1906
OFT	Office of Fair Trading
PPI	Payment Protection Insurance
UCTA	Unfair Terms Act 1977
UTCCR	Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083)

CONTENTS

	<i>Page</i>
<i>Foreword</i>	v
<i>Preface</i>	vii
<i>Table of Cases</i>	xvii
<i>Table of Statutes</i>	xxii
<i>Table of Statutory Instruments and European Legislation</i>	xxiii
<i>Table of DISP (Updated), ICOB and ICOBS</i>	xxiii
<i>Definitions/Abbreviations</i>	xxiv
 CHAPTER 1. BACKGROUND	
History and formation of the FOS	1
The rules of the scheme: establishment of DISP and ICOB/S	2
Aims and values	2
Law reform	3
Self-regulation by the insurance industry	4
Is self-regulation sufficient?	5
The FOS system as a substitute for law reform	6
Criticism of the FOS system	7
Certainty and consistency	7
Reliance on policy wording	7
Law has been developed over many years	7
Accountability of the FOS	7
Limited availability of FOS material	7
The Financial Services Authority ("FSA")	8
The contribution of the IOB and FOS to law reform	8
The current Law Commissions	8
 CHAPTER 2. THE WORKINGS OF THE FOS	
Jurisdiction of the FOS	11
Compulsory, voluntary and consumer credit jurisdictions	11
Relevant complaints	12
Eligible complainants	12
Intermediaries	13
Group schemes	14
Foreign firms	15
Claims management services	15
Legal proceedings and commercial judgement	15