Transcripts of oral evidence

Witnesses Nick Stoop and Abhishek Sachdev

First Oral Session - 7 March 2017, 17.00 to 20.00

Committee members present
George Kerevan (GK) - Chair
Chris Wilford (CW)
Nikki Turner (NT)
Cat MacLean (CM)
Tony Baron (TB)
Stephen Rosen (SR)
Lord Cromwell (LGC)
Lord Dyson (LJD)
Heather Buchanan (HB)

Witnesses: Nick Stoop (NS), Abhishek Sachdev (AS)

GK w*elcomed all to first official session of the joint inquiry of the APPG on Fair Business Banking and the APPG on Alternative Dispute Resolution,* "bridging the gap"*.*

GK: Basically the purpose this evening is to begin the first set of evidence: we want to look at the current landscape of dispute resolution between small businesses and banks and look at some of the issues in terms of gaps, some of the issues in terms of what is covered by the regulatory regime and what isn't.

So … just to reinforce, this is not putting the banks on trial - it is simply trying to move forward from where we were in 2008/9/10 to looking at where the gaps are in dispute resolution; going a little bit beyond the superficialities and looking in a bit of detail at some of the practitions and add to the body of evidence. We have quite a lot of written evidence coming in but tonight is a chance to talk to some of the practitioners in person.

Nick Stoop and Abhishek Sachdev (from 02:42 to 1:00:45?)

The first two witnesses answered questions together. GK noted their widespread experience in financial services and asked them to each give a brief introduction to themselves.

NS: My name is Nick Stoop. I used to trade financial products at a couple of banks, but quite a long time ago, in the 80s and 90s. But in the last 5 years or so I've been acting as a consultant or an adviser for small / medium sized businesses and individuals, mostly in the

context of the FCA IRHP review scheme, but also in the Ombudsman and also unfortunately quite a lot of these/ several cases are now descending towards litigation. I'm ready to… try and answer whatever questions people may have.

AS: My name is Abhishek Sachdev. I'm managing Director of Vedanta Hedging. We're the largest adviser… FCA-regulated adviser to SMEs for hedging instruments. Our… daily job is making sure the small and medium sized businesses have got awareness, transparency and proper advice, independent advice when they enter into hedging contracts. My personal background is, I'm an economist… I worked in the Treasury for a while and then at Lloyds Bank. And we helped to instigate the FCA IRHP process, which we'll no doubt be talking about today, back in 2011/12. We're also working, like Nick is, on a number of litigation disputes including some of the largest derivative disputes in the country.

GK has to vote so hands chair temporarily over to LGC. HB clarifies the purpose of the session and LGC progresses straight to start the questions to the witnesses.

LGC: There have been many (more or less publicised) cases around this issue. Starting off with a very general question: do you have any feeling that things are improving? Are the cases one hears about in the past, that now it's a lot better than it was, or are things carrying on as they always have?

AS: Because our day job is making sure companies are entering into hedging properly - a couple of different things. So firstly the compliance procedures of the banks now are far far more robust than they were in the past. In fact we started to see that from even… 2009/10 onwards in this specific area. One interesting point to note is that there are actually no new regulations or compliance rules in place now than were in the case from say November 2007 - we're still under the rules of… MiFID - but all that is… really happening now… is that banks are actually following the compliance rules.

So where you have a compliance rule from the FCA which may say 'Explain things in a clear, fair, not misleading manner', banks are actually doing it. So, for example, when it comes to breakage costs, which is what most people are unhappy about in these disputes, there are now 4/5/6 page detailed presentations of worked examples on breakage costs. Whereas, say, up until 2008, one may have just seen one line which says "Breakage costs may be significant", go jump effectively...

NS: I'll echo that and in fact if the presentations that were made in 2007 or 8 were of the quality that they are today, I think there wouldn't have been the problem, in terms of the mis-selling of Interest Rate Hedging Products. Because today, as Abhishek has pointed out, they are very very clear, setting out of the break costs. It's not a very difficult thing to do and surprisingly it wasn't done then, but that has changed for the better.

AS: Having said that, unfortunately there are other areas whereby the banks, and indeed other financial markets participants, are trying to generate extra profits, so for example (maybe it's not necessarily in the scope of today) I've seen the prevalence, certainly in the last 2 or 3 years, so more recently, foreign exchange derivative contracts being, in my opinion, mis-sold

(and I think Colyer Bristow have seen some of this too) to the same sorts of what we call retail clients, ie the small and medium sized businesses. And we've seen examples as recent as 2016. So, in some senses, we've seen the Banks improve but there are other non-bank financial markets participants who, in some cases, are still following immoral practices.

LGC: And is that because they are not using the MiFID rules? What you outlined initially, it was in the banks'[unclear]… in the small print at the back and now they've had to become [facile?], at the front. Is it the same issue with FOREX? Or does it need more robust…?

AS: In this specific example of foreign exchange derivatives, and I appreciate this is a relatively new area [unclear] my belief is that, and I have personally raised this with the FCA 5 or 6 months ago, and in fact this committee has been given the letter that I've sent to the FCA, but effectively my belief is that it's not the banks that have been causing the [unclear], because I think post the IRHP review in 2012, they have tightened up their procedures, but actually a lot of foreign exchange brokers, for example, who - how can I put it? - I don't think have the same level of scrutiny and supervision from the FCA as the banks do, have… seen that as an opportunity to perhaps step into the market. From a commercial perspective, it's good for banks because the banks still sell the products to these brokers but they have none of the conduct risk.

LGC: Of course with Brexit [unclear]…

AS: That's exactly the reason why we've seen some of these issues.

GK returns and LGC hands back the chair to GK who asks the committee to all briefly introduce themselves.Following the brief introductions, the questions continue.

GK: In my experience of talking to constituents and constituents of other MPs, one issue that comes up consistently in the various ad hoc redress systems is disclosure - access to information from the bank. I fully accept it's a complicated area, that the banks can't really go [unclear]… allow fishing expeditions [unclear] but there does seem to be a consistent pattern of a lack of access to information. Is that your experience? And how could we deal with that effectively?

NS: It's absolutely, I'm sure, both of our experience … that this is the real problem facing the clients is that … often they're not quite sure what the case is against them or what evidence the bank holds. They might not know which questions to ask but even if they do know which questions to ask, the bank is able to basically sit on key documents…. For example, I'm talking particularly about credit documents, which are often the leading indicator of what might have happened in the sale of a product.

The IRHP scheme is very narrowly defined - I'm sorry if you were part of that definition - very narrowly defined to just the sales process and it doesn't, in my opinion, give proper weight to the surrounding picture, which is often a credit picture. So a swap or a collar may have profound credit implications but - and this is one of the reasons why they've caused so much difficulty as interest rates fell - yet when challenging the products it has been very difficult to get hold of the credit information required in order to analyse the case.

AS: I think one can't overestimate how important information disclosure is in these disputes. And I would say that the one difference between litigation and say the FCA review process or the Financial Ombudsman process or even a complaint process is that through litigation, by hook or by crook one eventually does get most of the important relevant information one needs and… I don't think I've seen a single litigation dispute whereby once the full and proper internal information has been presented that the claimant's case hasn't got stronger; it's always got stronger.

GK: So there's a difference between a formal litigation process and access to information in ad hoc procedures?

AS: Completely. Agreed. … I'm not a lawyer obviously but one couldn't possibly expect banks to follow the same sort of civil procedure rules of disclosure just through any other kind of process other than through litigation, that's my personal view. But talking about some of these redress schemes, information has been extremely patchy and variable across banks and across different customers.

So for example, I personally sat in - and Nick was sat in on lots as well… I personally sat in on more than about 150 different of these redress meetings. There are some cases where full information such as the credit files with the contingent liabilities or credit limits are fully disclosed and provided to customers and so are things like internal call reports. All of this kind of information is kept on their internal files. Because you can't really expect SMEs to have contemporaneous records… from 6/7/8/9 years ago - these are just small business people. And when that information is presented to them they can actually see - "Hold on one second I didn't say that", "that doesn't make sense, how could I have had that meeting with bank - it was a Sunday afternoon?" or "My accountant didn't have 20 years' experience in interest rate hedging" etc etc. So they can only deal with that information when it's presented to them. But in other cases when that information is kept within the bank and not presented to them, the SME is effectively just fighting in the dark and, as Nick says, it's almost like they don't know what they don't know. The most interesting stark contrast happens when that same case or that same customer hasn't had any kind of satisfactory outcome then starts to litigate and we start to then see the information that comes out, and it's fascinating and then those cases sometimes/often then later settle.

NS: … Once the litigation process is started…it's still quite a hard process to get the documents that you need and in order to litigate you need to spend a serious amount of money and you have to take on a very big liability if you're fighting against a bank. So I think your question was about the ad hoc schemes, and within the ad hoc scheme there is a severe lack of disclosure. As Abhishek says there are some banks or some presenters will reveal details of the files at meetings but somebody has to ask those questions and most of them…

GK: Are some banks better than others?

AS: Yes.

NS: Oh without a doubt, yes.

GK: Are you prepared to go on record?

NS: Yes I think so… RBS has been very very difficult to deal with all the way through the review. I would actually say that Lloyds has been exemplary through the review.

AS: I would agree with RBS being the worst. To be honest with you RBS is the worst bank in almost every possible criteria... Lloyds, I have found them to be ok. HSBC… I have found them actually exemplary.

GK: What is it that banks that you find exemplary do? [unclear]

NS: … First of all they share information, allowing the client to assess the case. And sometimes that information can lead to the end of it in the bank's favour, as well as in the client's favour. Also I think, more importantly, they listen to arguments or listen to presentations. One gets the feeling with RBS that they're always just looking for a way to chip away or… an excuse to ignore the presentation.

GK: Well we'll write to RBS. We'll give them due process… [unclear]

NS: Lloyds on the other hand have time and time again considered the information put to them and changed… and made changes. I think there are differences between banks. HSBS we really didn't have any problems because they just did quickly and efficiently at the beginning.

CW: Really around consistency… A lot of feedback is there is lack of a clear route, a lot of confusion. Have you been surprised about any particular cases, clients you're working with, where the situation they've been facing is quite similar but the cases ended up in completely different places?

NS: Absolutely… Often…, for example the size of a case matters a lot. A small claim…a low value claim tends to… I mean there is discrimination against high value claims, probably for obvious reasons.

AS: Just to give a live example. A case against a bank called RBS... A small business, 2 different entities, both controlled, same shareholders, same directors. One happened to be a £500,000 swap, one happened to be a £1 million one. Exact same sales process and the case reviewer basically said it's full redress for the smaller one but effectively nothing for the bigger one. I was just baffled by how that could be and even the case reviewer just simply said, "I can't give a reason, but one is smaller and going through our expedited process". And that's just some complete arbitrary rule that someone has said that a £500,000 one should be given more redress as opposed to £1million, as opposed to looking at the actual sales process and the suitability and the knowledge and experience of the people that did the deal. So there's inconsistency everywhere and not just that, there's been inconsistency even with the banks in terms of how they've treated different decisions over time. So for example Barclays used to tear up what's called structured collars, category A products in the very beginning, cash given, almost no questions asked. Towards the end, two years down the line, they almost started to shift more towards category B- type products, so there's an inconsistency across, even within each bank.

NS: And also dramatic inconsistencies between different processes. This morning we had a case at the Ombudsman. It had been to the bank, yes it had been to RBS. It was A 10 year swap, they decided it was a compliance fail and no redress was due whatsoever. With the same evidence, it's gone to a different forum and they've given full redress. I mean it's a 180 degree turnaround on the same facts and the same evidence. So there's a lot of inconsistency within the banks, according to the size, between the banks, according to the way they choose to interpret the rules or whether or not to follow them. In particular, on credit conditions… there's an area that I think…. 90% of the RBS outcomes I've seen, the first line is "There was a valid credit condition and therefore you don't get redress". And it seems that the other banks are following a different rule where they actually query the credit condition and they pay your redress even if they have… There are different interpretations of the rules.

AS: I guess that the message back to whoever is - when applied properly and fairly and consistently, even this scheme, albeit with the amount of flaws that it has in there - we can spend all evening talking about the flaws - can actually work pretty well, because there are absolutely good examples of good practice that we see. But they're just not applied consistently.

NT: I'd like to ask, because it's something our members ask all the time, about the fundamental problem of dishonesty. So it might not be in selling something. It might be to do with business support units or, for example, we've just been through this huge HBOS Reading trial. And the one thing that's been established is that for 10 years the bank, both HBOS and Lloyds Banking Group have been consistently dishonest, not just to its clients but to the clients' MPs, to the police, to the Treasury Select Committee, and if we can have a situation where banks can do that and just get away with it then what chance has the average SME? Do you feel there is anything that we can do? Is there anything in FSMA or anywhere else that says you can't behave dishonestly? Is there any kind of protection at all against just the basic idea that banks think they can behave dishonestly?

AS: Yes there are. All FCA regulated firms have got Principles of Business, all approved persons are supposed to have integrity, be fit and proper persons. But those rules only mean as much as someone who is willing to enforce them and do something about it.

NT: So are you saying there are problems with the Regulator?

AS: Yes I think it's the problem is with the Regulator. A quick example to do with civil disclosure: we've seen cases where, for example, RBS was told "please provide these three documents2 and RBS said "We don't know what you're talking about, they don't exist." Now I knew I had these documents from a previous litigation case but I couldn't provide them because of legal rules - don't allow me to do that. But RBS just continued to say "We don't have these documents". And it wasn't until we / the client's lawyers threatened to go to the court and say "actually we have these documents - don't say they don't exist" that suddenly just when we're about to give that application to court, RBS says "Here they are" - these magical documents appeared. Even in a civil / lawyer disclosure process they can lie. So again, what can you do about that? I think… the Regulator has to actually follow the rules that they've

set.

GK: The problem is of course, in this instance, we're talking about products that weren't regulated.

AS: Yes they are.

NS: Swaps are regulated.

AS: But even, the question that Nikki asked, the institutions themselves in this whole GRG issue and the FCA saying "Hey we don't get involved in all this / nothing to do with us…" is a load of rubbish in my view because the institutions themselves are regulated and a lot of the individuals at a senior level are supposed to be fit and proper persons.

NT: And they've got the Principles, the FCA Principles which seem to count for absolutely nothing and nobody seems to be able to make the FCA enforce them.

CM: You mentioned the situation where the customer starts to litigate and once the litigation process has been started and you also talked about the distinction between high value and low value claims and the differences that can result. And I wondered, is there an average value of claim that you can say, generally speaking, when either of you become involved - the claim usually needs to be at a certain level? Do you have a feel for the - I appreciate neither of you are lawyers - but … the average cost of pursuing either a high value or a low value claim, because there has to be a cost / benefit calculation carried out? My final question is have you seen situations where a claimant that perhaps you provided advice to has been unable to pursue or indeed continue litigation because they've basically run out of funds?

AS: …In terms of the value, some of the smallest claims that we've been involved in in a litigation basis have been for as little as £500,000… that's the total claim size value. But it's a question of whether you include consequential losses or not - let's not get into that. And the largest size would be over £1billion.

In terms of the legal cost, it doesn't vary as much as one may think it might do and tied into that last question, have you provided advice to clients who've run out of money? - inevitably that will happen but again, to be blunt, I've never experienced that because we make it extremely clear to the client at the beginning: if you're not able to fund the litigation case - and I don't care about funding and all these other kinds of alternative means of doing things or no-win-no-fee things - if you're not able to fund, with cash, this litigation claim for 12 / 15 months - and you'll understand what I mean by particulars, defence [unclear]… to get through to that pleadings stage - don't start, don't even instruct us because you're not going to get a decent settlement until you go through that stage.

And my experience is to instruct a proper QC. You need to have a QC even for a small value case, and I'm sorry, that's why these cases go to court and they lose unfortunately. You need to have a proper QC, a proper law firm, a proper expert, all that know what they're doing. If you're looking at that kind of fee, you're looking at at least between £80-150k, in my experience, of all these firms being proper, just to get through to that pleading stage, or

being over, before you start to have realistic settlement discussions with the bank. That's my experience.

CM: So would you say that, that's the first hurdle that a claimant has got to get over and even then, they've got to be confident that if the process is protracted to any extent they can continue to fund it because of the relatively limitless fire power they're facing on the other side?

AS: Absolutely. So these numbers are the kind of minimum. They can easily double if things get protracted. Unfortunately we've seen more and more case law being set out in favour of the banks. The cases are going further and further… I've seen more cases in the last two years where there's multiple mediations, multiple WP meetings, going past the CMC in many cases. We're getting to disclosure, and all of that is very very costly, expensive and even if you're a very wealthy client and you start putting in LIBOR manipulation claims and all sorts of other bits and pieces, the adverse cost risk that the bank will throw at you is very very scary, even for large successful businesses.

CM: And you mentioned that the value of the claim can vary hugely from £500k right up, but the legal cost doesn't vary as much as you would think. Is that because effectively whether you're dealing with a case that's worth £500k or a case that's worth a billion, it's actually the same process that you've got to go through?

AS: To an extent you're absolutely right. And obviously there's much more involved with the larger cases, including whether you include LIBOR manipulation and other bits and pieces, but generally speaking, a lot of the court process is the same. You should still be instructing a QC. You should still be going to a good law firm, because remember the banks don't differentiate that much. So RBS is still going to instruct Dentons or MAB, no matter who you're using.

CM: So the cost of litigation is not pegged to the value of your claim?

NS: No.

AS: It is, but it doesn't vary as much as you may think.

TB: Could I ask three inter-related questions?

1. Do you believe that the introduction of the Senior Managers' Regime has made any significant difference to the conduct of banks?
2. Am I right in hearing from you that you believe that the FCA has fallen down on its duty to regulate the banks in their conduct; the conduct / risk element of the banks should cover all aspects of their activities, whether or not they're regulated?
3. Would it, in your view, make any difference if the products that were provided to SMEs were regulated in the same way as products to consumers or indeed inter-bank transactions?

AS: To begin with the Senior Managers' Regime. In terms of the processes - now they're a lot more stringent and the individuals, even individuals, for example derivative salespersons are a lot more accountable for their conduct. Having said that I think it was just this week I was

reading, the FCA has sent private warnings to this many senior executives in banks, but because… those remain private it… stays on their record. But you can't really do anything about it - only the FCA knows about it so I think it's had an effect, but I don't think it's going to monumentally change things. What it does mean however is that, in the old days, you could have lots of group think and committee think, but nowadays there are certain individuals who are now on the line for taking that conduct risk for their entire organisations.

As to the question about the regulator… The FCA. Yes I do think it's the FCA's responsibility, but also let's not completely absolve the banks because the banks did have compliance people and compliance teams who were supposed to be overseeing their sales individuals. So that's the first layer - that their compliance have misfunctioned. Yes one has to look at the FCA because the FCA is meant to be looking after the compliance people. So I think you can't just blame the FCA, you've got to look at the banks as well.

As to your last question about regulated products… there's a reason why MiFID classifies a lot of these small businesses as retail clients but unfortunately, due to some of the ways that the case precedents have gone, a two man business who has a limited company is somehow in the eyes of the law seen as a PLC, like a Tescos PLC which is completely ridiculous [unclear]. So there is that gap in the law which is the reason why we need to look at alternatives to the dispute resolution area.

NS: That also goes back to the disclosure problem because individuals have been able to get some disclosure under the data subject access request, and although often quite heavily redacted, but the same individual who happens to own a company with his wife doesn't have that access, so there is a problem with the way the categorisation of very small businesses as being somehow equivalent to a large bank.

AS: …So if Nick and I… if a wife and husband just did a partnership, Mr and Mrs Joe Blogs, that's fine - potentially treated like an individual, but if they incorporated into a limited company, God help you, you're treated in a completely different category.

TB: And of course, are you aware whether those people have been persuaded to become limited by various bodies, such as HMRC?

AS: I don't think there's any connection between someone making them incorporate to try to reduce their rights. There are beneficial reasons for limited liability to protect them. I don't think they're connected, in my view.

NS: And we've seen a lot of doctors… We represent a large number of doctors' practices and they were encouraged to incorporate and I believe this was to do with the leases that were granted by the Health Trusts, the HCTs. So they were encouraged for those reasons to incorporate and now of course that's back against them really badly because they often were encouraged into very long-dated transactions - 25 / 30 year long transactions… So of course, they might have been in their 50s when they took out the transactions. So it makes it very difficult for them to retire or to attract new doctors into the practice. So it's been a very big problem for NHS medical centres around the country. And we've seen them in the

North of England, in Wales, in the South of England, around London, everywhere. So slightly sidetracked, off piste…

SR: I've got two questions [unclear]… both based very much on your experience and expertise. The first question is about FOS, Financial Ombudsman Service. At the moment of course… it's got a limited remit in the sense that it can only deal with complaints from individuals or microbusinesses, ie businesses with less than 10 employees or turnover of lower than 10 million euros and it can only award compensation of up to £150k. Do you think there's anything to be said for, going forward, looking for alternative means of dispute resolution, for simply increasing these limits and, what I'd be interested to hear from you, from your personal experiences of FOS, is how well do you think it works and do you think, for instance, if we had a scenario where it could award up to say half a million of damages, which is the position with a court called the Enterprise and Intellectual Property Court, whether that would be beneficial? I suppose what I'm really asking you about is the quality of the FOS process and how well it satisfies people and should it be extended, should its jurisdiction be extended?

NS: I think… it's very variable, the quality that you get at the Ombudsman. We had a very happy result this morning and it was actually a 7 figure award that the bank has agreed to accept. Now that's way over the FOS's remit but… And the FOS does have certain powers to ask questions of the banks and so it considers that it is possible for claimants to use the FOS without an adviser, is the theory, but in practice they're a very varied quality of people... You get lucky if you get someone who understands the issues, but if you don't you're in real trouble because they won't move it to another person. They also don't seem to have powers to order disclosure. They can get documents from the banks in certain circumstances but they can't share them with the businesses/ with the clients. So I'm talking again about credit papers and they seem to be reluctant to challenge any commercial decisions of the banks, for example, the decision to impose a lending condition and / or the decision to put a certain price on an alternative product. So it's full of weaknesses, the FOS, and I think it's not very helpful. People with advisers, I would say, tend to get better results with FOS because they're able to educate the adjudicators. But I don't think they're really fit for purpose in this level of dispute.

GK: How would you change that? The FOS?

AS: I think, firstly increasing the limit is a very easy thing to do relatively speaking.

GK: To what?

AS: Half a million is a good start. Make it, say, half a million direct losses, to allow potential [unclear] for consequential losses. There are some good things with the way the FOS works, in the terms of the way they approach things. They're not bound by just, for instance, case law and precedent or things like that. Having said that, unfortunately it's very dependent, as Nick said, on the kind of adjudicator you have. Don't forget FOS looks at people… who are mis-sold PPI insurance or mis-sold credit cards or pet insurance. That's the kind of person you may be dealing with. And dealing with a complex embedded callable swap within a loan is a very different remit. So it's difficult for them. But unfortunately there is such patchy consistency. Personally I gave up with the FOS years ago. We helped one of the first

businesses, called Matchstart - Jim McGrory who you were with last week - to achieve something, I think, about 4 years ago. 0ne of the first decisions FOS made in giving someone a decision on a fixed rate loan, so that was great. So I effectively then used the same arguments again and again but got different answers from the FOS and like this just doesn't make sense. So but to answer your question, I think having a specialist sub-team, which they do now have, they do have a specialist team looking at that, but I think it's come a little bit too little, too late. But they could always expand that team and that's the first thing, and I think the second is expanding the limit to half a million is a good start for direct losses.

NS: I would add to that wish list sensible disclosure of the key documents. And I go on again about the credit documents. But the problem the FOS has got to date is in interest rate hedging product disputes is that people are coming to them often after having tried to resolve the matter in the review, with both sides having heavily entrenched positions. They didn't agree with the review decision, they're not going to agree with an adjudication. So what's happening is pretty much every single Interest Rate Hedging Product dispute is going all the way to an Ombudsman. So there are 2 layers of the Ombudsman's process. There's the adjudication stage. They would often aim to resolve even a majority of cases at the adjudication stage in other types of dispute, but they are actually resolving zero% of IRHP disputes. And then it goes to an ombudsman who can make a final decision against which there is no appeal. So it's quite an unsatisfactory process.

SR: Can I just ask one supplementary question? Swaps has been a terrible scenario for many businesses. In a sense it's coming to an end, once this - I know it's [unclear] over … there's hangovers etc - but it's going to come to an end. Looking forward to the next range of disputes, now, is there an advantage with FOS dealing with the next range of disputes? It hasn't worked with swaps, we know that, but people learn lessons and there's opportunities for change. Would that be a way forward to deal with this banking dispute…?

AS: Yeah. I think it would be. Because, for example with the foreign exchange (we spoke about it briefly George while you were out of the room) … I think with the foreign exchange disputes they could absolutely have a role to play in having a specialist team look at it. And also in some of the sort of GRG-type disputes where you're talking about just general commercial lending activities, which again FOS should be comfortably able to look at. But at the same time, I think FOS did - and someone may know about this more than me - did actually try to suggest that they could increase their limit temporarily for the swaps cases, but the FCA said no, don't worry, we've got a brand spanking new scheme that's going to take care of it so that clearly wasn't helpful.

LGC: Could we just go back to the start and the sort of nuts and bolts of how people get into these situations in the first place? And as we're moving towards trying to draw some recommendations up, consistency is a word that keeps coming up. Disclosure is a word that keeps coming up. I just want to put to you three short things that I wonder if you'd find them helpful or if we're putting our attention in the wrong place?

On disclosure, a much fuller playback in the know your client / treat your customers fairly zone that means there's much less to pull out of the banks later…

AS: Yes

LGC: …and a fuller statement of what we know about you and why we recommend this that they will then have to stand behind later seems to me an obvious go to solution for some of this.

AS: Yes

LGC: The other aspect is the categorisation. What is a sophisticated / what is a… these category words but essentially moving the dial on that categorisation seems again an easy win here. The two person business that you outlined shouldn't be in the same bucket as a PLC. And finally again a simple, much tougher definition of what constitutes suitability. Again - a technical piece of language. Are those areas that are priorities? What's top for you?

NS: One of the problems is that the suitability would apply to an advised sale and in 90% or more of the cases that we deal with the bank does not acknowledge that it gave advice. In fact it specifically - the terms and conditions specifically deny that advice is being given. So those wonderful suitability rules are deemed not to apply.

AS: And in fact, just on that one point, it's almost as if the banks are… terrified of using the word 'advice'. Actually the information they provide is pretty damn good but if you actually say to them "Can you advise me?" they'll say "no" and they're terrified. Which is why, bizarre as it sounds, my firm has got 11 people, we're the largest SME advisers in the country. That's ridiculous. There's 11 of us! So no-one is willing to give advice to a retail client. So they've got to actually say, there's nothing wrong with giving advice. Actually they're doing a pretty good job nowadays of doing it. But if you can't get independent advice on that, where else are you supposed to go? [unclear].

LGC: That's the suitability point. What about the other two? What's the big point we're missing?

AS: On the KYC point, again the banks are a lot better now [unclear]. Unfortunately there's other people like the foreign exchange brokers. For example we saw a foreign exchange broker fill out the usual KYC - tick your 1 to 10 level of risk aversion and all this kind of rubbish and the customer writes "Yes I want hedging, I want protection etc, etc" Great. Next day, the foreign exchange broker sends them something which is incredibly speculative, complex and bears no resemblance to their own KYC document from 24 hours earlier. But again, the FCA rules are there, in place, the MiFID rules are there. It's just the oversight. The banks won't do that today, but a foreign exchange broker is.

Regarding the point about the sophistication thing, I don't think that's too much of an issue per se because that label only come about because of the FCA review process, it doesn't really exist outside of that review process. Having said that I believe we already have the right label there. We already have the 'retail client'. And retail client does cover the majority of small and medium-sized businesses. Ok one could argue that professional clients should be afforded some more protection too, but, to be blunt, they're kind of big enough and ugly enough for people not to care too much about them.

LGC: But the small incorporated client, that seems to drop over the wrong side…

AS: That matters when it comes to the legal route of things. And changing, unfortunately the legal route of things, as the solicitors will probably tell you, that's going to have to be done by someone fighting the case in appeal or we do something legally.

GK: Are you suggesting that we need to change the legislation?

AS: So I don't believe that the FCA needs any new criteria for retail client. What I'm saying is the legislation, I believe - looking to lawyers to help out here - is set by case law and precedent. So for example, the Titan Steel case, I think, where it says a limited company is treated as someone who is not a natural person as far as the FCA... Effectively a limited company, none of the FCA rules need to apply to a small business, just because it is a limited company. Now that I don't believe can be done by yourselves or anybody else other than case law. I don't know the answer to that.

NS: I think that the limited company can't enforce the FCA rules; that's the real problem. The FCA can enforce their own rules if they want to but the limited company… The private individual has the right to enforce the DISP rules, for example.

SR: You asked for help from lawyers, but…two main things. One is that a limited company can't… [unclear] against a breach of COBS and the second thing is the exclusion clauses. So even if you've got the best rules and regulations, they come up against exclusion clauses, they're a big problem.

LJD: I have a feeling that at the end of all this we are going to have to be recommending some sort of legislative changes actually. We've been talking about quite a lot of detail. Can we just stand back for a little while? I think it's implicit in what you've been saying and that everybody else has been saying that there needs to be an effective, affordable dispute resolution mechanism.

NS: Yes.

LJD: And to be effective and affordable -it's got to be affordable - you've got to have an adjudication which is fit for purpose… The system has to be a suitable one and that includes, for example, being able to prise out from banks or whoever it is the documents that are necessary. Now all of that I think is a given and… But our terms of reference pre-suppose that there is a gap. In other words that for these SMEs what we currently have does not meet those requirements. I think - but I just want you to confirm - I think that what you've been saying is yes in the present system there is a gap. That the present system does not fit the bill for SMEs?

NS: Ultimately yes. I mean the only guarantee, or the best chance of getting a fair hearing is to take it or threaten to take it to court and that is only open… Well that's not open to… for the majority that's prohibitively expensive and in time, stress, money…

AS: The Jackson reforms didn't help either…

NS: …. and the liability, the threat of adverse costs is, as Abhishek said, in order to take the first step on that journey people need to see the ability to still be standing in 15, 18 months' time because it will probably… it may take that … In fact we have fortunately seen a number of cases settle quicker than that… but it's a bit of a gamble to say "I can survive 9 months and on the 10th month I'm dead."

LJD: So I think it's going to be implicit in what you're saying is that there is a gap. Something needs to be done to fill that gap. The question for us is what do we recommend should fill that gap? I mean I know this [unclear] might appear? very obvious but it is actually quite important to spell this out. And again, if I understood correctly, that you are not in favour - or at least you may not be in favour of extending the jurisdiction of… FOS, but I wonder if you can be absolutely clear about that as well, because you said that the decisions at FOS are very patchy, very variable… I got the impression that you weren't actually that keen on…

NS: I still don't think it's a fair process because of the lack of disclosure… that's the problem with FOS. You can make your case but the bank can say, "Well actually no, there's a policy here" or "a credit note here" that undermines your case and you're not allowed to *see* it, let alone to challenge it.

AS: Other than that, the FOS is not a bad template to start from, in terms of there are two or three things that could potentially be done [unclear]… The first, as we discussed… is the eligibility criteria. So the majority of the clients we work with actually are ineligible for the FOS because they're too large for one of the criteria. So those criteria need to be expanded, the ones that Stephen Rosen mentioned, because there's a big gap between the ones that have to litigate…. because remember even just to file in court - fees £10,000 - that's a barrier now to some people now because of the Jackson reforms. So I think the criteria for eligibility for FOS is one area. I think that having wider training and having a wider specialism - which does exist - but having a wider group of people who have that specialism is a relatively easy thing to do. And I think, being able to change, for example the limits they have, shouldn't be a difficult thing to do because we already have a body in place. As opposed to you starting from a blank sheet of paper, saying 'let's all put our heads together and come up with a brand new body." It may mean that there is something that can be done to FOS to make it better [unclear]…

NS: I do think another weakness of the FOS system is they do publish their decisions when there is a final decision. Where the matter is resolved with adjudication, the decision is not published, the adjudication is not published. And I think a difficulty for a number of clients is to know what the rules are. .. they don't really have a clear expectation as to… how an issue will be resolved and I think that's partly because of the rather variable nature of the people, but also because there aren't really signposts in the road.

LJD: … Just finally, as I understand it, you do not think starting from scratch with something new…one of the proposals from [unclear] one of the solicitors, Richard Samuel - I don't know if you've seen his paper? He's keen on the idea of the model of the Employment Tribunal. That'll be starting from scratch, something brand new, but you say you're not in favour of that or…?

NS: I'm not saying I'm not in favour of that at all. I think it's an idea that's of great interest.

AS: My view is … one of the paths of least resistance - because getting anything done through either of these two houses, or the House of Lords or the FCA is like doing things through treacle. And I've been doing this for five years. So I think that the path of least resistance is to modify, quite substantially, the Financial Ombudsman Service, because it already exists. And I believe the things that I'm suggesting there, for example, are not difficult to be able to change.

HB: So finally and I'll be quite brief because I know we need to crack on here. Just in terms of your experience because…we're obviously talking about the FOS now, but we're always going to be coming up against the regulatory perimeter. We've got regulated bodies that sell unregulated products that can then get sold onto unregulated entities and then all of a sudden you've got a slew of products that fall completely outside of the regulatory jurisdiction. Have you experienced that much? This is back to people, in good faith, trying to get around the table and being told that "sorry we can't help you because the fine print says that this product has been sold into an unregulated area". And that's something that [unclear] we have to bear in mind. We can expand one body but we still have this body which, in the commercial sense, is dealing with unregulated products.

AS: I've seen this area manifest itself in two ways: One is in hidden/tailored business loans or fixed rate loans with embedded. In fact we're going through this issue right now where local authorities who are deemed much bigger organisations have entered into 60-70 year long LOBO loans, but they've actually got very very complex derivatives within them. But the FCA says "Hey they're just loans - we don't really look at them, so go away." And one of the QCs on behalf of the Treasury Select Committee said, "Hey there's a lacuna in the law here," so that's great. So unfortunately… the FCA said again and again they're looking for parliament to be able to set down to them, saying "Treat this as a regulated product", and then they will then do that. So I think that's actually something for Westminster to deal with, not the FCA. As regards to the FCA, saying things like, "We don't look after things like commercial lending", I think that's quite ridiculous because, for example, with the GRG review scheme, why spend nearly and year and a half / two years looking into something and then at the end of it say, "Hey, by the way, we've kind of suggested something, but actually we haven't even sanctioned what has been released by RBS, but actually it's not really an area we look at." Well that's… very helpful, thank you very much. There's no shooting first, asking questions there later is there? So it's not helpful. But again we need combined pressure from both Westminster and the FCA to do that.

GK: Ok, I'm going to move us on. Thank you very much for that piece of evidence. If you feel that there is anything more you want to tell us, you can write in [unclear]…thank you very much. And now we will hear from the Financial Ombudsman…

First Oral Session - 7 March 2017, 17.00 to 20.00

Committee members present
George Kerevan (GK) - Chair
Chris Wilford (CW)
Nikki Turner (NT)
Cat MacLean (CM)
Tony Baron (TB)
Stephen Rosen (SR)
Lord Cromwell (LGC)
Lord Dyson (LJD)
Heather Buchanan (HB)

Witnesses: Debbie Enver (DE), Annette Lovell (AL) from the Financial Ombudsman Service (FOS)

Debbie Enver and Anette Lovell (from 1:00:42 to 01:49:02)

The two witnesses from FOS appeared together to answer questions from the committee.

GK: We are going to hear from Debbie Enver and Annette Lovell.

AL: That's right, yes.

GK: They will tell which is which.

AL: I'm Annette and this is my colleague Debbie.

GK: And you - very briefly [unclear] tell us your role in FOS.

AL: Is it worth me just saying .. you've already heard quite a lot about us, haven't you? Is it worth me saying just a little bit about the background to the organisation…

GK: I'd be happy … not too long. We need to leave room for questions … but please

AL: I will do it very… briefly. So just to explain that we were set up by a statute. We were set up to resolve disputes between financial businesses and their customers. We are impartial so we don't advocate for customers or for banks. We are independent and impartial. We were set up as an alternative to the Courts so what we do is meant to be informal and we... we make decisions on the basis of what we think is fair and reasonable. So we take into account… we consider things like the law, we consider regulation, we consider industry practice but on the basis of the information we have got and on the individual case, we make our decision based on what we think is fair and reasonable. So I think the important

thing is to remember that we are an alternative to the Courts. We are informal. We are... customers have the right to bring their complaints to us and if they accept our decision then that decision is binding on the financial business. If the customer decides not to accept the outcome, they aren't bound by it so they [unclear] to take action themselves in another forum. As has already been mentioned, the limit on the award that we can make is £150,000, although we can and do recommend payments or awards in excess of that but it is very much a matter for the businesses, the financial businesses themselves to decide whether they will comply with any award that we make in excess of the limit. Does that cover everything in terms of just a general introduction to what we do?

GK: We have had a very good response to the enquiry from FOS from Chief Executive [unclear]. What do you both do within FOS?

AL: We are from what we call our Stakeholder Team so we are responsible for areas of policy, we do our engagement with stakeholders. What Debbie and I don't do is decide individual cases. So we will do our best to answer questions about the way in which we work. We won't have lots of detailed knowledge about individual cases or particular types of cases but if there are questions that we can't answer we are really happy to provide you with more written evidence or talk to you further. However you want to do that.

GK: Let me begin by going to the heart of the disclosure process. Is the information disclosed to FOS available to both parties in a dispute?

AL: So I was really interested to hear the comments… of the earlier witness. The process that we follow has to be a fair process and so typically what that would mean is that we would want to explain to both parties what information we had relied on in reaching our decision and we would want to give both parties the opportunity to make comments and to respond to the evidence that we were considering. There are, I would say, quite exceptional or unusual circumstances when it might be that a financial business gives us information which we are then not able to share with the consumer concerned and I think when we were talking about this before, an example that we've given there might be that if we had a complaint about, for example, someone's transaction on a (what do you call them?) cashpoint machines and it may be that the financial business gave us some information about the way in which the cashpoint machines worked. That might be something that we thought it wasn't appropriate to share with the customer so we will make judgments. There will be times when information is shared with us in confidence, usually with things like security reasons but generally the approach that we would take is we would want to share information with both parties in terms of what has been disclosed by people to us.

DE: Yes. I suppose the key thing is that in the interests of natural justice anything which we have relying on to make that decision is something that we are going to want to share with the parties and if part of the evidence that we've got is commercially sensitive we will share that part of it which isn't so that the other party can understand what we are relying on.

GK: Who decides what is commercially sensitive?

DE: That would be the Ombudsman of the individual case so it's not ... the business can say this is commercially sensitive but that is not the deciding factor.

GK: Right so you are telling us in the case of a dispute with a small business client you … you have the ability to seek the information from the bank and that you will disclose that to the small business unless there is a commercial reason why you shouldn't and you will, the FOS, will itself determine what is commercial and what isn't?

DE: Yes, so the business might say this is commercially sensitive but that alone is not enough. We will obviously ask the business for their views. It is not something we would disagree with lightly but that is ultimately a decision that we would take.

GK: And if the small business supplies you with information does that automatically go to the bank?

AL: The same principle would apply. It would work in exactly the same way.

GK: I think this is an issue we may come back to over the inquiry because it is a point of dispute between many small businesses that I've been involved with who either don't believe that to be the case and certainly if that is the case then there is confusion and misunderstanding about what is going on. We will leave that one there and we may come back to you with some written questions.

CW: Yes I think just stepping back and thinking about maybe Lord Dyson's point about the gap before. It is obviously a very passionate issue for a lot of small businesses but I just wanted to get an insight … you are dealing with a high volume of disputes, there are a lot of different pressures in different areas. How conscious could you say that FOS is of a gap and what kind of nature of dialogue have you got with the FCA at the moment about this issue? Is it really a significant part on the radar or ..?

AL: So I actually didn't say that did I in my opening comments? But just to be clear we are only able to deal with consumers and micro enterprises so when we talk about the gap we are talking about the body of businesses that are beyond the ..

CW: your remit ..

AL: ... yes so I suppose in a way it is quite a hard question for us to answer because we do not advertise our services. We don't try and attract complaints from small businesses who are outside of our jurisdiction. So it's always difficult to know how many people would actually come to us if they were able to and if someone contacted us and if a small business contacted us one of the first things that we would try and establish is whether they were in the jurisdiction so it is difficult to know the scale of the gap.

DE: Yes but I think we also ... I mean we work very closely with the FCA on a number of levels but where they have obviously been tasked by the Parliamentary Commission on Banking Standards and Treasury Select Committee to look at this issue this is… we have been working very closely with them on in terms of what they might do.

NT: I wanted to go back to something that Nick said actually. I think it was Nick or Abhishek when he said that you kind of take pot luck when you go to the FOS because you can get a good adjudicator, you can get a bad adjudicator and you struggle to get the Ombudsman himself and I know that that is a situation a lot of our members are in so I wanted to know literally because I want to be able to tell the members what is the qualification to be an

adjudicator because, for example, Abhishek and Nick and other people advise SME Alliance and I know they've got strings and strings of letters after their names. I don't have to know everything they know because they know it and I can rely on them but if I was to go and get a job and say I want a job, you know, and I do know quite a lot about this because I work with lots of SMEs. What would be the qualification I would have to be to get a job?

AL: So I wonder if I could just tackle one of the first things you said which I think it just might be helpful to be quite clear about and that is that you talked about it being difficult to get to an Ombudsman. It just might be worth me explaining what the process is and how it actually works within our organisation. So when a complaint comes to us it would be initially dealt with by an adjudicator or an investigator and what they would do is seek to resolve the dispute informally. They would do that by issuing what they would call a view or an opinion in the case and that would go to both parties. If either party didn't agree with that then they would have a right to ask for an Ombudsman to make a decision and it is actually the Ombudsman's decision that is then binding on all parties so everybody who uses the service has access to an Ombudsman. Everyone – both businesses and …

NT: I know they do and I have had quite a lot of dealings with the Ombudsman but I would just add to that that, you know, I've been through a six year period wanting to have actually an oral hearing with an Ombudsman that we were told that we would be able to have and - this is not about my case - but just for him to say at the end you know what I can't help you. End of story. So, you know, it's a difficult one and that is why I picked up on the point of it's quite random because (a) I never know when I'm listening to members who are talking about an adjudicator that they are dealing with, what that person is qualified or not qualified to deal with.

AL: Sorry. I didn't actually address that point.

NT: Yes. Thank you.

AL: So let me just talk about that. So we are an organisation of around 3,500 people and that… who are made up of adjudicators and Ombudsmen. Within that we have a range of experience, qualifications and backgrounds and so there isn't a particular qualification that someone has to have to be an adjudicator or to be an Ombudsman. What we are looking for is building a round knowledge and experience and qualifications within the body of the organisation as a whole. But equally what we are looking for is people who are able to understand what the nature of the dispute is between the parties and is able to think about how that dispute should be resolved so it is certainly my experience that simply having a qualification doesn't mean that you would be able to resolve a dispute. I think it is having understanding of products and services and an understanding of the industry is a helpful component of the job we do but it is not the only [unclear] requirement.

NT: No I can see what you are saying there but on the other hand when you are dealing with financial products and mis-sales and financial instruments there is quite a complicated level of understanding you do need to have which is why someone might be a brilliant lawyer but it doesn't mean to say they could ever do what Nick or Abhishek does because they are not that specific and we are that specific on things like swaps and things so I would have thought that there had to be at least within the Ombudsman – and maybe there is – maybe you could tell me but maybe within the Ombudsman's organisation there is a breakdown of well

these people understand about IRHP, these people understand about tailored business or ..

AL: So there will be people across the organisation who have got lots of different experience. We use their skills and talents in the most sensible way according to the casework that we've got but, I think as the witness earlier was talking about, we have a team of individuals who are working on those particular cases at the moment who are very knowledgeable, very experienced and I think you did – I think it was you – I did think - I acknowledged that that was the case, that there is lots of expertise and experience addressing those cases.

GK: Could I just follow up? So if a new set of cases come along which are highly complex in terms of the financial instruments that may have been mis-sold, would you go out to seek new expertise to bring into the organisation?

AL: So I think it would entirely depend. What we would do initially is that so if a complaint came in to someone who was kind of on the front line, dealing with it, looking at it for the first time and it was something that was complex and they hadn't come across before they have lots of different routes to access the knowledge or information. So typically then we have lots of online resources, we have access to individuals with particular experience or expertise and so individuals dealing with cases have routes to getting support and assistance but if as an organisation felt that we didn't have sufficient knowledge or ability to deal with it then we would seek outside help.

GK: To your knowledge did that happen with interest rate swaps?

AL: Um [pause]. To be honest I don't know the answer to that question. To my knowledge it didn't but I don't know whether it did.

LGC: Sorry just to clarify something I'm going to press you a bit more because it is all very well for a doctor to have a good bedside manner but they also have got to have a medical qualification to understand the illnesses and I haven't really got clear in my head when you get these very sophisticated products, you know, derivative products are a minority sport for most people. Who do you go to? How many people have you got in your organisation who really know the stuff?

AL: So, so I think …

LGC: I'm after a number here – a dozen people? 20 people? 1 person? - who really has their head round the financial products?

AL: So I, so I would say there are significantly more than 1 person or 20 people what have you. So I think you have to think .. if you think we have got 3,500 people who will have a range of different expertise and knowledge and some of them will have experience and knowledge in one particular area and others will have … so there isn't … people don't sit neatly in … so it's not that there is a group of 10 or 20 people who are only dealing with this type of issue or product. People will work across products and across different …

LGC: Alright. You are 3,200 then?

AL: About 3,500.

LGC: 3,500. Of your 3,500 people, how many people in that number could tackle complex questions on interest rate swaps?

AL: So I don't know how many people are actually dealing with it at the moment but I don't know it might be in the region of 10 or 20 people I would imagine are working on those, but over the course of time there would be people who would be involved in that work, who now work in different parts of the organisation and there would be people who we will bring in who will learn through the case so we are looking to spread …

GK: Is there a formal process whereby knowledge would be shared within your organisation? Do you come together in seminars…?

AL: Yes so there are lots of different methods of doing that so we have lots of online and technical resources people can access. We have things called practice groups. So they are groups of our most experienced, knowledgeable people who are responsible for making sure that the organisation understands the way that it needs to think about particular cases but … so we put quite a lot of effort into making sure people have the right information to resolve cases but equally we have in place systems for checking the quality of the work that people produce and making sure that we are getting the right outcomes.

LGC: One last question on that point. You mentioned, I think you said 10 people you have with sort of deep expertise ..

AL: So I think I said 10 to 20.

LGC: Okay 10 to 20 ..

DE: Working on it at the moment so ..

LGC: Fine, fine, fine. 10 to 20. My question was how many cases are those people looking at? What is their typical caseload?

DE: Well I think it is fair to say with these sorts of cases it is different to other cases because they are that more complex,[unclear] so there is much more evidence available. We've often got .. to be honest I'll have to check. I mean there is not many .. the one thing with our cases is it is not one size fits all. We adapt what we do to the individual case and what is required by that but we could probably come back to you…

LGC: [unclear] standard but it would be very kind if the organisation could come back and give us some written evidence… written numbers …

AL: We would be quite happy to do that ..

LGC: .. so we could understand how the process worked.

AL: We would be happy to do that.

CM: I've got a couple of questions. My first is, you know, we've heard from a couple of witnesses about various significant inconsistencies that they described in terms of FOS outcomes and I wonder to what extent you review the trends and patterns in claims made to you and do you recognise that picture of inconsistency that the previous witnesses have described? That was my first question. And the second question I wanted to ask was you talked about when

we were looking at those who are excluded from FOS' jurisdiction because they are not micro enterprises and I think you said we work very closely with the FCA. I just wanted to dig a bit on that. Do you mean that you are working with the FCA because there are issues that affect those SMEs who are not micro enterprises and what … is there anything that FOS is doing in terms of speaking to the FCA, lobbying the FCA because of course my own very personal experience as a lawyer is that there is a great number of clients who are not eligible for FOS who go off to the FCA and are given absolutely short shrift because they are told "nothing to do with us, we don't deal with individual cases" so there is a real gap there.

AL: So in terms of working with … so the FCA published its discussion paper last year and one of the things it talked about was the limit of our jurisdiction and so naturally we have had conversations with the FCA about that. But I don't think it is our role to lobby the FCA to extend our jurisdiction at all. Our position is that our jurisdiction is what the Government has given us and what the FCA gives us through its rules and I think what we have said to the FCA is if it is considered that we would…could have a part to play in having a wider jurisdiction then we would stand ready to do that. We think we would be able and capable to do that but we are not lobbying to change our jurisdiction.

CM: Okay. So when you say we are working closely with the FCA ..

DE: So that's kind of feeding into the work they are doing so for example they would come to us with questions about the type of complaints we see from micro enterprises that we cover, the limited details we have of businesses we have to turn away so obviously we will have some limited details of the larger micro enterprises who come to us with a complaint that we can't help because they are too large so we have shared that type of information with the FCA as that gives them a bit of a sense of where there might be a gap but with the big caveat that we obviously only know who comes to us and lots of people will be either they are too big or …

CM: And then people will self-select.

DE: Yes.

CM: And would you … would you be able to look at this picture that we have from two witnesses on inconsistency. The problem I have is that, you know, what you are saying just doesn't always square with what they've described.

AL: Well. I mean I think the first thing to say is it is really difficult to comment when someone just … when someone makes a statement that there is something wrong with the system. It is actually quite difficult to tackle that or deal with it because what we do is we deal with individual cases so each case is decided on its own circumstances and its own merits. We don't make … we don't make a set of decisions that will always be the same no matter what the circumstances so my starting point would be that there will always be the possibility that we will reach different outcomes in different cases and I think, you know, you would probably expect that that would be a reasonable thing for us to do. If the issue is that the suggestion is that we are reaching inconsistent outcomes on exactly the same circumstances then that is something that we would be very concerned and very worried about and we would want to know the details so that we could look at that. I have to say that I would be surprised by that because we go to great lengths to ensure, to try to ensure, that we are

consistent so I would be quite surprised about that but if things like that are brought to our attention we would absolutely want to look at it. It is almost always the case that, well in my experience, there are hardly ever lots of cases that are the same. There are generally reasons why cases are different and that will go to the decisions that we make. But you know you've both raised examples and, you know, I would be very interested to …

Man speaking in the background.

GK: Go through the chair.

DE: I suppose the only other thing to add which I think has been mentioned already is that we publish all our final decisions on our website so everything is there if anyone thinks we are inconsistent. I mean the evidence is there and trust me businesses and financial journalists do kind of trawl it to try and find those inconsistencies and as I said we would be keen to hear if someone has a concern that there is something there in substance.

GK: [unclear – name?]

TB: I have a member who is very concerned. His bank admitted fault, he went through you and his losses were in the region of £100,000 and he was awarded £1,000. He wasn't very happy so he came to us and I wrote to the FCA and was pushed back, can't do anything, you know. It's all [unclear]. So our experience is not the picture that you are putting forward. I would like to ask you the following question – Andrew Bailey has gone on public record recently saying that he is in favour of a new ADR service for dealing with financial disputes between banks and other finance providers and SMEs. What is the FOS' attitude to that statement? Would you see that as being helpful or would you prefer, as was being discussed earlier, to expand your own remit?

AL: So I would have to refer back to my previous answer. I mean actually can I just say it is quite difficult for you to raise a case and we have no knowledge of what that case is. It is very hard for me to try to defend what we've done or … I think it's not really helpful to make reference to one individual case like that but to go back to what I was saying previously if the FCA decided that they thought we should be a different body to resolve disputes with small businesses that would be entirely a matter for the FCA. We wouldn't really have a view on it one way or the other. If they thought it was right that we expanded our jurisdiction then we would be happy to do that. We are … I don't think … if you protest that you are neutral too strongly you don't sound very neutral do you? But generally we don't think it is a question for us. We think we will do what we are asked to do.

TB: Is it not the case though that the majority of your focus is on dealing with retail disputes of the nature of mis-selling of shares to people who are vulnerable?

AL: So we deal with a very wide range of disputes. Some are kind of low value and very simple issues, some are high value, complicated issues. Some of them are things that have quite a low impact on individual consumers, some of them are life changing for the people that bring them to us so, you know, we deal with mortgages, we deal with investments, we deal with pensions but equally we would deal with something like bank charges, you know. We are used to dealing with a very wide range of disputes.

SR: Could I just ask you for a few statistics?

AL: Well I'll do my best!

SR: I don't think you are going to find them very challenging …

AL: Okay. [unclear as people laughing]

SR: You mentioned that the Ombudsman can direct … recommend an offer that the bank pay in excess of £150k …

AL: Yes.

SR: … I would like to ask you a few questions if I may. I think we'll make a note of them but it's how often is that recommendation … how often is that recommendation … how often does the bank comply with that recommendation? That's number 1. Number 2 – in terms of percentages how often do you find in favour of the complainant and number 3 – when you find in favour of the complainant how often are you awarding the whole amount? That's probably the more difficult one. And there are a couple of small points – number 1 of those 3,500 people how many are dealing with PPI? I think it's [unclear].

AL: So PPI is a major part of our workload …

SR: Can I just ask one last question?

AL: Go on then. You'll have to remind me of them!

SR: Yes sorry about that. I will remind you. The very last question is this that many consumer facing organisations have satisfaction surveys so they make a decision and then they ask people how did you find our decision, the way we dealt with it …

AL: Yes.

SR: … etc. Do you do that? So I'll go through those questions again. How often does the financial institution pay the amount when you recommend they do so? That's number 1. How often does that happen? Above the £150k?

AL: So I don't think I know the answer to that.

DE: Yes so our role is set out, FSMA is…essentially ends when we make that final decision so it's for the consumer to accept it or not and then it is binding if they accept it but we have no powers of enforcement. Parliament didn't give us that. So if the business doesn't comply we provide the consumer with information as to what they can do next – logistically to go to court or we refer to the FCA but it means what we don't have is reliable information on what happens next.

AL: But you are particularly talking about in excess of our award limit aren't you? The answer is we don't know so I think what we will do is we will take that away and think about whether there is any information that can help with that and provide you with that.

SR: Thank you very much. The second question was in what percentage of cases do you find in favour of the complainant?

AL: So if you bear in mind the number of cases that we deal with. Last year I think we resolved around 450,000 disputes. On average, there is an uphold rate which is what we call the rate at which we find in favour of consumers or customers is around 50%. The problem with that is the sort of abrogated figures it hides a kind of myriad of very different uphold rates so there will be some sectors, some businesses that we have high uphold rates for, others there are very low but what we do is publish all that information so we publish our uphold rates in the annual review in terms of products and sectors and we also, on a six monthly basis, publish data that showing what our uphold rate is against individual businesses and we do that, I think I said, on a six monthly basis. That … I would be really happy to provide you with any more information but it does make interesting reading because it is very different and it is not always consistently the same so you can see that uphold rates do change.

SR: And the last point I have was from a lawyer's perspective was that people even though they could be in quite a substantial way of business find it very, very hard to express themselves in writing. It's very, very common and very hard for them in identifying what are their strong points and dealing with their weak points. Do you feel that the FOS system adequately helps people in those circumstances?

AL: So I would say that that is something that we are … I think we are very proud of … the way that we provide that kind of service to people that approach us and it is worth saying – I don't think I did say it at the beginning – that we have what we call an inquisitorial remit so people don't have to bring a complaint to us which is sort of fully formed with a case made out. We have the ability to listen to what is told to us and think for ourselves about whether we think there is an issue that needs to be addressed so you don't need to be expert, you don't need to be represented to come to us and you don't need to be articulate and capable of making sophisticated arguments. We will do that for you. That is what our role is. And we deal with consumers with a vast range of knowledge, awareness, articulacy, people with vulnerability or disability and we work hard to make ourselves as accessible as we can.

GK: The good Lord Cromwell has had some questions but we're going to allow him the chance to ask a quick one.

LGC: That's very kind of you. First of all I'd like to point out – I think I was a bit rough with you earlier about the qualifications side of things so I … I am simply trying to gather, particularly for the organisations here, a realistic understanding …

AL: Of course.

LGC: … of what you are and what you can be expected to deliver so I think one of the takeaways from today is probably that a lot more contact between you and for you to actually share case studies would be helpful for you and that may be a takeaway today. I need … on a related question and somebody touched on it. Do you monitor a pattern of these issues that come to you, the cases that come before you and if you do so are you compiling a sort of lessons learned list from those and do you ever call in … you know if you get 50 complaints about Barclays every week – maybe that's not enough, I don't know but… make up the number – do you have the right to call them in and say this isn't good enough? And finally I just want to get a clearer understanding, so you can educate me on this - on the disclosure point, do you make polite requests to banks for information or are you making a demand

backed by legal enforcement?

AL: So I think we would start with a polite request and that would get – I was going to say less polite – not less polite …

LGC: More assertive.

AL: … yes, exactly. That's a very good choice of words. And if we felt that the business was not disclosing something that they ought to then one of the first things that we would do is talk to the FCA about that and we would seek their help in getting the business to disclose and that would be something that we would take very seriously and the FCA would take that seriously. Can I come on to your … you had a couple of questions about spotting issues of concern. So we think a really important part of our role is to share the insight that we see from resolving all [unclear]… I think, as you can probably imagine, within that volume of complaints there will be all kinds of different insight and we do … we kind of interrogate that in a variety of ways so one of the obvious ways is you can cut the details so you can look at what the numbers tell you and so if you've got lots of complaints about a particular issue or you see a spike that is useful insight but equally if you have a very small group of complaints that are particularly serious that wouldn't show up in the numbers so what we would do is we would work … I talked earlier about our practice groups, so we have ways of surfacing those issues so that we, as an organisation, can recognise them and know that we have to share them and we talked about whether we can summon Barclays. No, we can't.

LGC: I'm giving away my former employer...

AL: We can't summon Barclays but what I would say is that we are not shy in sharing our knowledge with them so we have regular meetings with most of the major businesses and we have kind of ongoing operational contact with them on a very regular basis. Our chairman would meet with the biggest institutions probably annually and we would … so that range of contact that we have is an opportunity to share issues of concern and so we would do that anyway but if we thought that business was behaving in a way that it was appropriate we would refer their conduct to the FCA. We do that on a fairly regular basis with a range of businesses and that is just a kind of natural part of the engagement between us.

LGC: Thank you.

DE: And that respects the roles as well because again it is the FCA who are the regulator rather than us so if it's a matter of calling a business to account that is more appropriate for them than us.

LGC: Thank you.

GK: Alright. [Lots of rustling of papers and informal chatting/laughing]

LJD: I'll let you pour first. Then I'll deliver an exocet missile. [Laughter]

AL: Oh no! I might take a long time! [Laughter]

LJD: I just wanted to ask you whether there are any ways in which you think that what you do could be done better. I'm not talking about extending your jurisdiction but just confining

yourself to what you currently do. Are there any ways in which you do - what you do could be done better?

AL: That really was an exocet wasn't it… [Laughter] So I think it would be a foolish organisation indeed, wouldn't it who said that there weren't things that we could do better. And I think we are very focused on making sure that we deliver the best possible service that we can. I think one of the things that's particularly important for us is that what we do is not really a static service that we provide, so consumers and the people that use our organisation, their situations and circumstances and the way they engage with financial services businesses changes over time and so one of the important things for us in terms of improving this is making sure that we understand the way they are having their engagement, to make sure that we are providing is as relevant as it was sort of ten years ago. So the service you would get from us now would be quite different to the service that you would have got from us ten years ago and that is partly because the people who use us have quite different expectations from us.

LJD: Thank you. Do you have any difficulty of .. in recruiting and indeed in retaining your 3,500 people? Having been a judge until fairly recently that's an issue which is very much in my mind because there is a difficulty now in recruiting… and retaining staff, so is that a problem for you?

AL: So, it can … it's a challenge for us because sometimes we are recruiting amongst a pool of people where there other employers who are able to pay much bigger sums than we are able to pay so many of our adjudicators have worked in financial businesses, for example, or could work in financial businesses, where they would probably be paid a lot more so there can be a tension in terms of the salaries that we can offer but I think the balance - why they are attracted to [unclear] employees and one of the reasons people stay with us is because they have a quite personal agenda and commitment to delivering a fair outcome. They … there is a lot of belief that what we are doing is a good thing.

LJD: So job satisfaction.

AL: Absolutely. And so that kind of is on one side of the scales and on the other we are a public body and we can't pay immense commercial salaries.

LJD: Just two other quick questions if I may. One is, I'm interested, you've said that you take pride in the fact that you operate an inquisitorial and that quite a lot of your clientele – if that's the right word – are unrepresented. What percentage of the claimants are – very roughly – unrepresented as opposed to being represented?

AL: So I actually can't think of the figure off the top of my head, at the moment, I think you have to think about what representation might be so someone might be represented by a family member, they might be represented by a solicitor or an accountant but we have got a big number people who use our service who are represented by claims management companies typically in PPI so there are lots of people who are represented but we don't believe they need to be to use our service.

LJD: Well if we could treat … people like that as well as lawyers and all those professionals, in one sense, as opposed to having been self-represented or represented simply by friends or members of family, I'm interested in knowing roughly what percentage are with

unprofessional representation … representatives.

AL: So I think what we have to do is come back to you …

LJD: Just give us a very approximate idea.

DE: So you are talking about representatives who aren't professional or who represent themselves?

LJD: I'm talking about people … this is [unclear] because you've could look it either the way … what … roughly what percentage would you come across either representing themselves or are represented simply by friends or members of family?

DE: So outside of payment protection insurance it's about 80 or 90%.

LJD: The …

DE: With PPI it's a higher proportion of CMCs but for the rest of our case work it is by far and away most people come themselves.

LJD: And my last question is … I suspect this is in the papers somewhere and if I've seen it I've forgotten … the question of costs. Do you make orders for costs in some cases?

AL: So typically no we don't. So we don't, as I said earlier, we don't believe people need to be represented when they come to us and so in the vast majority of our cases we don't do that. I think there are certain exceptions where we might do but they would be very, very few.

LJD: Thank you very much.

HB: I'm just going to go back to the regulatory perimeter because it's quite clear that you can have the most streamlined system in the world but if something falls outside the remit it falls outside the remit.

AL: Yes.

HB: And so presumably if somebody comes to you with a complaint about an unregulated firm are you able to act for them?

AL: So if it's … so no you're absolutely right there are limits to our jurisdiction and we can't act outside of that so if it isn't regulated then we wouldn't be able to act. There is a small exception to that which is that we do have what's called the Voluntary Jurisdiction where firms can volunteer to be part of the scheme and we can do things about that [unclear].

HB: So because this is I think very specifically when dealing with unregulated products that were sold to regulated firms that have now been sold on to unregulated entities and that's when everything falls completely outside your jurisdiction.

AL: So unregulated products if they are sold by regulated firms, some of those we would be able to deal with.

HB: Even personal loans by an unregulated entity?

DE: So we could … it is definitely complicated. It would depend on the case but as a general rule if it is a complaint about the mis-sale we would still be able to look at the mis- sale against the original regulated business whereas if it's the debt has been sold on and it's a question of how that has been administered. If that's not the responsibility of the original regulated business we wouldn't be able to look at it against the unregulated business. Does that make sense …?

HB: Yes. It makes sense. Yes [unclear]

GK: One further question from me. If a complainant in the course of communication alleges illegal activity on behalf of the bank how would you record that and what would you do with the information?

AL: So we would … it's something we would take seriously. We would think about who we need to … so it wouldn't be something that we would take action against the business for. We would think about where we had to report back to so, typically, that might be that we had to report it to … I think it's very likely we would report it to the FCA but we would also think about whether there were other … so for example it might be, depending on what it was, it might be something that we should bring to the attention of the police. I think we would be quite clear that that would be our responsibility to do that.

GK: There would be a formal recording and reporting process in those cases?

AL: When you say … I'm not sure I completely understand what you mean …

GK: Well, for example, had a number of complainants who have alleged that the information supplied by the bank had been manufactured, um, in instances, for instance to claim that the bank had fully explained the situation to them as individuals … if an individual claimed that when they saw bank documentation they would be able to have been manufactured. I'm not saying they are right or wrong. I'm just saying in a situation like that, quite a serious one I think, does the FOS record the allegation and what does it do with it once it has that?

AL: So I would expect that that would be something that we would report to the FCA and all of the reports that we make to the FCA are recorded and … yes. Does that answer you? I'm not sure if I did or not.

GK: Um. Yes I didn't want to put you on the spot but it's interesting to have that.

GK: Thank you very much. You have been very generous with your time and thank you for answering a wide range of questions.

AL: Thank you and we …

GK: You are hoping to supply some more data.

AL: We will follow up the later questions that we need to reply to.

GK: Thank you very much.

AL: Thank you.

Witness Richard Samuel

First Oral Session - 7 March 2017, 17.00 to 20.00

Committee members present
George Kerevan (GK) - Chair
Chris Wilford (CW)
Nikki Turner (NT)
Cat MacLean (CM)
Tony Baron (TB)
Stephen Rosen (SR)
Lord Cromwell (LGC)
Lord Dyson (LJD)
Heather Buchanan (HB)

Witness: Richard Samuel (RS)

(transcript from 01:49:02)

CW: Our first set of witnesses sort of suggested that modification of FOS could be the easiest path to a solution. FOS then said that at the moment some of these disputes are beyond their remit but they will do what they're asked. I just wondered, in you view, how much you think modification of FOS does have a role to play here or do you actually think that's a cul de sac and a diversion from creating a solution that could make an impact here?

RS: I think that depends on your appreciation of the extent of the problem. The way I understood the evidence that was just given was that it was the most pragmatic solution in the sense of… not in the sense of reconciling two irreconcilable positions which is sometimes what is meant by that, but as in the most pragmatic in the face of inertia. It's the most likely to get some kind of change rather than no change - of being too ambitious and getting no change at all. That's how I understood that. If one's appreciation of the problem is that it requires some greater action then I don't think FOS would be the solution. I think that we're already at a place where Andrew Bailey has said it isn't the solution. And I didn't understand the evidence we've just heard to say Andrew Bailey is wrong. I specifically understood them not to be agreeing to the proposition which was put to them. So we start, I think, from a position where the appreciation of the head of the FCA is that the problem is of the nature which requires a different solution and therefore you take it from there.

CW: Right.

RS: That's how I understood the position to be today.

NT: As you know I'm very much on board with this alternative solution of the tribunals and I've looked at the tribunals a lot since we first met, but one thing that worries me about them is we've seen a lot of whistleblowers and people who've been specifically sacked from banks going to tribunals and employment tribunals and also other tribunals and they've all been very expensive. So I wonder if you've thought about how we'd be able to run this system and it would still be free at the point of service for the SMEs? Because the last thing we want to do is replace one system with another very expensive system. Because it seems that everybody in those tribunals has their own QC or barrister and therefore there is still a cost so I wondered if you had thought about how that cost would be covered?

RS: Well there is always going to be a cost to justice. You can't escape that, partly for the reasons that we've just been given - the fact that a lot of people find it very difficult to distil their complaints and to communicate their complaint for a number of reasons. Sometimes it can be a very difficult subject matter and they're emotionally engaged. So it's very much more easy to be persuasive about something if you're not directly emotionally engaged. So as soon as you appreciate that you're into the area where people are going to need assistance, you've got cost. You can't avoid that. The broad proposition that I'm making is that essentially we have - not to apply too crude a language - you've got two dispute resolution products at the moment. You've got the High Court, which is, if you like, the Rolls Royce product, which is what most financial services institutions will choose. They choose it; it doesn't just come by default. It's, if you like, a product which runs alongside the performance product. There are a series of promises given. Then, in the event of dispute, they choose English law and English Courts' jurisdiction. They choose the most expensive and best product because that's what they want. Then we have the FOS which is basically the bottom end of the market. It's the bicycle. It's a cheap version of getting from A to B, deliberately designed so, with a lot of elements which are similar to the employment tribunals, which are designed to take a lot of the disputes out of the system very inexpensively, which is obviously a very good thing to do. Because a lot of the disputes… a lot of journeys don't require a Rolls Royce; they require a bicycle to get you from A to B and a lot of the disputes are of that nature. But there is a mid-market there which is unserviced. You're one of the people who… FOS would never have got you… You just secured a conviction of the Bank Manager who defrauded you and your company. It has taken you over a decade I think. No-one is ever suggesting around the table or around the room that you could have got the kind of result or got to the truth through FOS. I don't think anyone is suggesting that. You could have got to the courts. You couldn't afford to go to the courts so you ended up going to the Criminal Court. And the process took 16 or more years. But that space in the middle market where you can address issues of honesty and dishonesty is exactly what a vehicle like employment tribunals are trying to do. And even more difficult things like… You didn't just lie. You did that thing because you were influenced by my sex or you were influenced by my race. That's a terribly difficult thing to assess. You're never going to get that through purely an inquisitorial process like FOS.

NT: No, no I totally agree with that. I just worry that, I mean for example, we've heard of a case this week where… a case went to an employment tribunal. I know yours - it's a different issue - the fees for the person who was being taken to the tribunal by the bank were £1million. The bank's fees were £8million. The bank settled at the door of the court for £1million to cover her fees. This is just like, you know, the CFA trap. I'm just wondering how

do we get around… how do we make it accessible to people who don't have…Yes there is a cost, but how do we make sure that the…. System is not abused as well, because when you've got £1million and £8million…?

GK: How do you make the tribunal system affordable?

RS: The employment tribunals are affordable. The primary thing is that you don't have cost shifting. You don't pay for the other side's costs if you lose. You have a semi-inquisitorial element so that if you do turn up alone you get some assistance for the tribunal around directing of what the issues are. That's not a perfect solution for somebody being well financed and having expensive lawyers to help, but those are the two things. Once you import these, the whole world opens up to you because there is a newly developing industry called litigation finance or dispute finance and, if you have a good claim, there are people who are now able to fund your claim so you can bring a case against the defendant. There is … if you don't have the risk of having to pay the other side's costs, you've taken a massive problem out of the litigation funding issue, because you don't have a cost of a the premium for the litigation funding. So there are all sorts of ways of designing a low cost - it's never going to be free - but a low cost tribunal system which is going to be able to deliver a different form of justice - something in the mid-market which may not be as perfect as the High Court. It's going to be different from the FOS; it's going to get to places the FOS won't be able to reach, like honesty. And it's a matter of balancing it up. We were speaking a little bit earlier about the Intellectual Property and Enterprise Court. This is a different balance of rules, put together by BEIS, which is the funny acronym of the department of state, realising that small businesses trying to protect their intellectual property against goliaths, which are 'big farmer' or whatever. They could never hope to win against 'big farmer' in court because they would never be able to fund their way through to the end of a traditional piece of litigation. But if you provide them with a low cost one, they can find a way. They'll still have to work. It's not going to be free. No-one is going to hand it to them on a plate. But if it becomes realistic, whereas at the moment, with FOS at one end and the High Court at the other, it's just unrealistic and, you know, that's why you didn't go there. You couldn't go there. So you ended up in the Criminal Courts. But the idea of this is just to bring it within reach.

NT: Actually, that's not why we didn't go there and we wouldn't… we did go there, because we were in and out of Civil Courts and we ended up in the High Court. But I think the issue is still the fact, if you're saying that the High Court is the Rolls Royce of this model and FOS - sorry girls - is the bicycle of this model in this case, and we've got this middle ground that we're trying to fill, my concern is…

GK: Can you make it a question?

NT: Yes - is it still going to be as difficult for a small SME who has been hammered by a bank to afford the middle as much as the top? Do you see what I mean? So I'm worried about that…

RS: No, because I'm anticipating there won't be cost shifting, or cost shifting will be limited, so that you don't have…

NT: I just want to make sure that it's affordable that's all Richard. I'm just…

CM: A couple of questions:

My first was really picking up on something you said to Chris. You said, well really 'it depends on your understanding of the extent of the problem." And I thought it would be helpful if you could outline, in your view, what the extent of the problem is and I'll come back to my second question.

RS: It depends on your terms of reference and your point of perspective. If you're talking about the claimants, there's simply no forum which allows redress in - practically - in this mid-market - let's call it the mid-market product. There's no mid-market product. The places where the dispute is big enough, that it's important for them to get to. That's why Nikki spent so many years getting there. So that's from their perspective. From Andrew Bailey's perspective, he went along to listen to the vote of no confidence in the FCA, wondering why everybody hates the FCA and listens to the tribunal… listens to the debate and it's all about dispute resolution and he's thinking, "Why are we even getting involved in dispute resolution? It shouldn't be what we're doing. We're a supervisory and regulatory body. There should be an independent tribunal that deals with disputes, which is specifically qualified for that and then we're going to get rid of a problem off onto somebody else and we can get on with the stuff that we're doing well and then everyone will start to love us again, or for the first time. If you're looking at it from the banks' point of view, it's a very much more complicated, difficult situation for them… or the situation that they've made for themselves, which is really around trust, I think. It's - again, perhaps a bit crude - but it's almost sort of a Tony Blair / Iraq moment - 2008, you've got this trajectory. One of the questions which is hinted at here was what are the similarities between what happened in the employment tribunals in the 1960s and what's going on now. In the political context then there was - unfashionable word - a socialist one. Capital was bad, employers were bad, business was bad, the workers were good. Government action was good. That was the political context in which people decided the legal set-up at the moment of master and servant is just not politically acceptable any more so we're going to change the legislation. That's the context of the 60s. That then carries on until you get to 1989 - the Berlin Wall falls down and everyone decides that Socialism wasn't the huge panacea to everything and everyone moves into a phase where Capitalism was going to reign supreme and it's the end of history and all of that stuff that we all know. And then 2008 comes and it isn't right. So, but during that period, they've been telling everyone that this is the answer and they're the people who generate growth and then everyone is hit with a huge bail out. And people - they now seem to be consumers of wealth rather than creators of wealth - and people feel duped by it. So that is the huge sort of macro kind of scale. If you're talking about the small realistic business sort of scale, then I think the particular difficulty that they've had is the relationship they traded off with the retail consumer was one built up over centuries of High Street banks doing just retail business who were then after 'Big Bang' bought out and became universal banks. So behind the scenes they were changing in culture. And therefore the kind of products that were being sold were not being… were not the same kind of products as the consumer expected. So they were used to dealing with John Lewis and they didn't get that, they got Gordon Gekko instead. And they feel that no-one can trust the banks any more.

Now if you accept that thesis, which you may not do - the bankers may not do - they you've got a huge problem shifting / getting back to the point when you're John Lewis again, or

you're trusted again. I mean Tony Blair pops into the Brexit debate and he doesn't carry the weight. There's a huge amount of good will towards him. Now that's all evaporated because of that moment around Iraq. So I would have thought that they're in a similar situation. If you accept that thesis, then how do they turn it around? How do they get back to where they should be? It seems to me they've got a bit of a task on their hands to get there. Presumably they want to be there, because all of the political pressure comes to them from the retail transactions that they do. People don't really understand the wholesale markets. But they do understand what goes on behind the counter in the local branch and everything built around it for small businesses. So that is the touch point, as people call it, for political… just in the way the FCA is judged on dispute resolution which it didn't want to be doing in the first place. The banks are being judged on retail transactions. And it doesn't matter whether deep capital markets are a great thing for us or not, they're judged on what they do. Their character is judged by that and so they have to turn it round. They may well think, "well we're going to need something big to change this and this kind of thing might be it." I can't imagine they're going to say, "Do you know what, we need more of the same." Because, at the moment, RBS has just announced its legal provision; it has tripled its legal provision for compliance. So the whole direction of travel since 2008 is a huge amount of political pressure on the banks because their balance sheets were nationalised or part-nationalised and everyone was wagging their finger and telling them they're naughty. And the answer was more regulation, more regulation, more intrusive regulation. So they're now on a trajectory which is ever more expensive, every more oppressive. And for us, the downside is that all of that Anglo Saxon entrepreneurialism which creates wealth is also being pulled out of the system by very heavy regulation. And here we are thinking, "Oh well, Donald Trump is just tearing up the Dodd-Frank Act". That makes you start worrying. So the point about a solution such as was tried in the 1960s with Employment Law is, they don't have a compliance officer in every business checking whether somebody is a racist or not. What they do is they say "There's a very simple law which is 'You're not to discriminate on anything'" - very simple, to the extent that you're not to discriminate on grounds of race. Fiendishly difficult to put into practice, but they leave that to be argued out in front of / within the courts. That's how it's done and then through very painful cases where people are being cross examined about why they did something, you start developing the case law and everyone understands. And culture moves on as a result of what goes on in those tribunals.

You don't get to it by having a compliance officer there. So the banks… they probably need to start… it's very difficult - they probably have a bunker mentality now, just hunkered down waiting for the next scandal - LIBOR and all the rest of it. That system is not working for them because it's destroying trust - every successive revelation - LIBOR or FX - everything comes out again and again and again. It's… they're crooks. They're crooks. These guys are who are…

GK: I hope that answers the question. Can you keep it shorter because we need to get through by 8 O'clock?

CM: Can I ask one quick question? Hopefully this is a short answer. You mention in your paper 'FCA - are you listening?', in your experience… you talked about Andrew Bailey coming to the debate but, in your experience, is the FCA listening and if not, why not?

RS: I can answer very quickly. I've had very little direct experience of the FCA, but judging by what Andrew Bailey said when he came here, he's listened. And he's saying that it's a good idea, as far as I can understand, in which case... The second article is called 'FCA, now you're listening'.

[Laughter]

TB: Thank you. May I ask you, do you believe that it would be helpful if the banks were forced to take a duty of care in their transactions with SMEs… indeed with all of their customers? If I understand correctly, the thrust of your argument is that if there is a binding, affordable dispute resolution system in situ, it would change the culture of the banks, in that they would be mindful of their obligations and the probability of redress being sought and given quite quickly. And if I understand your comparison with the Employment Tribunals, that certainly worked there; the existence of the tribunal changed practice amongst employers.

RS: Ok - there are several questions in that. Let's approach it through the employment tribunal experience. So you… Parliament creates a right, for example, not to be unfairly dismissed. You create the tribunal which allows the private individuals to enforce the right. It's not the state or the regulator trying to do it; private individuals are empowered. That's the platform upon which it's necessary, if you're going to rely upon the private citizen to start changing culture rather than the state. That's the thing. Once you move beyond that, once you open, if you like, what is sometimes called 'the floodgates', to that kind of litigation, such as you had after the 1960s, you have a very very rapid development of law through the courts. So that's exactly what happened from then on. Since the 1980s it carried on until the fees were increased not so long ago in order to try and stem that flow. Now one of the things that the tribunals worked out though that is something called the 'implied duty of trust and confidence' between employer and employee. Now that… this in a way is about the core message about what I've said. What you get is a huge number of cases coming through the system. And the judges who are, you know, people are coming to this task towards the end of their career after they've seen a lot, they listen to this stuff and they work out what/how they should decide the cases and through that they distil the principles which then are enshrined in case law, particularly as they go up the judicial tree. So, if you like, you're getting a distillation all the time. The more of this stuff comes through, perversely you distil it down and the judges work out this thing called 'Implied duty of trust and confidence'.

The duty of care concept is the same. You have, back in the nineteenth century, a whole series of different areas in which there were certain formulations in which the courts recognised that somebody shouldn't hurt somebody else. Through that process, that iterative process of case after case, after case, you get this thing, the Duty of Care. So that's the product of the Court. Now I would be the last person to pre-empt that process by saying before these tribunals - which I think are probably quite a good idea - are set up; I'm going to tell them what the answer is. It's precisely the reason that I'm suggesting that the tribunals are put into existence for them to work and exactly whether that should exist or not, for, between customer and bank, and if so, in what circumstances. That's the job of the Courts; it's the traditional job of the common lore courts, unique to the common law -doesn't exist in the European systems. That's what we do. That's the value that we add for the economy. That's what underpins the dynamic entrepreneurial economy, that the Anglo Saxon thing is

capable of. The second layer out of that is unique to Employment Tribunals. So there's a bit in the first half, [unclear] Lord Browne-Wilkinson - Mr Justice Browne-Wilkinson quoted from then, where an Employment Tribunal which has a specific jurisdiction to deal with labour disputes is/ doesn't just deal with Black Letter law. It tries to work out what a fair or an unfair dismissal is, but then it, if you like, arrogates to itself this additional job of working out what good employment practice is. So it's not pure law; it's just observations which carry weight…

GK: Are you saying it's a similar process that would take place if we had a tribunal-type system?

RS: Absolutely. Absolutely, because you're not talking about Black Letter law - what gives right to a cause of action. You…there is also scope and margin for judges or… to observe "We dislike this kind of behaviour because, you know, what we'd like to see is X, Y and Z". And therefore you can… you develop good practice, off the basis of experience and that's where the strength of the tribunals is in having the [unclear] Wing Members because they're specifically designed to bring their experience, sitting on either side of the transaction - buyer/seller or employee/employer - and that's hence the judgements of those tribunals, even the appellates have in Employment Tribunals… they have authority because both sides of the market - the buy and sell side - are prepared to buy in, because they know that their guy has had a say in this outcome and, you know, it's very different from being excluded from it, saying "Hang on, this is not good enough". So there we are.

GK: Satisfied?

TB: Very satisfied. One quick question, if I may. You were talking about litigation funds. You can't really get funding unless the funder has access to data, to the information, so you need disclosure before you can get the funding.

RS: Yuh. Disclosure is one of the problems which beset all forms of dispute resolution. It's one of those intractable things. It becomes more difficult by…by… because of the electronic element to what we do now. There is just more material. But, you've got to go there, I think - I mean. You can't… the FOS, you know, it doesn't force that in the way the courts do force that, and there are huge costs associated with that. But you've got to there because, if you're going to get to it, get to those honesty points which are at the core of a lot of the stuff that people feel so strongly that they wouldn't be satisfied with a FOS outcome. They'd feel… they'd say, "No, that's not good enough for me, in these circumstances. My life has been destroyed by this. I feel the need to have this, if you like, this public experience. It must be recognised, what's happened to me, publicly", like a wedding almost, it's a sort of, that's it, that's what you need. You need the application of law, that's what people want.

I mean if you turned it around, on its head for the moment… It's always useful to do that. If you were a debtor to a bank and said, "Oh, I haven't paid my mortgage", and you said… the bank said, "I want my money back". You say, "Go to the FOS. Why take me to court? Why do this expensive process of taking me to court? Go to FOS; you might not get your house, but you'll get something." That's a good example. We don't have that conversation, do we? So, you know, you need to reality check. There are certain kinds of people who need that, just like the banks do.

GK: [Unclear]

SR: Reality check for me then! Just to ask you something. We've spoken about the limits of the FOS, which is the eligibility limits - micro-enterprise etc - and they've got a limit on what they can award. Under your type of tribunal, would there be something similar? And the reason I'm coming to that is this, that one very frequently has claims against banks which are in the millions and surprisingly these claims can often be from small businesses, and often the reason is they're property companies. Now when you've got a couple of £million at stake and possibly someone's house at stake, if they've given a guarantee for their loan, people want a high level of justice. They want a high level of legal application. So where would be…how would that be [unclear] dealt with under your tribunal system? Wouldn't you need somebody of the same quality as a High Court or County Court judge Wouldn't you want them to apply the law in exactly the same way as a court would and, if that is the case, would not the costs be roughly the same as they are in going to court?

RS: Well um… a number of questions. Ok. The point which is fixed in my mind is the point about costs associated with the quality of judicial product - we use that word again. The [unclear] High Court judges are expensive, an expensive resource, and they're very very good at what they do. The way that the Employment Tribunals takes the benefit of that without incurring the cost of it is to have one of these judges sit as the President of the Appeals Tribunal. I'm probably going to be corrected by my terminology [unclear]. So what you don't have is every man and woman on the payroll is a High Court Judge. But you have them at the appellates here, and in a managerial, if you like, capacity. And then bring in another talent, which will come from different places. We here… we are talking about one of the reasons why it should be less expensive is because you don't have to educate the judges every time about a new product. You're talking about developing it just as the Employment Tribunals - Wing Members and Judges - they're fully up to date on ACAS procedures and all the rest of it and they know their own territory very well.

GK: [unclear] comment.

SR: Yes - no. I think what you're saying is this tribunal would be applying the law in the same way as…

RS: Employment Tribunals; they're cheaper. I mean they are… it's cheaper to run it through tribunals than it is to run it through courts.

SR: Yeah. The big difference, if I may say so Richard, is that in banking cases, you're arguing over millions. Very frequently in Employment Tribunals you are, in fact, the statistics [unclear] are at the level of quite small…

RS: It doesn't make any difference to the complexity of the law. The complexity of the law in employment is one of the things that people hold against it. And it's terribly important to the people who bring those cases.

LGC: We talked about various issues tonight around curing the problem, once you've got it. I'm always interested in prevention. And if this isn't your area, please do just say so. But it often seems to be apparent that the contract terms, the actual agreement, that's where I always go when I believe there's a [unclear] in dispute. What was said in the contract, and the terms of those contracts are often deeply unfair to the potentially naïve SME persons signing up, on a wing and a prayer to [unclear] a power relationship with their bank. Do we need to

look at that? Should there be more controls on what can actually go into these contracts or in our Anglo Saxon Caveat Emptor culture is that anathema to us?

RS: It's not anathema to us. We have an Anglo Saxon Caveat Emptor culture. But we derogate from that in a number of ways and the FCA handbook is one of those areas in which we derogate from it. The basic answer is it's no difficulty to derogate from it where the balance between the parties requires some other solution than just 'Caveat Emptor'. But that doesn't mean…

LGC: So you mean the contracts could actually be circumscribed as to what could go into such a contract? Is that actually practically achievable?

RS: There are all sorts of ways of skinning that cat, but the point that I think underlies what we're saying is that, by doing this you're somehow going to avoid the dispute. You're not.

LGC: You're going to reduce the chances of it hopefully.

RS: Er no, I don't think you will because very often people don't read the terms or the points of the contract. But people make decisions about whether they've been fairly treated or unfairly treated on much… far broader terms than that. They think, something somebody said around the contract, looked them in the eye, told them they'd never do that, that kind of stuff. That's what really brings people into dispute. You can't, you know, legislate against… for human nature. You're always going to have that.

But the point that I've been making about the dynamism of the Anglo Saxon Common Law system is that effectively this is a feedback loop for the market. You have two people go to the market together and say. "You can't treat me like that". If, when they get to the point of dispute and they go to the judge who then works out all the facts for it - what the right answer should be. And that is a very valuable process. That goes back to the Anglo Saxon dynamic economy. You don't want to leech all of the dynamism out of the market because then we've got nothing to sell and people would go off somewhere else to get their financial services. So you want to be cautious of that.

LGC: Thank you very much.

LJD: I'll be very quick. You've written extensively about this subject; your proposal to have a tribunal. I imagine you've spoken to a lot of people about it. Have you had any… has anyone come up with any objections to your proposal which… Well, first of all has anyone come up with any objections to your proposal?

RS: Um no. I don't think….

[Laughter]

RS: I don't think I have. There are… the qualification that I would say/give to that is that I haven't had a great deal of direct contact with the banks. Although that, I hope, is about to change. And they might take objection to say, "Oh you are going to land even more cost on us now! You're going to expose us to liability we don't yet have." They haven't said that because they've kept their counsel. But that's the point that I was, you know, my little sort of loop about trust, is that, that's a calculation. Politically that was acceptable, you know, people said "You're a businessman, you're a grown up - should have read the small print

and, you know, you have to go… [unclear]….

LJD: I just wanted...and you've answered it really… I just wanted to know whether there has been any objection…

RS: No.

LJD: … voiced so far. And the answer is no. And just one quick other point which I think is important. The cost of setting up and running this system would be borne by who?

RS: I think the banks would be the obvious people to look for and the reason I say that is that they are at the moment paying, under FSMA, they're paying the S!66 and 1404 investigations which in 2013 cost them £145 million. And in that year it cost £80 million to run the Employment Tribunal service - the whole thing. So there are… my point is, they can fund it and still save money. It maybe sounds too good to be true.

LJD: Because the Section 166… will that all fall away on your scenario?

RS: A good chunk of it would fall away, because it would become… you wouldn't be having… those 166s were part of the ad-hoc 'bespoke' processes that Andrew Bailey says he doesn't want to do any more.

LJD: Thank you very much.

GK: Heather, one question…

HB: I was going to say as we're [unclear], I defer to the Chair to [unclear] keep on time.

GK: Thank you. Well I was wondering [unclear] - it only requires a brief answer - if I was to ask you, what's the flaw in the tribunal system…?

RS: What's the flaw? Um… [long pause]… I think I'm going to go back to what I was saying. The banks should be looking at it as a cost of business; a cost of trust, you might look at it - money-back guarantee in the retail sector. People… retailers offer that, and, um, it's just a cost of business. Direct debit guarantees; people get their money bank if there's - without question. Um… what's the other thing? The credit card. There's a cost of business and what you're buying for treating your customer well is the trust which generates the volumes. So the flow has its upside; the cost has a benefit.

GK: Right. Reasonable answer. Thank you very much for answering at length and for the last [unclear]. Thank you for everyone who has given evidence. That first session. We're learning as we go alone. There's a load to digest there. Thank you to the members of the panel for their participation [unclear] questions. And our next…

HB: 3rd of May.

GK: Yes, 3rd of May.

HB: And so I'm handing over to the… to Chris's team to….

GK: And thank you Chris for preparing the brief which was very [unclear].

Witness Marion Smith QC

Second Oral Session - 15th September 2017, 13.00 to 16.00

Committee members present
Lord Cromwell (LGC)
John Howell (JH)
Chris Wilford (CW)
Nikki Turner (NT)
Cat MacLean (CM)
Tony Baron (TB)
Stephen Rosen (SR)
Lord Dyson – (LJD) - Chair
Heather Buchanan (HB)

Witnesses: Marion Smith QC (MS)

LGC w*elcomed all to this second session of the joint inquiry of the APPG on Fair Business Banking and the APPG on Alternative Dispute Resolution,* "bridging the gap"*.*
Marion Smith gave a brief intro to herself, stating she wears a number of hats including trustee of CIArb, Counsel in all forms of ADR and teaching which she sees as a very important part of her work. She feels that there is "still a large teaching and training role to be had" with respect to ADR. "There is a surprising lack of knowledge about ADR, at board level, at lower levels…"

MS: Do I take it as common ground everybody in this room knows what ADR is? Yes? And when we're talking about ADR - we are talking about the broad range of ADR? We will look at, not just the negotiation and the structured assistance to reach a settlement, but look at other methods of dispute resolution, such as adjudication, tribunals and [unclear]

LGC: I think perhaps I should, at the beginning, given this a bit more context. I think, as the banking and finance group, what we are concerned about is that, if you are a small fish with a small complaint you go to the Ombudsman. If you're anything bigger than that, you…whether you're BP or a small bed and breakfast, or a slightly larger bed and breakfast possibly, you're invited to lawyer up and go to court. Now in the middle there we feel that there might be…definitely there is, ground for something else, which gives a greater possibility of people finding resolution without having to go to that enormous and intimidating process and expense of going to court. ADR has been put forward, as you would expect, as one way of doing it. What we're trying to learn about is, what are the mechanisms, whether it's in construction - wherever - that have worked? What are the lessons from that? What could be done in this sector and how do you give it sufficient teeth, that on the one hand it works and has to be gone to - it isn't an option - but on the other hand it doesn't mean that no financial institute never wants to lend money to anybody ever

again.

JH: Let me just add to that that I'm also the Chair of the APPG on ADR so I'm fully familiar with what you're going to say on ADR - I hope! And it is something that we have examined over the past year and a bit, I think.

MS: Well let me focus then on…

LGC: Does that help?

MS: It does. What I want to focus on are sectors where ADR has gained significant and positive [unclear]. There are four I want to flag up. Construction - in its widest sense. That's not just the main contractor, or the employer, the main contractor and subcontractor, but also professionals; Tax; Employment; and then Shipping and general commercial world, because I think it does leap out.

Let me say that what I'm going to be focussing on is not regulatory disputes, but the general contractual and tortious disputes. In those 4 areas I think ADR has made a significant difference.

If I start with construction. Adjudication…statutory adjudication was introduced in this country and confidently predicted as being a disastrously misguided intervention and one that would act as a powerful impetus to increase litigation. That has not been the story. It is seen as a success and you will be well aware that it has spread from England and Wales into countries such as Malaysia, Singapore, New Zealand, and throughout Australia. It is a statutory scheme. It is also supplementing a contractual scheme.

The standard form contracts used globally within the construction industry have always had in them multi-tiered dispute resolution clauses, building a dispute up, through that first director to director contact. Build a scheme into a form of mediation and then and only then into the arbitration. So you have the two strata - the contractual and statutory side. There is limited hard data available, but the Glasgow Caledonian University maintains a up-to-date analysis (in fact the most recent report is 12 years in retrospect) by the Adjudications [unclear] Centre. But it shows a pattern of success. Now the nature of adjudication is that it is a temporary binding solution. It's all about cash flow. It can of course be challenged. But the statistics show that it's a decision and that most businesses just want a decision. Taking it any further is perceived to be quite a rare step. The annual numbers of adjudications: it's decreasing at the moment but it tends to be counter cyclical. 2008 saw a huge spike in the number of adjudications. 2012 saw a downturn in them. We can all, I think, forsee how it's going to spread over the next 5 years. It is perceived as being quick. You have to have the result within 2 months. It is perceived as being cheap, because it is a documents - based procedure. It doesn't have to be, but that is how it in fact operates. It's…the problem I think with it is that it is not tied to any form of mediation and it plays to a claims culture.

The construction industry is very poor at the take up on mediation. And you will see that there are a large number of people who operate in that industry who do not know about the

option of mediation. They are focussed on the claim. So you lose the opportunity to build a co-operative flexible solution.

That of course is not the problem with the employment scheme, where you have the dull[?] down of the act... of the use of ACAS, which is now mandatory, I believe - the nomination - and the attempt to settle and then and only then would you escalate it through to the tribunal [unclear - period?]. And we all know the ways of saving everybody time and energy. You've got to cut people like me out. Or you've certainly got to stop giving them opportunities to speak!

You do these things on paper, with an absolutely rigorous timetable. On any system that you introduce by way of an ADR, you have to have the support of the Ministry of Justice and the Judiciary. That has been the firm lesson. Our communication could have gone wrong, in the sense that it would have been completely set aside if we hadn't had specialist judges who understood the policy and philosophy behind its introduction and insisted that they would follow that approach. They were not going to allow the setting aside of adjudication decisions, simply because it [unclear] be the wrong decision. It's rough justice. You've got a decision - live with it. We will enforce it. Challenge it if you want to.

So you've got construction, employment, tax. The HMRC's use of ADR is perceived as having been very successful, particularly for the smaller business. The tendency was to try not to use it for the larger scale. Again it has got some very good success figures. I think they were quoted most recently as just under 80% success. But that's a pure ADR being offered, as an alternative to going straight to litigation.

And the last one. I could put together a list of specialist mediation groups that have proliferated since the courts have introduced the - you can't call it compulsory mediation - but the compulsory 'thinking about mediation' and they are providing a service which… if it's not [unclear] reaching a result on the day, it is rapidly proving to improve results thereafter.

So those are sectors where there has been success. They cover a broad range and one can't see why financial and banking matters wouldn't also fall within these routes.

Can I just… on an international basis, I'm sure you've had your attention drawn to the ICC report on financial institutions and international arbitration…. And they suggest that there are two schemes in particular where you've got the application of both the regulation and the disputes and compensation to arise out of them. And that is one in the United States of America, the Financial Industry Regulatory Authority [FINRA] and its efficient, cheap scheme and also the Financial Disputes Resolution Centre [FDRC] offering what seems to be a very successful mediation and their [unclear] arbitration in Hong Kong. So it can be done.

Was I more than 10 minutes?

LGC: It's bang on the 10 minutes! I am incredibly impressed! [laughter] So yes, so please note other witnesses. I think we would like however to take a few minutes to ask you a few questions, based on that. And if I can abuse my role…

A thing that seems to come up again and again in the financial disputes between clients and banks is the whole issue of disclosure - getting access to information, and all of the information, and all of the information in a reasonable period of time as well. Reflecting back on the construction sector and the others you've referred to as being successful, has that been an issue and if so, how have they overcome it?

MS: In mediation it's always the worry that you won't get access to the information, but I find this is where the good mediator comes into play, because they appreciate that. It is one of their tasks to build consensus and they will attain the release of the documents or an explanation as to why not. So it's more of a problem in the preparation. In reality it hasn't turned out to be a problem.

Similarly in adjudication. I don't really think the need for the disclosure is quite the same driver in the sort of construction dispute that one comes across. It was believed it would be, during the job. It's mostly now, statistics show, a dispute about the final accounts and everyone has got their paperwork, so it's not. Interestingly there has been an attempt to introduce adjudication in professional negligence. Now that's an adhoc pilot scheme led by a specialist legal.. specialist bar associations, specialist solicitors' associations and it has got nowhere - almost no take up at all - and I wonder if a perceived problem with disclosure is one of the reasons behind that. But that's pure speculation, I have no knowledge.

LGC: Thank you, that's quite interesting. It is going to be an issue. It already is in the financial services sector because it's one thing in a construction contract where you know they've got a copy of the contract. What you don't know is what emails have gone back and forth. You don't know what you're asking for, but you do need them.

MS: [unclear]

SR: Could I just ask a question? I'm very interested to hear about these four forms of dispute resolution. And I'm a solicitor in private practice and I head a group that specialises in claims against banks and we've done hundreds. And can I just tell you what the common scenario is and you can tell me if you feel any of your forms of ADR fit in with it. So a common scenario is the dispute is a mixture of law and fact, complex legal issues, including exclusion clauses and basis clauses, fact in the sense of my clients have witnesses who dispute what the bank is saying, and the bank is contesting all that. Then you've got potentially very serious consequences of failure on the part of the client: they may lose their house; they may lose their business; they may lose everything; and there may be millions of pounds at stake. And the trial, if it gets as far as the trial, which rarely it.. it very rarely does…may be 5 days, for the Judge to sort it out, work out [unclear] consequences. A huge imbalance in resources on the part of the claimant and the bank. I see that Lloyds have submitted a paper. And their solicitors are typically DLA and Hope Lovells who are huge international law firms, whereas the claimant law firm is usually far far smaller, has far smaller resources. And there is a lack of co-operation, in the sense that the banks' lawyers have to represent their clients, I have to represent my clients. The banks are not going to make anything easy for me. They're not going to disclose anything they don't want to disclose and when they do a disclosure exercise they won't disclose everything. The whole thing involves huge costs. Now against that kind of scenario, the reality I think… Mr Akram in the corner [unclear]…

LGC: I'm going to have to…[unclear]…you to come to a question…

SR: Yes well my question was the initial question - having explained the circumstances, what form of ADR do you think would fit in with that? Against the background of the four forms we discussed?

MS: Can I say this is an everyday tale of litigation. This is what litigation is like. Emotions run incredibly high throughout almost every case I've ever seen. And ADR provides a unique opportunity. Mediation is a unique opportunity to actually give the key players - because at the end of the day, on the side of the bank and on the side of the individual business, there are two people and ADR will give them the opportunity to talk. And you've got these preconceptions, you've got this structure. But there's nothing like sitting in a room with the two individuals involved and a skilled facilitator. You have to warn them it's going to take a long time. Walls aren't going to come down very very quickly. But if you give the time and you've got the skilled facilitator, individuals, humans start to find common ground. Now there will always be exceptions. There will always be the litigants in person who end up over 15 years trying to re-litigate endlessly the lost decision. There will always be someone who storms out of the room. But there is generally more that unites us than separates us and if you get people together, they can build a consensus. You can push through. And ADR - I see it time and time again where I think that there is simply no way at the end of the day that we're ever going to find a solution - something happens.

LGC: Thank you very much. Please…

CM: You and I spoke briefly outside; we were discussing litigation. I was explaining I am a big fan of mediation generally, but I think my concern about mediation is that… it's voluntary, and that is both its strength and weakness. Now there are ways to make it less voluntary and I think you've done that in England because there is the costs sanction. We haven't… don't have that in Scotland, and that has meant that in my… I mean, I'm in the same position as Stephen in Scotland - we litigate against banks. And in my experience banks will almost never mediate. Full stop. Rarely and occasionally they do but those are the exceptions. So there needs to be some… you need to move away I think from the voluntary nature of mediation and there has to be some compulsion but... What do you do about the fact that ultimately… there is no decision in a mediation? It's parties coming to a consensus with the assistance of a mediator and actually it can be possible for a larger organisation to play the system quite cynically and say "Hey that's fine, we'll go to mediation," and they go to mediation and there is no resolution. And then you're stuck with having to go back onto your expensive litigation train track. Is there a way round that?

MS: I think you have to take a holistic approach to it. What you have to do[unclear]… Right at the beginning, if it became something that had to be reported at the first case management conference to the Judge if it hadn't been considered, and it wasn't something that you could just tick a box and ignore. You would be facing questions about it. it's led by the Court [of Appeal?]… making it absolutely clear, that even an unreasonable refusal to mediate would, not necessarily automatically, but very much could lead to a cost sanction. So suddenly you have the Board's attention. No Finance Director wants to go back to report that he has won the case but picked up the multi-million pound costs bill. That calls for attention suddenly to

focus on this alternative. So I think you have to back it up. I think taking the step and making it mandatory, which is what some countries have done, is interesting. I'm not sure that it would work here. I think there is a resistance. If you make me do something, I don't want to do it. It's a child's response but it's not necessarily one that won't be had. But you make it clear that there are sanctions if you don't. Yes you can game the system. One of the problems with mediation that I hear is "Look I've got a contract that's failed once already. All that I'm going to get out of the mediation is another contract which will fail again and I'll have to litigate to be forcing the settlement I want." To which the answer of course is, well that's a very simple, straightforward piece of litigation.

CM: My experience is that if settlement is achieved in mediation, it's fixed. But the concern I have is a cynical large financial institution going through the motions: "I'm mediating because I'm on [unclear] and there's a cost sanction if I don't", but really with no intention of ever coming to any reasonable resolution. So you spend the day mediating and you're not resolved and I'm not clear what can be done to prevent that kind of playing with the system?

MS: I don't think you can but you have to open up conflicts [unclear] the process. And the moment [unclear] it's possible to actually let an adjudicator in to test the good faith or just the reasonable endeavours that a dispute needs to settle - you're never going to be able to reach a settlement [unclear] but once you do [uclear] the settlement negotiations have to be that much [unclear]. So you can't… I can only say… and I can't give you any statistics, but it's always said to me is the fear "Oh they won't talk", "It won't happen". But they do. And the success rates that are quoted indicate that a settlement is reached in a significant proportion on the day and, if not reached then, is reached shortly afterwards and ultimately if you don't do it then, it will result in a quicker court process, because [unclear]. People understand what the difference is.

SR: May I just say one last thing… very very briefly. I'm sure Cat will confirm this. What's important is when mediation takes place. So if it takes place early with the bank, nothing happens, you won't get an offer, you have to sue. The whole point is, mediation takes place quite a long time down the process of suing and it's because you've sued and because the bank can see a Case Management Conference coming up, or a trial, that's when they settle. You've got… It really is quite a cynical process and, as I think Cat might have said… it's a bit of a game. It is a bit gaming. It's a bit like, unlike I must say construction where you've got the two parties and they want the building to carry on being build, which is what adjudication is all about, they've got a common interest. The bank's interest is really to string the thing out - it's a war of attrition - and see if a client can survive in pursuing. I must say that sounds very cynical, but that's my experience, over many years.

CM: Same with mine. I litigated against a large financial institution on behalf of a client for eight and a half years and it was only after eight and a half years we went to mediation. It's… we need to find a way to avoid that war of attrition before the mediation.

LGC: Which is like carrot and stick [unclear] again where the mediation comes in.

LJD: I think we need to… we could spend the whole afternoon talking about the pros and cons of mediation, the problems and so on. Some of the problems have just been identified. But I

think we mustn't take our eye off the ball, which Chairman you identified at the outset, that what we're really focussing on, as I understand it, is the fact that, at the moment, for small or medium-sized enterprises, the choice is either the Financial Services Ombudsman - we looked at that in detail last time, with all its deficiencies - or the 'full monty' of very expensive High Court - or not necessarily High Court, but anyway court proceedings - and the gap in between them. And what we are about, as far as I understand it, is to see whether we can do something about that gap into which so many SMEs fall. It seems to me that… at the moment I'm struggling to see how debating the pros and cons of mediation helps us at all to decide what to put into that gap… This is a completely different question because mediation - and I think there is a lot to be said for mediation - presupposes that you have got an alternative to ADR, mainly you either you go to the High Court or you go to Arbitration or - you've got something. And at the moment what we're trying to do is to work out what that alternative to High Court or the Financial Services Ombudsman, what that should be. Then, once you've got that identified, then you have got something against which to set the pros and cons of a mediation. I think we're - the discussion to my mind anyway, in danger of confusing two quite different things. Mediation pre-supposes that you have got some alternative to mediation: High Court, litigation, arbitration or whatever… and at the moment and I'm coming to my question [unclear]… Is there any particular virtue of ADR which is going to help us to decide how to fill that gap? I don't see how it does at all, but that's my question. Because if you've been asked to come here and talk to us about ADR and ADR is a terrific thing - a huge utility. But it is an alternative to something else. It's an alternative to having your dispute resolved in court or an arbitration or by some other means.

MS: I think my decision would be whatever you fill the gap with - whether it's arbitration, a form of adjudication, or a form of a specialist tribunal, ally it, as a first step, with mediation. Because I think that's where the construction [unclear] scheme, which is very successful, where it fails. And it has got to be that opportunity at some stage - and I take your point about where in the process you put it, but an opportunity and a compulsion of sorts to talk, but you're right, it doesn't [unclear]. It's the beauty of it. You can shape this mediation.

LJD: We have to decide how to fill the gap and then once we've decided what goes into that gap - it could be an extension of the jurisdiction of the FOS or it could be a new tribunal, whatever it is that we decide to put in there, then we shall bear in mind the virtues of mediation as an adjunct to having a dispute resolved in that new way. But the virtues of mediation hold good regardless of however your primary means of resolving disputes may be.

MS: Absolutely.

LGC: There are some very powerful points made there. I think you're quite right actually to sort of challenge the pre-supposition that we perhaps made in putting this meeting together, which was that some sort of mediation / ADR process *was* the intermediate step between FOS and court and maybe there are some other tools in the box to be used. Where this comes back to however of course is compulsion to use any of those. If you can sit back and say "sue me"… But I don't want to take up too much of your time. I'm conscious that we're now coming to the end of the period allocated to you. But you wanted to come in…

NT: I just wanted to talk from the point of view of the SMEs who actually don't have any of these opportunities, because even mediation is impossible. We've got an interesting case with HBOS Reading at the moment where a lot of the victims are going into mediation and they're going into mediation because the bank has agreed to pay for the mediation. How successful that will be, I don't know… is it just going to string it out…? Probably could do. So I think the big problem at the end of the day [unclear] … without the safety net of any funding behind anything that we put in place, we don't have any other options, so for example, you're talking about new situations but if we had legal aid that would level the playing field once again and then it would be very meaningful to have mediation because the banks would know that you could go to court. But at the moment they're using mediation as a way of spinning it out so that in the [unclear]… if it doesn't work you can't go to court, because that's where the biggest problem that we have lies… We don't have funding as a sector to sort out litigation [unclear].

MS: I was thinking of the recent… Because of course the joy of the Employment… the statutory Employment [unclear] is that you do have access to the tribunals where the costs of the process are managed. And ACAS offer their mediation services - it's state funded, I assume, but there will be others who know better. So there is the funding there to do it. And it seems to me that that really is the model that plugs the gap with the greatest prospect of success and it meets your point that where [unclear - can you find pots?] of money.

LGC: That is a very interesting point and you made the point very openly earlier that justice is an expensive thing to get. I don't want to spend the afternoon on legal aid, but that is possibly a way to go. We have one last question to you and then I'm afraid we're going to move on to our next witness.

CM: A quick question. Just going back to this idea of compulsion to mediate because you've had that in England for some…[unclear] -

MS: Compulsion to think about... Compulsion to consider…

CM: …Because you've had that in England for quite some time now. Can you say whether, even without looking… you have seen a rise in mediation, a rise in disputes resolved in mediation when that condition came in?

MS: Oh yes. There was complete resistance to the idea. Complete ignorance as to what was envisaged. And don't forget what we now have is we have to think about it in the pre-action protocol process issue because they're aware of the timing issue. You've got to think about it before you start. You could be stopped from continuing [unclear]. And then you will at some stage in the process find the point in … the appropriate point at which you think you've got the best chance of settlement. And you save your money if you don't go trial. We all know that [unclear]. So yes there has been a huge learning curve... And certainly I now don't have to sell to the board, the notion that we will go through mediation. But I think there is a public training program that needs to be embarked upon. Everyone knows Rumpole of the Bailey, Silk or any of the Americans. They all know about that. That's their picture of dispute resolution. The challenge is to get the BBC to run a series about a mediator.

LGC: In parliament which is based of course on an adversarial system of debate, you're probably in the wrong place to produce that. But [Laughter] Thank you. And actually very encouraging your - at least initially - very optimistic approach that this can work. I think what perhaps some of the scars being revealed around the table are about - the compulsion, about the binding - ness or lack of the decisions etc [unclear]. Thank you so much for that and do feel free please to join the questioning of any of the other speakers too.

Witness Jeff Longhurst

Second Oral Session - 15th September, 13.00 to 16.00

Committee members present
Lord Cromwell (LGC) - Chair
John Howell (JH)
Chris Wilford (CW)
Nikki Turner (NT)
Cat MacLean (CM)
Tony Baron (TB)
Stephen Rosen (SR)
Lord Dyson (LJD)
Heather Buchanan (HB)

Witness: Jeff Longhurst (1:00:50 - 1:17:35)

LGC: Jeff is going to address us and as he has UKFinance in the title I'm assuming he has all the answers! So Jeff - no pressure!

JL: I'm Jeff Longhurst and up until recently I was Chief Executive of the Asset Based Finance Association. And on the amalgamation of the 6 trade bodies, Asset Based Finance Association, British Banking Association, the Council of Mortgage Lenders, Fraud Action UK, Cards UK, Payments UK, I was given responsibility for Commercial Banking. So I have about 8 weeks of experience in banking.

LGC: So you're an expert?

JL: [laughter] So… many of the questions I know you might have I will be unable to answer because I just haven't got that experience, but I'm… on a very steep learning curve, and actually… so far today I am actually finding that learning curve increases exponentially as well. But one thing I do know about and what I want to talk about particularly is the Standards Framework, Code of Conduct and Complaints Process that we set up within the

Asset Based Finance Association. And UKFinance have taken that on board for those members who provide invoice finance and are continuing to be members of the new trade association. This was set up in July 2013. I'm sorry, I'm just going to take a couple of minutes just to tell you what invoice finance is, because I do find that whereas people understand what [unclear] are, when I'm in the pub talking to people and they say "what do you do" and I say "I'm involved in invoice finance", the glazed look on their faces and they start talking about something else. So I'll try to not get you too glazed over too quickly. But basically invoice finance is all about providing cashflow to small and medium-sized and some bigger businesses. So if you're supplying water bottles to here, and they are going to take 60 days to pay you, if you use invoice finance, the invoice finance provider will give you up to 80%, sometimes 90% of that upfront and the remainder when the customer has paid. The invoice finance provider uses a spread to [unclear] and for that there's a service charge and a fee. But basically it's cashflow. Something like 20,000 businesses with turnover below £1million use invoice finance. So it is… it was almost designed there to help small businesses to grow. And… the final bit about me, I have been an owner/manager of a business twice so I have been on … I was going to say the receiving end… but I do understand what makes small business tick.

So in July 2013 ABFA set out its own - we called it a self-regulatory framework. It's an unregulated industry, invoice finance and it was felt by the members of the association that something ought to be put in place to help businesses where they have a complaint. It's not 'big ticket'; it's not a massive industry. But I think one of the strengths of the process is that it was tailor-made to fit the industry and by people who understood the sort of complaints that were likely to come up day to day. And as a consequence, it has been adopted by all members of the ABFA and it has actually helped them compete, in many ways because that stamp of approval to show that they'll abide by the Code of Conduct and Standards Framework meant that those businesses who were not prepared to adopt that were put at a disadvantage when selling to SMEs. So it has worked; it has worked effectively. And I suppose the only message really that I probably would get across today… is that - and it's something that I believe - is that as you put together any ADR framework, the danger of getting one-size-fits-all, that sometimes you actually need to look at the nature of the product, the nature of the businesses that are going to use that product and actually try and design a framework that fits the bill.

LGC: Thank you. Can I just ask you a question, which is something that struck me is with the financial sector in which many of us are involved - and I've worked in the past - the constant cry you hear is "We're over-regulated", "We can't do anything - our customers are so swamped with bits of paper from us covering our backsides about the latest MiFID whatever number we're up to now", etc, etc. To what extent do you think banks are going to be friendly to, "well let's have a reasonable arbitrated, mediated process here" or are they going to retreat into, "this is the letter of the law that I have to follow and I'm not prepared to budge from that and be reasonable because my neck is on the block if I don't follow these boxes"?

JL: I don't have the experience of dealing with my members to sufficiently answer that question yet. What I do know though is that members have given a commitment to look at ADR, well to actually conduct a review of ADR, how it works, how SMEs have had experience of FOS

etc. And as you know we've actually taken on board a lot of what this APPG is trying to achieve. We will use… take account of what you want that review to … the questions you want that review to ask to try and get sufficient broad breadth of replies to properly ensure that whatever schemes are looked at later, it's not just focussed on one particular area. We want the review to be independent as well. We don't want it to be seen as banks looking at the banking… We want somebody completely independent to look at it and come up with the best answer really."

NT: You say it's unregulated, the industry, for the most part?

So what will make your code of conduct more effective than all the codes of conduct that the banks have already got and they effectively ignore? There is really a tendency that they ignore them, the FCA will give them a quick tap on the wrist…

JL: Well one of the things I think that has made it different is that we have a Professional Standards Council that reviews the Code every year and looks at whether it needs to be changed to suit different circumstances within the industry.

LGC: So this is in the world of invoice finance?

JL: This is purely in the world of invoice finance. That's really all I can comment on….And that has meant that where there has been… we've looked at the complaints from the previous years… and see well actually there has been an awful lot in this particular area and we need to do something about it. And the members would buy into change of the Code and actually then start looking at the rules to make sure they're no longer in breach of them. The other thing as well, which I think was particularly significant for us is that, again this - not requirement - but the importance of having that stamp - the framework stamp - to put at the bottom of the letter when they are trading… on the letter heading, on the website… when they were trading… to know that… any potential clients looking to use invoice finance would have the comfort of knowing that there was a code there. And it would put a non-member at a competitive disadvantage if they're looking to try and attract new business to say "Shouldn't there be a stamp there?" So those that did would say, "We abide by a code, they don't".

NT: If one of your members was to breach your code… I mean it's totally hypothetical, and they were to write to your organisation and say, "This member has breached the code", would there be a significant penalty? Because this is… one of the things we're…

JL: The biggest penalty would have been expulsion. And where we had anything significant that we had a concern about, the Professional Standards Council, usually the Chair, would then visit the member and say, "Look, one of the staff has been doing this… this is the report that we're getting. You need to do something about it." And to be fair, every time they went, they changed things, they actually got their act together. But that was the ultimate penalty, Effectively it was that they could not be a member of that trade association.

LGC: Can I just ask a supplementary…? How many potential members of that association are there? And how many were members?

JL: It's a fairly small industry, so there are only 41 members, but it's 98…99% of the industry…

LJD: Are members?

JL: …275 billion…[unclear]

LJD: … My question is: Are there a whole bunch of them out there trading quite happily without being members?

JL: There are one or two, but they are niche players really.

SR: Are banks members, may I ask?

JL: Yes.

SR: Which banks are members?

LJD: You say the ultimate sanction is expulsion. I'm looking at this document we've got here, 'Complaints Process'. And it says at the end that "If a complaint is upheld, Ombudsman Services [unclear]… Ombudsman Services has the authority to require any of the following actions: apology and/or explanation and/or a financial award up to a maximum of £25,000.

JL: Yes. As I explained, it's a small ticket, small…

LJD: It doesn't say 'Expulsion'.

JL: No no, that's… that's within our membership terms. [Pause] Ombudsman Services is an independent limited entity.

LJD Oh I see.

JL: But the terms under which…whenever a member signs up at the beginning of each year, they sign to abide by the Code. And we spent quite a lot of time… as you can imagine the consequences of expelling a member. It's quite serious. I mean, we actually spent a lot of time, a lot of legal advice making sure we had the right investigation processes in place. [unclear]

LJD: The jurisdiction…of this body, with the terms of the complaint Procedure, claims not exceeding £25,000 is coterminous with that of the Financial Ombudsman?

JL: I mean that's… it's a different thing… If you're a bank, then you can go through FOS as well. This is a specific… process for those businesses using invoice finance.

LJD: They would go to… Can't they go to the FOS?

JL: I'm sure they could. I'm sure they could.

LGC: Does that answer your question?

LJD: Yes.

LGC: Any other takers on this particular one?

CM: We get a lot of feedback from the small business community that this is a really important issue for them. I'm just wondering from a dialogue from your members, is it a significant part of their radar? Is it a cause of concern? Or is it just something that is just part of their daily operations? I mean… you've said the industry is reacting, wants to explore it and is committed to a review, but is this something that is, you know, keeping people awake at night or…?

JL: All I can speak for is the personal experience of speaking to those members who have given a commitment to put their money where their mouth is in terms of actually sponsoring this review. And I think that's… that's evidence at least… of a commitment to ensure that obviously we get the best ADR that we can possibly get.

LGC: Without asking you to name names, how many of your banking members have you, proportionally, had that sort of level of support from?

JL: The way that we work is through a… a Commercial Committee and at the last meeting all those members… and you can … presume that the members of that represent the major clearing banks and others. But it's a range of members.

LGC: Well it'll be very interesting to see where that research goes. I'm encouraged that they are prepared to get involved. It's where that involvement ends up obviously will be the proof of the pudding.

JL: I have great hopes coming into UKFinance. UKFinance is a different trade association from some of the others that existed previously in terms of its approach and Stephen Jones, the new Chief Exec, is a breath of fresh air…

LGC: Just on that… can I just ask you: UKFinance is in its sort of honeymoon period. Is it likely to end up being seen as sort of the banking association, the bankers' club, it speaks for them and it's their lobby group, or is it going to be seen more as a standing between the banks and their customers kind of body? Where do you feel it's going to end up? What's your prediction?

JL: All of the members, bankers or no, had to decide whether they were going to join UKFinance, and there was a concern initially amongst some members that there could be a 'bigger banks' club' and there are 254 members of UKFinance and some of those members are very small entities, some of them are very large, but basically if you take the 4 or 5 clearing banks there are 4 or 5 of those out of 254. And the assurances that we were all given at the beginning that this would not be the case, this would actually represent not banking but finance, hence the name. Banking is not in the name.

LGC: One thing that we as a group face is this business of trying to stand between the banks and also their customers who write to their MPs, who as the democratic representatives in our process come to us and it's… I think UKFinance has a limited period in which to establish

itself in a similar role or "We speak for the banking industry and we try to be fair but that's whose flag we've got on our roof."

JL: One of the things that perhaps if you have time if you look up the board of UKFinance… it is not made of the banks. It is made up of a range of people… with a range of experiences… We feel it is very important that the direction of UKFinance is managed by… not a group of self-interested people but the people with a diverse range who can ensure that we focus on the UK and UK industry and the way that we can provide lifeblood to that industry.

LGC: And how are you getting feedback from the participants, the SMEs for example. How are they represented? How do they have a voice in your processe we?

JL: [unclear]… We have actually set up a government structure to include an SME advisory panel. And that panel will not be made up of… again it's not the commercial board. It's actually going to be representatives, we hope, from… people like the FSB, hopefully somebody from here, and… one of the ideas we have as well is to look at the various trade bodies and to try and get representatives of those trade bodies to come and sit… on that panel as well, which would give us access to their members so we can actually test directly with the SMEs what we're doing, what their needs are, how we should fit in with those. I mean, you know, it's all fairly new and the terms of reference [unclear]… I'll bring them out! I need to make sure they're all approved. That's what we want to try and do. We need to try and make sure we have the right degree of information from the right people to behave in the right way.

LGC: I'm just convinced that having the buy-in of the SME and other 'E's actually - sectors - is going to be critical to your credibility. I'm tempted to stop you there.

JL: I've personally worked with SMEs through all my career and been an SME… I've set up a business and made sure that there was toilet paper in the toilets… so… I know… I think I[unclear]…

LGC: Thank you very much.

Witnesses Tim Hardy and Anthony Abrahams

Second Oral Session - 15th September, 13.00 to 16.00

Committee members present

Lord Cromwell (LGC) - Chair
John Howell (JH)
Chris Wilford (CW)
Nikki Turner (NT)

Cat MacLean (CM)
Tony Baron (TB)
Stephen Rosen (SR)
Lord Dyson (LJD)
Heather Buchanan (HB)

Witnesses: Tim Hardy (TH) and Anthony Abrahams (AA) 33:09 - 1:00:50

LGC: Next up we have Tim Hardy and Anthony Abrahams, who are... I don't know how you want to play this? Who is going to speak? Both from the Chartered Institute of Arbitrators… Over to you sir…

TH: Thank you very much. Let me just begin by introducing myself a little bit, very quickly. I'm Tim Hardy, I am a commercial litigator. In October this year I will have been practising litigation in the city for 40 years. And I am also an accredited mediator for CEDR. I've been mediating in cases for 20 years. I'm also a fellow of CIArb and its[unclear] scheme of international and domestic arbitrations so I have huge experience of civil disputes. And in the specific context of the work of the committee, I have been mediating disputes between SMEs and banks, particularly on questions [unclear] swaps litigation and I've got some stories I can tell you about that [unclear]. What I'm going to tell you about is the current work which I'm undertaking at CIArb, where I have been chairing the Practice and Standards Committee for 3 years. And I am currently working on a new set of rules, which we're calling the 'Cost Control Rules' which we consider are unique and are a very important development in arbitration. We are having those drafted. They're going to the Practice and Standards Committee for final vetting next week, they will then go out for consultation amongst the members of CIArb. After that they go before the management of the Board of Trustees and eventually hopefully will be promulgated in January next year. In doing this work, we have looked at how the Arbitration Institutions around the world have been addressing the issue of the costs of arbitration. Because as with civil litigation, arbitration can be just as costly, just as expensive. And all of the institutions, the leading institutions have been introducing expedited rules and procedures. We've looked at Australia, we've looked at Hong Kong, we've looked at the ICC, Sweden, Swiss rules, Singapore and Holland [unclear Hungary?] in particular. They all have different schemes. We are unique, save for one exception. We are unique in the new set of rules which we're putting forward because we are proposing that the fees of the arbitrator are capped at 5% of the sums in dispute and that the recoverable costs are capped at 15% of the sums in dispute. So I expect you can see the cost is going to be about 20% which the winning party will be able to recover from the losing party. Also the rules with regards the arbitrator is to deal with the whole process in no longer than 160 days, sorry 180 days. So it is a relatively quick and relatively cheap - inexpensive - next to the costs which would normally be incurred in an arbitration. One exception is that Kuala Lumpur has a scheme where they cap the recoverable costs at 50% of the sums in dispute. So when you hear 20% - it makes a big difference. It will automatically [unclear] on the present basis, capture any or all disputes where CIArb rules are incorporated into a contract where the value of the sums in dispute are below £2million. So it won't catch all disputes. Bigger disputes can be resolved in the usual way and typically

they are between parties who can afford to pay for the expensive route. But the smaller traders will automatically fall into this cost controlled and time-limited expedited regime. So I think it has got a lot to commend itself to SMEs. We're [unclear] that it will be well received although we haven't yet [unclear] the consultation and we don't know [unclear]. We have looked at this area [unclear] everybody else [unclear] trying to take the best of the practices which we looked at. And particularly we liked what the ICC did with their rules which they introduced in the beginning of this year, expedited rules. When they included advice which said well you don't need to have incorporated the expedited rules into your contract, all you need is the ICC rules and automatically, if the value of the case is less than $2million, then you'll fall into their expedited scheme. So they have an expedited scheme very similar to the CIArb scheme but it does not have the capacity for cost capping which we are seeking to introduce. So I think that is a really really significant development. And I think it's very timely. I was very pleased when I read Lord Jackson's latest report on costs and what to do about it. As you know he has been studying this whole issue for many many years and produced a huge number of reforms, but he has concluded in his latest report, and I read from it: "The only effective way to control costs for civil litigation is to do so in advance. That means either fixed recoverable costs or costs budgeted on a case by case basis." And we know from the cost budgeting regime which has been put in place in civil litigation and [unclear] … it is an incredibly time consuming aspect of litigation which, I'm afraid, just puts up the costs even more and results in a huge amount of satellite litigation.

So on genuinely controlling costs in civil litigation is where civil justice is going to go. It will take time to implement through pilots and trials and tests[unclear], but international arbitration - arbitration can be more fleet of foot, it doesn't need to go through quite the same processes in order to introduce the scheme. Of course we [unclear] the scheme once it's introduced and once we see what the take up is like, but at least we've got the [unclear] and let the market decide.

LGC: Thank you very much. I'm very happy to go with a question, but I'd rather somebody else did. Yes go ahead.

JH: I'm very pleased to hear what you said about costs. One of the things I've been very concerned about with the APPG for ADR has been the assumption that it's going to be cheaper. And actually when you work through an ADR process, it often doesn't work out to be cheaper. And I think we need some more evidence on that in order to show that. I also think that the point you made about being fleet of foot is very important. I think there has been a tendency so far to try and force ADR into being more formulaic rather than being more… more fleet of foot, to use your expression. And I can see why lawyers would want to make it more formulaic, because that's the culture that they come from. But I do think that there is a big cultural issue over the use of ADR and particularly with small and medium-sized enterprises that I think the work you're doing is going to tackle.

LGC: Do you want to respond to that? [indistinct talking and laughter]

TH: We have talked to the market obviously about this and I can say, generally speaking, it's been well received. There are some critics who say "well [unclear] lawyers are the gatekeepers of the contracts which need to incorporate these types of rules [unclear].

Lawyers won't like the idea of some cap on the costs. However, I believe the contrary to be the case, because I think lawyers actually generally do act in the best interests of their clients, that's why they are professionals, and will encourage their clients to use these rules, knowing that they will have a happier client.

LGC: Can I just ask you a question related to that? If you flip that around. If I'm a large financial institution. You are an SME up against me. I know what your budget is for your legal costs. I've got deep pockets and if I can smash you, I won't have to take on the other 12 who are waiting to have a go. So isn't that kind of giving me advance knowledge of when you're going to start spending your own hard earned cash and not having a chance of recovery?

TH: Well… yes [unclear] for sure. There is no doubt that large institutions, faced with litigation will manage that in a way that is to their advantage.[unclear] However, I do feel that transparency is a good thing. And I think, the civil Judges, and also the mediators are pretty good at spotting the misbehaviour by the banks, they really are. And they've got cost sanctions now which they can use to adverse consequence as well, and they're happy to do it. And I think that's a good part of our system. [unclear] The more that can be done in that respect, the better. Just in terms of the mediation [unclear]. In mediation I had a big bank and an SME in litigation coming up to trial and the big bank said, the lawyer said to me, the senior partner in the litigation said "Oh, your case is misconceived and we have no liability." And I had a meeting with them and I said "I'm very interested by the language you used there about the case being misconceived. I see what you mean, they've repeated their case incorrectly." And they said, "Yes, they have haven't they?" I said, "But the judge is going to spot that at the trial and he's going to point it out to them and say "But you just need to make some amendments and you'll be back on track", and they said, "Yes that may happen.." And I said "What do you mean? - not may happen, it will happen!" So you've got to approach the day on the basis that that amendment has taken place. I'm not going to go and tell them they need to amend. You've got to proceed on the basis that they will know and that you've got to face them and you've got to deal with the case you will face in court, not the case you're currently looking at [unclear]… But you need experienced mediators like Marion to be able to spot those things and have the authority to take the lawyers aside and you know point out these misconceptions. So I believe the mediation process can address some of these issues.

LGC: Thank you very much and I'm all for cost control by the way. But I was just running the scenario the other way around. I think you had a question?

SR: Yes I do. It's a [unclear - back?] one… When we talk about dispute resolution in this country we talk about an adversarial system. Has your institution thought about the arbitrator in the dispute you were just describing acting in…pursuant to an inquisitorial system as is common, of course, in civil jurisdictions?

TH: No we haven't. That is a step too far, I think, for the institution to take on. But the rules are actually designed to work internationally, in any context, so they're not linked in any way to any system of law. So they could be used in an inquisitorial legal system. But that's determined by the choice of the law of the parties in the dispute and I think if you were trying to sell this system to a bank, saying "Oh by the way we're [unclear]in the UK and we're

transferring from an adversarial system to an inquisitorial system, I think they'd back away pretty quick.

LJD: Could I just make one short statement and ask one question? The short statement is that, to pick up on this question of how the lawyers are likely to react to the subject of your fixed costs, I was very heavily involved in this report that Justice Jackson has produced and I've been trying to persuade the government to agree to fixed recoverable costs for smaller cases for about [unclear] year[s] but it was proving incredibly difficult. Eventually it was [unclear] who gave it the green light and the response of certain - I think both professions - but certainly the Bar has been enormously resistant, I'm afraid. Enormously resistant because they're fearful it's going to [unclear]… the profession. I don't think we should be under any illusions that this idea that lawyers will not act in their clients' best interests is… They will say they will, but I view that with a certain amount of scepticism. That is the statement… it's slightly controversial but it's based upon my own observation [unclear] … The question is [unclear]. As I understand it your proposal is that, your capping in your rules, - your capping of costs and all the rest of it - will… the idea is that the standard form contract will incorporate these rules into the arbitration clause?

TH: Well that's the regime [unclear]… was that the question?

LJD: The question is: Have you done any research to establish that the big boys, the banks and the big financial services providers will actually sign up to this, because it has got to get into a contract and the contract relies on both parties to agree. So it's all very well, sounds a very nice scheme on the face of it - I'm very interested to hear what you have to say - but it won't work unless it is taken up, not just occasionally but pretty well across the board for all these claims of up to £2million.

TH: Ok so if we just take a step back. So I came today to tell you about this to illustrate how arbitration can be more flexible and fleet of foot in terms of setting up a scheme and also address some of these issues like cost [unclear]. But also the Chartered Institute has in mind that this fleetness of foot can be used to introduce other schemes and it may be that it requires a statutory regime to be introduced which takes advantages of these types of aspects of arbitration. And I think Anthony can probably say some more about that…

AA: We've worked [unclear] on an international basis to look at this. We haven't specifically looked at the banks or the financial services in the UK but it is being looked by [unclear] community who actually endorse it and are quite excited by the prospect of getting this through. Because there are three things [unclear] that's all I can say. They want certainty. They don't want this going on forever [unclear] The financial directors are putting pressure on them. They want to know where they are. They want it at reasonable cost and at reasonable speed. Those three with cost control: arbitration - they get that and so at the moment [unclear - the mercantile?] community are behind this.

CM: I think my concern is that you say of course sensible businesses do want reasonable costs and reasonable speed. Stephen will probably share my scepticism about whether the banks actually want reasonable costs or reasonable speed, because I think we've seen instances where it is in their interests for the costs to escalate because the bank can afford to pay

those costs and their opponent can't. And it's also been in their interest to spin everything it out because the vast majority of the banks' opponents will give up and go away eventually and so [unclear] question which is I'd be very interested to know whether specifically financial institutions are on board because I take your point about the mercantile community generally. I can see what's in it for them but I'm not so sure about banks?

AA: I agree entirely [unclear]. If I can point to the Leveson inquiry and, if I may say so, the disasters to come out of that. Because on the one hand you've got the publishing industry [unclear] set it up, haven't they? On the other hand you've Impress - they're the only regulators...the only individual organisation that's meeting the regulatory framework and what happens? It's being judicially reviewed now [unclear]. And I think the banks [unclear - will act?] in the same way. So there are two things that need to happen. Either there has to be a regulatory framework which forces the banks [unclear] or there has to be so much social pressure on them that they cannot face the public with some of the things that they have done. Now the latter is rather harder than the former. At least I think within the regulatory framework [unclear] we can actually bring them to the table in a reasonable way. It is a pity that we don't have the concept of acting in good faith [unclear].

SR: Can I just say one very small point? It's about arbitration. It's in point, very much in point that I don't know if you're familiar with the ISDA Agreement, the International Swaps and Derivatives Association Agreement? Now that's always specified New York law, New York courts or English courts, English law and recently they introduced an alternative: arbitration. And the banks, who [unclear] first draft of this agreement, as I understand it, are against choosing arbitration and continue to choose English law, English courts. My guess is because they like the certainty of English courts and English law and the precedent that is established.

LGC: Thank you. Just one question for me [unclear]. There are some of these key things that keep coming up, you know, about compulsion, about… do you go to a legislative framework or do you rely on the banks wanting to maintain their good name? I think that ship may have sailed… The… what interests me is if you're trying to put on timelines and say "within this period you will get an outcome". In a situation where a bank may have hundreds of customers in a potential class action or many individual arbitrations, are you really going to be able to impose timelines that are realistic?

AA: No. You can't do that[?]. My background - I'm [unclear] of CIArb. I am a solicitor. I was in practice for 30 years. And during that 30 years I was on a [unclear] Committee of [unclear] in the first group litigation action [unclear]. So I have got some background in that. We also have background as an organisation in the Lloyds names case in particular. Looking at this sort of group estate[?], there are huge advantages within arbitration because you can actually build a consensual process. You can frame what you're going to do. If you identify enough strings you can then reduce the amount of the disputes / of the issues in dispute and you take those discrete issues one at a time so that you get a progression. So you can look at litigation and liabilities. The liabilities - first off, what are the issues of the liability? Take them away, arbitrate them or, as in the Lloyds case there were some judgements. That then sets the framework for how you then begin to assess the quantum. And again with the

quantum you will have generic strands which you can pick out so that you know each particular case for the individual claimants - what sort of evidence are they going to have to produce? If you take the swaps example, the banks have a choice. Do they say "ok the swaps should never have been sold" in which case you go straight into the quantum? If it's a [unclear] liability which they can abide by or they're forced to abide by the courts you then have the mechanisms in place - right we want three years of accounts before the swap was sold to you. What was the effect of having… What position were you in at the time? Would you have gone into insolvency anyway? In which case you go down a particular route. If you wouldn't then you go down a different route and then you get a valuation of the business. With arbitration you have panels of experts so each of those strands can be dealt with in a discrete fashion by a particular expert. So in group type of disputes arbitration is a very very good field. You can get [unclear], so these are the questions that need answering now lets go down that route, you also look at costs by saying ok you will get a percentage of the settlement or the ultimate reward [unclear]. You can never stop the biggest banks spending what they like on any sort of dispute. You just can't stop that. And that is going to be a fact of life. At least you can then focus the individual strands and the evidence you will need for each strand into something that an individual, or if you get enough of them to go together to one set of lawyers then, because of the group aspects of it, it becomes actually cheaper on an individual basis to come up with the [unclear].

LJD: Do I have time? [unclear] I've just noticed something in the pack that we have here. We are told that CIArb applies rules [unclear] disputes across [unclear]. These include the [unclear] and the Business Arbitration Scheme (BAS) which is a fixed fee scheme which will issue an award in under 3 months for low to medium value disputes (£5,000 to £100,000). So that's a different scheme to the one you're [unclear]?

AA: Correct.

LJD: And - interesting… I should have picked this up before. This Business Arbitration Scheme, is this up and running?

AA: Yes, it is.

LJD: And how has that been working?

AA: We are still… We've gone to the small business organisations to get it into their contracts. Until it's in their contracts [unclear] … launched last year. We have signed up a couple of the organisations on it and we would expect the disputes to come through in two or three years' time.

LGC: So it's very early days?

AA: Very early days.

CM: In relation to fixed costs, and costs being capped at 15% of the award, what would happen in the situation in which a claimant, who may be claiming against a bank and what was at issue is a personal guarantee, so that, if the claimant was successful, success is zero, because the personal guarantee, for example, is ripped up. How do costs work in that scenario?

TH: The value of the sums in dispute. The sum in dispute would be the liability of the personal guarantee. So you would have to measure it by reference to that liability. So [unclear] try to avoid that [unclear]. [Further unclear statements by TH / AA and CM]

LGC: If I can just finish with this piece with one observation which is, Lord Dyson made a good point about "well what are the other tools in the box?" Well I think that was my phrase. The tools that the banks have tended to go for is to set up an internal process with an 'independent' - who, if they're appointed by the banks nobody on the other end is going to ever believe is independent - person at the top of the process. And I think that is probably what you're up against, what you're trying to replace here, is an internal process that nobody is going to believe in, even if it's entirely honourable. With an external process, if it is transparent and it has these… a greater equality of arms, if you have better spread of representation on the panel of experts. So I think perhaps if we return to your question, that's where we're trying to take it, is outside of the castle walls within which the bank exists, into the public arena and to me that is the most compelling part of all this, is that, no matter how good the banks' internal process, if the transparency and belief isn't there, they might as well not have bothered.

AA: I say again - it's what happened in Leveson.

LGC: Yes, thank you.

Witness M Ali Akram

Second Oral Session - 15th September, 13.00 to 16.00

Committee members present
Lord Cromwell (LGC) - Chair
John Howell (JH)
Chris Wilford (CW)
Nikki Turner (NT)
Cat MacLean (CM)
Tony Baron (TB)
Stephen Rosen (SR)
Lord Dyson (LJD)
Heather Buchanan (HB)

Witness: M Ali Akram (2:08:12 - 2:49:57 session end)

LGC: Can I take the chance [unclear] to welcome Ali Akram. And I see that your part is entitled "Vision for the Future". So we're all looking to you with eager expectation. Over to you.

MAA: Before we get to the vision for the future, let me tell you a bit about myself. I run a boutique litigation firm in Middle Temple who comprise Barristers and Solicitors. And 88% of the work we do is based on financial services litigation, so suing banks for misconduct against customers. The firm was set up 8 years ago and in the last few financial years has been one of the fastest growing firms in the UK. And that's largely because of the misconduct of the banks…

LGC: I'm so sorry. I've asked them to shut up in the corridor, but I think they're having a party or something and it's very rude, but they are being rather rude back at us. Could I ask you to speak up a little bit?

MAA: Of course. So the firm has basically gone from strength to strength because of the past misconduct of banks [unclear].

So my basic vision for the future is a very simple concept: I would like to inject some honesty and responsibility into the banker/customer relationship. It seems to me that in this jurisdiction of England and Wales it's very hard for judges - or judges find it very hard - to inject a requirement for good faith into the commercial relationship between a bank and a customer, for example, or into any commercial relationship. So I think that at some statutory level, and it gets around this issue of is it fiduciary duty, for example, that we have with IFAs? It gets around this issue of advice as well and it's a very simple concept and there is some precedent to say that in English law we can have it. It's very rarely seen and in fact that is one of the major problems that we see in our litigation cases: precedent. The cases that have gone to court have been modelled and shaped by the banks. They're legally and financially sophisticated so they can overwhelm their opposition and what they do is pick off the good cases and settle them. We've brought more claims than all other firms in the UK combined and not one of the claims has ever gone to trial. So we've got two listed for October and November. Will they go to trial? We've had dozens and dozens listed in the past and not one ever went to trial. So what they do is, if a carefully constructed claim is put against them, they will settle it. If a badly managed and badly constructed set of pleadings faces them, they'll take advantage of that to create a precedent and to maintain tactical control and [unclear].

LGC: I've heard that from a number of practitioners [unclear]…

MAA: So something has to be done and it has to be as simple as possible so that it happens quickly. And I see injecting a duty of good faith as very important. It's very simple. They have to behave honestly, which everybody in society would expect banks to do that with their customers anyway. They have to behave responsibly. Again, something that society expects. And law is meant to be a reflection of society. So why can't we have that in English Law?

There have been 36,000 approximately - it might have been 38,000 - swaps, derivatives, caps, collars etc that were mis-sold that were pegged to interest rates. And the FCA

reported on that and said that in the cases they looked at there was mis-selling or misconduct in over 90% of cases. We've seen the same thing again in RBS and GRG. Now RBS were the biggest wrongdoer in relation to the swaps mis-selling scandal and, the way I look at it is in every derivative that was sold to an SME, almost every single case I've seen - probably all 38,000 of those cases - minus maybe less than 1% - they engaged in deliberate concealment, something that is akin to fraud. Because within the bank they have a process called 'Credit Limit Utilisation'. That means that they sell a product to the customer and they don't give them an honest and responsible set of information about that product. Internally they do a calculation called a potential future exposure calculation and that suggests what the possible financial risk of this product will be. How is it honest? How is it responsible not to give that figure - which could be £several hundred thousand or £several million - to the customer? The reason they don't give it is because, as soon as they give that figure, the customer will realise the risk that they're entering into and that will deter them from entering into a risky product and it's the risky products that make the biggest profits for the bank [unclear]…

LGC: How is that not captured - forgive me - by 'Treating your Customer Fairly'? How does that not capture that issue?

MAA: Well the problem is that there is no… COBs look at it as if they're two commercial parties.

LGC: …Yes, sorry.

MAA: And they're not necessarily treating each other honestly and fairly. What we should have is a system where it's statutory or it's implied that they will treat each other honestly and fairly. So the duty is from the customer to the bank, just as it is from the bank to the customer. And I think if we can inject that sort of duty and also have a forum where customers can have access to justice - because they don't have access to justice now.

Four or five years ago it cost a customer making a typical derivatives claim or misconduct claim against a bank £1670 to issue a claim form. So this is the cost of taking two sheets of A4 down to the court and getting the court to put a stamp on it and enter it into their system. That's all the court has to do. Nothing else. It was £1670. That was increased after a long time to £1920 and about 18 months ago it was increased to £10,000. So you have customers, SMEs, who are meant to be, you know, often described as the backbone of the economy, but they're not respected in that way by the law, who have now got to fund £10,000 in order to start litigation.

LJD: That's for a claim of £200,000.

MAA: For a claim of £200,000 or more. And the vast majority of these claims are well in excess of those figures. So that is a clear barrier to justice. It allows litigation funders, it allows CMCs, it allows people to take advantage of these victims, because what they… what happens... I mean, for example, there is a case that is in the public domain that settled - Hockin - and that is a GRG misconduct claim. And it's understood that it settled for quite a large sum but that the majority of that money went to a litigation funder. And it's because of the banks like RBS and Barclays will delay cases. They will engage in dilatory litigation conduct with a view to starving out their opponents, forcing them to give up their claims or

to settle them at very low cost. They have panel solicitors who charge a fraction of the real cost to the bank - because it is a very competitive environment and they have panels. The barristers will not do that for those banks. And so the costs really only hit the bank when it comes to the trial phase. So they can take advantage of that situation, whereas the claimant, who has one claim probably in their entire lifetime will not get any of those financial advantages that the banks have got. So it's a very unfair system for SMEs taking on major banks. It's a very difficult system for them and something needs to be done, not just from a legal perspective but a tribunal itself because… you know… arbitration: fantastic… mediation: fantastic… but only reason the banks will get into bed with these concepts is if you give them a push; if you force them into that concept. And therefore a financial services tribunal which is open, which is just, where decisions are published, where there is routine guidance given, and the costs are met by the state - that is the real future to resolve these problems.

LGC: That's rather depressing but… very interesting. If I can just ask you… the point made earlier by one of the witnesses about you have to be careful you don't make it too easy for SMEs to litigate. How do you respond to that… in this… with your suggestion? And the other point which I noted when you were speaking is what response have you - you haven't had this idea this afternoon, you've been out talking to people about it - what sort of feedback have you had about it? "I don't know why we haven't done this before, it's so easy we could all sign up for it" or "Ooh no, we're never going to get that…" Can you give us a flavour? I love the idea but what has been the environment in which you've found yourself?

MAA: Well I speak on behalf of my clients, so the 350 to 400 SMEs that we've met and represented over the last 5 or 6 years. And there is not one of them who wouldn't want the option of a much less costly process. We had a look at cost capping earlier and a figure of 20% was mentioned. And on a £1million claim it was suggested that that would be £200,000. Well actually it's £400,000 because there is an adverse cost risk as well. So obviously that's subject to the tribunal rules but in a court system you would have to have [unclear] so all our customers almost universally would… and even, you know, we represent… our biggest claim is a client which has a land bank approaching £1billion and has a very substantial claim against a major bank. And even they would welcome this. Just because an individual may be very very successful… the level of success, the level of financial value…

LGC: Forgive me… Of course your clients would like it, but have you had any discussions with people who are at the other end of that pipeline? And is there any kind of indication that they would buy it or are they going to block you all the way? I think I know the answer, but I want…

MAA: I'm not really concerned about the views of the banks and their advisers. I've worked for banks. I've worked in house at Goldman Sachs, ING Barings and [unclear] banks so… Obviously their views are in the financial interests of the organisations they work for or represent and my views are for the clients that I represent.

LGC: Alright. We have two questions. You sir, and you. Is yours particularly germane [unclear]?

CM: [unclear] It is germane to the good faith point.

LGC: Are you happy? If you go first… [unclear]

CM: I want to make sort of quite a small statement and then ask a question on the back of the statement.

We, some years ago, ran an argument that the bank in these particular circumstances… in the particular circumstances they were under a duty of good faith. And we..you know[unclear] … Of course they were very dismissive in response, they weren't very interested and eventually it went to [unclear] . [unclear] to strike out, but not quite.

The bank sent the trainee solicitor from the external firm day 1 of this debate and the Sheriff was very interested in our arguments. Day 2 we had the deputy head of the legal department of this particular bank and [unclear] at the debate. And day 3 we had legal people [unclear]… So we were making significant headway and we did resolve that case so we never actually got the chance to get our decision and clearly what the bank had been thinking was, no chance of getting a decision moved towards [unclear].
Have you ever tried to run that argument in any of your cases? And have you been able to make any headway with it?

MAA: We've had a very similar experienced to you except that when we run these arguments in pleadings, our pleadings never actually end up before a judge and in that sense they've been [unclear]. Anyone can apply to the court records and obtain those pleadings but they're very much in legal language and the general public are not going to understand what's gone on, but it is gaming. This is how the banks' legal teams, in which I've worked, this is how they operate. They need to be pressured… There's lots of ways to pressure them, but the way that you're talking about is one aspect of that arsenal that has to be deployed against them. And it is unfortunate and it is a by-product of our legal system that when you deploy these tactics that is what is likely to result in a settlement. The bank has a huge sum of money with which to pay good claims against it. And if it's worried that this claim for £1million could result in a judgement if it goes wrong, which will affect a £1billion worth of underlying claims then clearly it will want to settle it at an early stage and so we've experienced that on multiple occasions.

CM: I suppose you've then got this tension between clearly you have to do what is in your client's best interest and it's in the client's best interest to go to mediate and resolve, but you then have this bigger issue that the argument that is runnable and probably winnable… has to be shelved.

MAA: Yes… that's absolutely right, our duty is … to the best interests of that client in that case and that's why we're so grateful to these APPGs for coming together and hopefully establishing a financial services tribunal.

LGC: That's a nice statement, thank you very much. Manu

MD: I have a question on your point about… again trying to bring a little bit of balance to this from the banks' perspective [unclear]. Where files exist and this comes down to disclosure and fairness, you talked about transparency, fairness and disclosure, three quite distinct ideas. Where a bank does proprietary analytics on a product or service it sells and says, "That's for my files. I have a risk position behind it" or "I have risk mitigation" or "It's something I've created. And because I have intellectual property and no competitor, I'm going to charge you a fortune for it. And by the way the risk analysis is mine." Banks do that. And they should do. That's how innovation occurs. That's how banks are run. So my question was: when you talked about transparency and fairness and sharing and disclosure. We have to draw lines between what is a proprietary business information set and what is a duty of disclosure in terms of a risk warning. It's not just [unclear] stuff that you've seen in 35 pages at the back of a prospectus that nobody ever reads that mean nothing, but proper disclosure of things that matter. So I'd like you to talk some more a little bit about that

MAA: Well to expand a bit on what I'm saying about honesty and responsibly and I think you're touching on credit limit utilisation as well. So it's not, the issue isn't that the banks have done proprietary analysis internally and that - they do this based on a Monte Carlo analysis, they work out [unclear] these derivatives. It's not the fact that they've done this analysis. It's the fact that they then attach the quantum of that analysis to the customers' creditworthiness. They use up the customer's property and assets. So when you got your mortgage from the bank you know how much you borrowed, you know how much is at risk, but the business customer who has been mis-sold a derivative - and all of them arguably, or almost all of them were arguably mis-sold derivatives, because they weren't given a proper break cost warning. So the bank will have determined the analysis, worked out how much credit to take up of this customer and normally the analysis was actually well how much equity has this customer got… and I mean how much assets have they got that we can utilise the credit limit of and then sell them the derivative to maximise that loss. And there were many banks, many derivative salespersons who worked in that way.

MD: If I understand you correctly, and this is getting a little technical and the inquiry may not be interested in this, is that that metric is used to work at the perimeter or boundary such that it causes just short of stress and therefore that ought to be disclosed because it's a duty you had. If I've got you… is that correct?

MAA: You're right, and let me just expand on that because the Conduct of Business rules, which already exist today, effectively say 5 things that banks, when they sell these products must sell them in a clear, fair and not misleading manner and must only sell a suitable and appropriate product. But they weren't selling them clearly; they didn't give the customer the quantum of the risk even though they calculated it and attached it to the customer's creditworthiness. It's obvious, isn't it?

MD: [unclear discussion] I apologise.

LGC: No not at all.

NT: [unclear] Do you think that as an alternative to a tribunal it would have more… equal effect if we just - because the tribunal will cost a fortune [unclear]. Would we not be better just reinstating legal aid and letting SMEs have their day in court?

MAA: I think that's quite ambitious [unclear]. Legal aid is very much in the past.

NT: [unclear] It just seems like in some cases a logical step [unclear] because a lot of these cases, if they were actually able to get to court [unclear] a lot of these cases would win if they went to court, therefore money would come back to the court. But they don't win because they can't get to the court in the first place. And as you say [unclear] most of the money goes to litigation funders [unclear] inequitable situation really for such strong claims.

MAA: All good claims against banks that would definitely win will always be settled, so by win, I assume you mean settled?

NT: Settled, yes.

MAA: And we're so far gone from the days of legal aid. Legal aid was replaced in civil litigation by CFAs, by a form of no-win-no-fee, where ATE cover premiums were paid by the losing party, where success fees were paid by the losing party. Well, that was got rid of a couple of years ago. It's gone. And it's been replaced by damages based agreements which are incredibly unpopular and not workable on many cases. So, you know, to think we're going to go so many steps back to legal aid [unclear]. My personal view is that it's unrealistic and I agree with Manu that there's already a tribunal system in place and it appears possible that it wouldn't take that long to establish a Financial Services Tribunal.

LJD: Could I say something. Because I have a lot of experience on this about funding of litigation, civil litigation. And you're absolutely right. I'm afraid that it's totally totally unrealistic and I don't think we should be trying to assume a revival of legal aid. There's no support for it politically… anywhere as far as I can see. And the trend is all one way. Latest suggestion has been a CLAF. I don't want to go into what a CLAF is, but that's an alternative way of funding... There are all sorts of alternatives but the one thing that I'm afraid that is dead is our wonderful old Legal Aid scheme. So personally I don't think we should be spending time on that.

MAA: And I think, you know, I'm hopeful that one day there'll be no need for any financial services litigation lawyers on the claimants' side or on the defendants' side. But the levels of misconduct arising at the banks don't appear to be stopping any time soon.

LJD: Could I say something about this very interesting - very interesting to me anyway - question about the duties on banks and… I'm interested in your experience of running this… no it was your experience, running this argument… sorry, it your experience, running this argument and you thought you were getting a fair wind and then they settled. There is a problem here, that this… to extend the law, the common law in this way would be a big step to take and it could only be taken by the Supreme Court and the case would have to go all the way. That's expensive, time consuming and, in reality… it's been unreasonable to suppose that an SME could take the case to the Supreme Court, but I suppose you could

have… you could have a big corporate client who felt strongly about this who would be willing to take it to the Supreme Court. It's a bit of a long shot. The alternative is legislation but I mean that, you don't need me to tell the Chairman that legislating in an area like this, which is really the province of the common law and which has not been made by the Courts, by the Judges, I doubt very much whether Parliament would have great interest in this, but I don't know. So I think that to… to move the law in this way, however attractive and desirable it might be and it would seem on the face of it to me would be very attractive, I think it would be difficult.

MD: I beg to differ, and if I could explain why. Take the case of a tribunal, first instance. Quite low... low level - entry level. We often receive references from the Attorney General that come to us on points of law and we sit at the tribunal. It's a published decision. It sets out precedent, so it's behaviour changing. So with due respect sir I disagree that that's the only way you can have an approach towards certainty. It doesn't actually force certainty, which primary legislation would do. But a reference by the Attorney General - unsubtle one, you know, very clear. It's on a point of law. It goes to the Upper Chamber immediately. It's published within weeks and everybody knows it's behaviour changing. You do not even need to go to the High Court, never mind reach the Supreme Court, with due respect.

? Well that's very interesting.

MAA: Can I just ask about something else earlier in the debate. There was mention made that we're creating a new tribunal and there's already the chance to use the High Court in any [unclear]. But the reality is for claimants … I think a lot of claimant lawyers don't fully appreciate this, certainly in England and Wales, there is lots of option about the court to choose to issue the claim. Within the High Court itself, you can issue in the Mercantile Court or the Commercial Court , the Chancery Court and possibly even the Queen's Bench Division. So there is a choice of which court to use; that already exists. Add in the tribunal to this with a different costs regime. It just gives the user of the courts process and the tribunals process another option and there is nothing wrong with that.

And then to, the other question that the Chair posed - I'm sorry I failed to answer earlier - is about the… whether claimants would start to abuse the banks by bringing mass litigation against them. Now, you know, to bring a claim against a multi-billion pound corporation - most people never want to do that. Most customers never want to do that. And to think that they're going to be able to access rights and make employment claims willy nilly as has happened in the Employment Tribunal, by themselves is quite naïve. The reality is that it will cost them a lot of money to establish and pursue a claim against a bank, even if there is a carefully organised and structured cost system. And within that system you can… you know if there is any perceived risk of this happening to the banks then that can be taken care of in how the costs are structured for that system.

LGC: But I think, nevertheless, I think banks will advance the argument that this is leaving them open to abuse and they will point to whiplash claims in the insurance industry… and insurance businesses are a not small entities after all. Equally you get chancers in any system, you know. Not every SME is an angel and you will see people who will see an

economic opportunity here and… But does that mean you do nothing? Almost certainly not but… a lot of this is going to come back to balance.

CM: And of course the point is… that a tribunal system, if it is relatively cheap and cost effective, is not giving a green light to all claims…it's not saying well this automatically means that every claim against a bank is going to succeed. It's just levelling the playing field so it will allow the SME to advance, within a sensible period, a solid claim in a way that they can afford to.

LGC: Yes, the current solution is that most claims aren't going to succeed. Therefore it's rebalancing… Currently most claims don't even get that far.

CM: Well I think most claims don't get that far. So I think… it's very difficult to know whether, if you took away… if you stripped out the cost element, what percentage of claims against banks actually are… you know, have prospects of success. I think it's very hard to say.

LGC: Yes that's alright… I think you're right.

MD: On that point… I've just raised… I think it was me that said that, we ought to beware, not lowering the threshold and burden too far and I suggest that your point was addressing that and countering it. I would say, it's not that the SME necessarily, or calm corporate party as the counterparty to the bank that is going to do this. You do find, and don't we know it, that an ecosystem built up of law firms and intermediaries and litigation funders that see the lowering of that burden and try and find clients. Has your firm not been run with PPI mis-selling for the last ten years? My point is, what I'm saying is, we all as consumers have suffered from the ecosystem that builds up around, not the claimants' desire to litigate or to pursue, but the fact that they can make commission out of it…

LGC: Yes, ambulance chasing is part of [unclear] but…

NT: I don't think SMEs in general… I mean they have absolutely no wish to go to court. The banks love things going to court and it's their arena; it's where they are in charge, because whether or not you can afford lawyers or not, they can afford such a huge team and they can throw everything at you. I don't think there is any chance actually that you will get chancers [unclear] SMEs, because they don't even want to be there in the first place, they're only going to court because they've been put with their backs to the wall and once they've been put with their backs to the wall they've discovered that they've got no options …

LGC: I hear you. I think to pick up on your point, it would be interesting if there was a better system for cases to go through via the tribunal, to actually look at the data afterwards and see how many of these - actually it was just a mis-match in opinion between what the value of the company was or whatever - and who is proved to be right in any given case, you know, because we're all speculating here. It would be very interesting to know the outcome of that process.

CM: This takes us back to the evidence that we heard at the last session from Richard Samuel about the fact that when the Employment Tribunal was set up that was because there was

a complete lacuna in precedent and established case law, because employers were kind of gaming the system. And establishing the Employment Tribunal system allowed a much more balanced body of case law to build up. And this problem [?] that we've got at the moment which we're referring to is that banks will not allow cases that they're concerned about to run. So all of the cases which have actually gone to court on swap mis-selling or even with GRG, the ones that have actually run, you know, they're very unhelpful precedents and they're not representative, I don't think.

MAA; I agree with that and I would like to ask SMEAlliance: my estimate is that somewhere between 95 to close to 100% of potential claimants never start or initiate legal proceedings against financial services institutions. Do you find that in your experience?

NT: Well I'm afraid certainly 90%. And even though, you know, we managed to actually get bankers to jail in the HBOS Reading case. But Paul and I won't go again [unclear]. We're not going to take a claim against them. Why would we do that? Why would we go to into the bear pit again? Absolutely not.

MAA: So the reality is the claimants we feel, and certainly in my experience, are not exuberant litigants, they're very reluctant litigants, and not many of them actually ever litigate. The vast majority never litigates. So there is a huge number of victims out there who have zero access to justice.

MD: So we're seeing that the tip of the iceberg is what is visible and actually the problem lies much deeper. The notions of unfairness and transfer of wealth from the small and medium economy to the large banks and their shareholders is the bulk of the pyramid, the bulk of the iceberg.

LGC: Yes, that's a very compelling image.

MD: It is, isn't it?

LGC: If there are no - did you finish, have you finished what you wanted to say?

MAA: Yes, thank you.

LGC: If there are any further questions… and I'm conscious of the time and the sort of temperature and humidity in here. I'll try very briefly to pull a couple of thoughts together. But is there anybody else who feels they have got something to say that hasn't been aired yet? Going, going…gone!

It has been a very educative and interesting session, and thank you to our witnesses and to all those who participated in questioning and probing. I think there is an agreement that there clearly is a gap in the process that needs filling. There is also quite a ground swell of opinion that without compulsion to participate in it, it's not going to happen. The example I often give is seat belts. They're a very nice, efficient, constructive bit of kit. They expand, they contract to fit the individual; they're a very nice piece of design, if you think about it. And nobody used them, until it became the law and you were fined if your passenger wasn't wearing one. And then everybody wears them. My children would think it

astonishing now to get in the car and not to put on a seat belt, in the way that when I grew up, very few people put them on. And that's because there has been a legal compulsion.

Clearly what has come out with all the different bits of expertise we've had is that intense care is going to have to go into designing what this thing is; whether it's mediation, whether it's a tribunal, whether it's some sort of hybrid, how that whole thing is going to fit together and that is beyond my capacity to … comment on that. But clearly that is going to be a process. The tribunal model has been strongly presented to us. The other couple of key issues that have come out is: cost - Legal Aid would be lovely but I think the general view is it ain't gonna happen and maybe tribunals in a way… are a way to … not exactly slay that dragon but to help.

The final presentation of this whole issue about the duty of good faith, duty of care is… one of the greatest surprises to me getting involved in this area was that there isn't one. And I think most customers who signed up to these agreements over the years, assumed that the guy sitting across the table - forgive me pointing at you, but you're sitting across the table from me - is acting in good faith and in their best interests and probably giving them advice. When you find that none of those apply, you're into some very interesting territory, and how we rectify that, whether it's just an education piece or we make it the law… Probably there is a bit of both involved. But that… that's a huge elephant in the room, I think, in this whole area about relations between their clients and the banks themselves.

Those are some key points I've picked out. We've got a few minutes left. If anybody else wants to throw in any - for goodness sake why didn't we mention X? - or they've been sitting there burning to ask a question, now is your moment, otherwise I will draw proceedings to a close.

LJD: Could I just come back to one that I made about an hour ago about the role of mediation, ADR. Because you threw that into the pot, but I do think we need to be quite clear about the role of ADR. ADR is an alternative, it's an adjunct. I think what seems to have emerged… certainly [unclear] is yes there is a gap, that the most obvious way of filling it is with some kind of tribunal, which will have compulsion, to which complainants can have recourse and which will have the same powers as a court has. But the role of ADR in connection with claims which are brought to that tribunal is no different from the role of ADR in relation to ordinary High Court litigation or in relation to arbitration or anything else. It is a very very valuable part of the tool kit but I don't think we should regard it as being some sort of alternative to a tribunal to slot into that gap. That's how I see it anyway.

LGC: I think possibly there is a slightly semantic issue here, that what the starting point was: we need an alternative to what we've currently got and sort of ADR has that word in front of it so it kind of got adopted. And you know tribunal is possibly the alternative and is that ADR or isn't it? But I think it's a helpful clarification…

LJD: It's not an alternative.

LGC: No… exactly. But I think it's a helpful clarification, so thank you very much.

MAA: Can I just add to that that the way that the major banks deal with mediations, without prejudice meetings is very different. It's very dependent on the particular bank, their attitude to protecting their reputation, if they have one at all, and who their dispute resolution officers are. So, I mean I'm very happy to name banks here and I would say that Lloyds and HSBC treat mediations and treat WPMs fairly, and I would say that RBS and Barclays often do not. Often they will come to mediation and force the customer to spend £20,000 /£30,000 /£40,000 on all of the parties being present on his side for a whole day; mediator's fees, venues, perhaps a QC's fees, etc, etc, law firms' fees; so force them to spend that money, only to offer them nothing. And that's what they'll do during the course of the entire day. And there are two major banks that do that; one that does it as a matter of routine, RBS; and one that does it regularly, Barclays. So having ADR, having arbitration or having just confidential -or largely confidential - or having mediation as a solution, it just doesn't work at all. There really does need to be a tribunal to resolve this. And of course mediation and WPMs can play their role but you need a Financial Services Tribunal to help enforce the access to justice problem that exists.

LGC: Yes, and it's the enforcement aspect that is key in it. Last one, Manu. [unclear]

MD: [unclear]

LGC: It better be good then, hadn't it?

MD: The pressure is on! One of the questions that was posed to me, as a result of my paper, was, the notion of working around the contract - I think it was presented in that way. I found it a really disturbing question. Disputes turn on either breach of contract, or a tortious liability - it's the usual things that go wrong in everyday life, [unclear] in business. In the case of tortious liability we do need to set it out. We do need to have standards. Where do those standards emanate from? We can borrow them from similar or adjacent regimes where there are codes of conduct, we can allow the courts system from the days of the case brought of the contaminated bottle to slowly arise and then become part of everyday law. So there are many ways of dealing with the tortious aspect of it. In terms of contract law, playing with it is fools' gold. You do not want to tamper with that. It's a perfectly elegant, well run system. Whether a tribunal does it or whether some form of modified CIR, Chartered Institute system does it, has to be determined. The easier route is to let the courts or a tribunal apply English law, apply the law of contract.

LGC: I think there is a misunderstanding here, if I understand your point correctly. It's not a question of messing with contract law. It is saying that there could be a review of the kind of contracts that are put down in front of clients and saying, "Ok in 1850 that clause might have been a fair thing to do, but just as there were lots of things we did in 1850 which were legal then aren't legal now, maybe those clauses should be now prohibited in lending contracts." I think that's more the tone of it.

MD: I believe that is dangerous too. And the reason I believe that is that you have no innovation impossible unless you have willing buyer / willing seller negotiate. And it is the inequality of bargaining power, that's what we're talking about in that. So you can only

deal with that, not by telling them what they can't …in… freedom of breach of contract is essential. You can't play with that. What you've got… you can't say [unclear] to supply that in a willing buyer / willing seller contract. It's very difficult to do and it is fools' gold if you do that, in my opinion.

LGC: I think we could have a cup of tea and discuss it [laughter]. Because the example I always give is that we could have a contract for you to kill me but it still wouldn't be legal. And on that cheerful note… [laughter]... Thank you very much again, ladies and gentlemen, and I hope you've found this as interesting and stimulating as I have. Thank you again, very much, it has been enormously helpful and I hope, you know this is a long old process, but there will I hope be good to come out of it, thank you again.