Access to Financial Justice: Three Financial Services Conduct Scandals, and a Proposal for Reform

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Abstract

The UK's access to justice issues means that individual and small and medium-sized business (SME) customers struggle to obtain redress for banking sector misconduct through litigation. Regulatory protections promoted by the Financial Conduct Authority (FCA) are effective for straightforward complaints but not for more complex ones. The payment protection insurance, interest rate hedging product and Royal Bank of Scotland's Global Restructuring Group scandals evidence this. A proposal to establish specialist financial services tribunals to determine consumer claims against banks can provide a solution to this problem.

Overview

This article is concerned with access to justice in financial services disputes.[1] It analyses the handling of three financial services conduct scandals to assess the barriers that users face when pursuing financial services claims. It then considers a proposal for the reform of financial services disputes by way of the establishment of a specialist financial services tribunal. This was put forward by Richard Samuel[2] in the *Capital Markets Law Journal*,[3] presented to the All Party Parliamentary Group for Fair Business Banking[4] and recently debated in parliament, which passed a resolution calling for (inter alia) the: "… rapid establishment of a tribunal system to deal effectively with financial disputes involving SMEs".[5]

Access to financial justice is an important issue for two reasons. The first is that the English civil justice system suffers from an access to justice problem. The Lord Chief Justice's 2017 report repeated concerns he has raised previously, stating: "We continue to highlight the importance of reform and how essential it is for there to be access to justice."[6] That concern reflects increases in court fees and the rising costs of solicitors, barristers and experts, whom parties need to pay to obtain fair representation in an adversarial legal system. These costs are frequently unaffordable for litigants in absolute terms and/or disproportionate to the sums in dispute.

The second is that the UK financial services sector suffers from conduct problems which affect individual consumers and SMEs. That can be evidenced by the actions taken by the FCA in relation to financial products mis-sold by financial institutions. One example is the mis-selling of payment protection insurance (PPI). According to the FCA, banks have handled over 12.5 million PPI consumer complaints and paid approximately £20 billion in compensation.[7] Another is the mis-selling of interest rate hedging products (IRHPs). According to the FCA, banks have reviewed around 30,000 potentially mis-sold IRHPs and paid £2.2 billion in compensation.[8] A further example is the conduct of the Global Restructuring Group (GRG) of Royal Bank of Scotland Plc (RBS). A report prepared in 2013 by Lawrence Tomlinson,[9] the Entrepreneur in Residence at the Department for Business, Innovation and Skills, suggested there were occasions when RBS had engineered businesses into default in order to move them out of local management and into GRG.

It is therefore widely acknowledged that individuals and SMEs in the UK suffer from both an access to justice problem and also from a financial services sector conduct problem. By way of background, the second section of this article sets out the current regulatory and legal framework protecting our financial services consumers. This article then analyses, with reference to the PPI, IRHPs and GRG scandals mentioned above, the extent to which access to justice and effective redress for consumers have been achieved within that framework. Finally, the article considers the merits of the financial services tribunal proposal. This includes an analysis of

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[1] This article arises out of lectures given by Mr Beale and others at a seminar chaired by Professor Iris Chiu and organised by the UCL Centre for Ethics & Law on 27 September 2016 entitled "Change in Financial Sector Conduct?".

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[3] R. Samuel, "Tools for Changing Banking Culture: FCA Are You Listening? Why the FCA's IRHP Mass Dispute Resolution System Has Failed and What the FCA Can Do About It" (2016) 11(2) CMLJ 129–144; R. Samuel, "Tools for Culture Change: FCA, Now Are You Listening! Time to Build an Independent, Low Cost Forum for Conduct Dispute Resolution" (2016) 12(3) CMLJ 277–298; and R. Samuel, "The FCA Has Now Listened: Banks, It Is in Your Interests to Listen Too" (2018) 13(1) CMLJ 3–25.

[4] Including on 25 May 2016.

[5] "RBS Global Restructuring Group and SMEs", *Hansard*, HC Vol.634, col.1082 (18 January 2018).

[6] Judiciary of England and Wales, *The Lord Chief Justice's Report 2017* (2017), Introduction, p.5.

[7] FCA, *Rules and guidance on payment protection insurance complaints*, CP15/39 (26 November 2015) available at: *https://www.fca.org.uk/publications/consultation-papers/cp15-39-rules-and-guidance-payment-protection-insurance-complaints* [Accessed 26 February 2018].

[8] FCA, "Interest rate hedging products (IRHP)" (updated 4 November 2016) available at: *https://www.fca.org.uk/consumers/interest-rate-hedging-products* [Accessed 26 February 2018].

[9] L. Tomlinson, *Banks' Lending Practices: Treatment of Businesses in distress* (25 November 2013).

its key features and a consideration of the extent to which such a tribunal would have improved the handling of the PPI, IRHPs and GRG scandals.

Regulatory and legal framework

Regulatory framework

The primary rights protecting consumers in the financial services sector are set out in the Financial Services and Markets Act 2000 (FSMA). Pursuant to the Financial Services Act 2012, the primary regulator of conduct in the retail financial services market is the FCA.[10] One of the FCA's roles is to protect consumers by enforcing those rights. Part 9A of the FSMA provides for the FCA to issue rules and guidance for persons authorised under the FSMA. This is achieved via the *FCA Handbook* (the Handbook).

The FSMA also governs how complaints of breaches of those rules should be handled. The Handbook contains, among other things, rules and guidance on how banks should deal promptly and fairly with complaints.[11] In addition, Pt 16 of the FSMA provides for the establishment of an adjudication scheme for the resolution of certain disputes "quickly and with minimum formality by an independent person".[12]

This scheme has been established as the Financial Ombudsman Service (FOS). If a consumer is not satisfied by the reaction of a bank to a complaint, then they can refer the complaint to the FOS for determination. It will be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case.[13] If the consumer accepts the ombudsman's final decision, it becomes legally binding. However, if the consumer does not accept it (and they have no obligation to do so, for example, if the ombudsman does not uphold the complaint) then the consumer is free to go to court.

In addition, the FSMA provides for mass consumer complaints to be addressed by the FCA and the banks that it regulates. Part 16A of the FSMA provides that consumer bodies can make "super complaints" to the FCA in order to alert the FCA to a feature of a market which is significantly damaging the interests of consumers.[14] Part 28 of the FSMA provides that the FCA may impose consumer redress schemes upon banks where there appears to have been a widespread or regular failure to comply with their regulator obligations.[15] Banks may be required to investigate the failing, whether or not that failing caused loss, determine the appropriate redress and make that redress. Those schemes may be supervised by a "skilled person" pursuant to s.166 of the FSMA.

Legal framework

Consumers, as well as having the right to submit complaints directly to their banks, to the FOS and to benefit from consumer redress schemes as offered by their banks, have the right to enforce their rights at law.

Those rights include statutory and common law rights. The statutory rights include claims for breach of the FMSA and the Handbook. For example, the Handbook provides that a firm must act honestly, fairly and professionally in accordance with the best interests of its client.[16] These rights may be enforced directly by certain persons pursuant to s.138D of the FSMA,[17] which provides that a "'private person" may bring an action for breach of an FCA rule by an authorised person. Additional protection is found in the Consumer Credit Act 1974, which gives the court the power to provide various forms of redress where a relationship between a creditor and a debtor in respect of a credit agreement is unfair.[18]

Alongside a consumer's statutory rights, he or she will have protection at common law. Typical causes of action in mis-selling claims include misrepresentation and breach of duties to advise.

There is a connection between statutory and common law rights. It may be that the FCA rules are incorporated by reference into the contract and so breach of the rules gives rise to a common law breach of contract claim. Also, whilst it was held in *Green v RBS*[19] that the existence of statutory duties under the FSMA does not in itself give rise to parallel common law duties, it may be that the duty under the FMSA is relevant to the scope of a freestanding common law duty, for example, in relation to the giving of advice.

Financial services conduct scandals

Payment protection insurance

PPI covers loan repayments in the event of unforeseen problems, for example, if a borrower becomes ill or is made redundant. PPI policies were sold extensively by British high street banks. According to the FCA, approximately £44 billion of PPI has been sold since 1990, either as standalone products or, frequently, as part of a loan package.

Common complaints regarding the manner in which PPI was sold to consumers include it being sold:

[10] Replacing its predecessor the Financial Services Authority (FSA).
[11] *FCA Handbook*, DISP 1.1.1.
[12] FSMA s.225(1).
[13] FSMA s.228(1).
[14] FSMA s.234C.
[15] FSMA s.404.
[16] *FCA Handbook*, COBS 2.1.1(1).
[17] Formerly s.150 of the FSMA.
[18] Consumer Credit Act 1974 s.140A.
[19] *Green v Royal Bank of Scotland Plc* [2013] EWCA Civ 1197; [2014] Bus. L.R. 168; [2014] P.N.L.R. 6.

- in a way that lacked transparency, including customers being told that it was a compulsory element of a loan, or indeed not told about it at all;
- to customers who would not be able to claim under it, including people who were retired, self-employed or had pre-existing medical conditions, and who were unable to claim under the policy's terms; and
- on terms that did not suit the borrower's circumstances, including where the term of the policy did not match the term of the loan, or where a couple jointly borrowed but the policy was only in one borrower's name.[20]

It is reported that the first ever PPI court case was the 1993 judgment, *Price v TSB Bank*[21] and that, because of a post judgment settlement, the decision was subject to a 10-year confidentiality clause, after which it was released to Citizens Advice.[22] In any event, in 2005, after an increasing number of complaints and press attention, the consumer body Citizens Advice submitted a "super-complaint" to the Office of Fair Trading (OFT) (as it then was) in September 2005 pursuant to s.11 of the Enterprise Act 2002.[23]

This led to investigations by the regulators and compensation payments by banks. In August 2010, the Financial Services Authority (FSA) proposed a package of measures that would lead firms to handle PPI complaints more fairly and consistently.[24] The British Bankers Association sought to challenge those measures via a judicial review process, which failed in court.[25]

That in turn led to the vast numbers of complaints referred to above. Because banks are no longer selling PPI in the same way, it was thought a few years ago that PPI claims might have tailed off by now. However, in November 2014, the Supreme Court ruled in *Plevin v Paragon*[26] that a failure to disclose to a client a large commission payment on a single premium PPI policy made the relationship between a lender and the borrower unfair under s.140A of the Consumer Credit Act 1974.

That was seen to open the door to additional complaints. As a result, the FCA has imposed a deadline of 29 August 2019 as a cut-off for further PPI claims.

PPI complaints generally are processed as follows: first, the complaint is made to the bank which sold the PPI. If it is accepted, the customer receives a refund, generally calculated as the amount of the premium plus interest. If it is not accepted, the FOS is asked to adjudicate. It either upholds the complaint or rejects it. If it is upheld, the same compensation is paid. If it is rejected, then the customer is entitled to bring a court claim. However, in reality very few are brought.

The majority of complaints are brought by claims management companies.[27] These are businesses which advertise for customers and acquire lists of people who may have been mis-sold PPI, contact them and process the claims. They are not law firms and their claims handlers are not usually qualified lawyers. They do not need to be because the process is largely automated, with the claims handlers asking set questions, reviewing set documentation and following a flow chart to determine whether there is a claim, correspond with the bank and/or FOS to assert it and process the funds.

Conversely, few claims have been brought by law firms. A search for reported judgments identifies around 30 judgments handed down in claims for the mis-selling of PPI. Even allowing for the fact that many cases which are commenced never reach judgment and that it is not necessarily possible to make a comprehensive search of county court judgments, this is a very modest number of judgments given the volume of PPI complaints.

Interest rate hedging products

IRHPs are financial products which are intended to provide purchasers with protection from interest rate fluctuations. In particular, banks offered swaps to borrowers as a way of insulating them from the effect of future interest rate increases. These included swaps (where a variable rate would be replaced by a fixed rate), caps (where the interest rate would be subject to an upper limit) and collars (which provided upper and lower limits to the rates payable).

Limiting risk in this way was, in theory, a sensible concept. However, the way in which IRHPs were sold was thrown into the spotlight by economic events and in particular the dramatic drop in interest rates from over 4% to under 1% in 2008 and 2009, following the global economic crisis.

A result of the drop in interest rates was that borrowers with swaps ended up paying total charges, taking into account interest and IRHP charges, substantially in excess of market rates. This placed borrowers under severe financial pressure, in many cases this was exacerbated by the impact of the economic recession on their business generally.

Attention naturally fell on whether the IRHPs had been fairly sold by banks. It was found that, in many instances, IRHPs had not been fairly sold. Common issues included:

[20] To read more, see Which?, "Top five PPI mis-selling tactics" (10 May 2011) available at: *https://www.which.co.uk/news/2011/05/top-five-ppi-mis-selling-tactics-253105/* [Accessed 26 February 2018].
[21] *Price v TSB Bank Plc* Bristol CC 93/10771.
[22] PPI Advice Ltd, "PPI Court rulings" available at: *http://ppiadvice.uk.com/court-rulings-page/* [Accessed 26 February 2018].
[23] Citizens Advice, "Protection racket: CAB evidence on problems with payment protection insurance" (13 September 2005) available at: *https://www.citizensadvice.org.uk/about-us/policy/policy-research-topics/debt-and-money-policy-research/protection-racket/* [Accessed 26 February 2018].
[24] FSA, *The assessment and redress of Payment Protection Insurance Complaints*, Policy Statement 10/12 (August 2010).
[25] *R. (on the application of the British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin); [2011] Bus. L.R. 1531; [2011] A.C.D. 71.
[26] *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61; [2014] 1 W.L.R. 4222; [2014] Bus. L.R. 1257.
[27] According to the FOS' *Annual Review 2016/2017* (June 2017), p.63, 84.5% of PPI complaints were brought to the FOS by claims management companies, whereas only 2% used a lawyer or other professional.

- customers being required to enter IRHPs as a condition of obtaining or renewing a loan facility;
- the risks of IRHPs not being adequately explained, especially what would happen if interest rates fell and the costs to borrowers of terminating swaps early, including the level of breakage costs payable; and
- IRHPs being sold on terms that did not suit the borrower's circumstances, including where the term of IRHP did not match the term of the loan it was protecting.

Following a review of the selling of IRHPs by the FCA in 2012,[28] most of the major UK banks implemented voluntary redress schemes in relation to swaps. Some were mandated by the FCA pursuant to s.404 of the FSMA as referred to above. Most of them had an additional layer of protection, in that the FCA required the bank to appoint a "skilled person" pursuant to s.166 of the FSMA to oversee the process. Beyond that, a dissatisfied customer could appeal a ruling to the FOS and also had the right to purse its claim in court.

According to the FCA's figures as of September 2016,[29] around 30,000 IRHP complaints were received. Those were reviewable by the FCA where the customer was assessed as non-sophisticated. Around 20,000 received that assessment. Of those 20,000, around 15,000 were assessed as non-compliant, meaning that the customer was offered redress.[30]

It can be seen that IRHPs have many similarities with PPI. The nature of the mis-selling complaints were similar in both cases: both affected a large number of consumers and both were addressed via redress schemes operated by the banks and supervised by the FCA.

However, there were also important differences. PPI was sold to individuals whereas swaps were sold to individuals, SMEs and large businesses. Assessing liability for PPI, i.e. whether it was mis-sold, was straightforward based on the circumstances of the borrower and the terms of the policy. Conversely, liability in an IRHP case would typically depend on a number of factual and legal factors, including what information was provided to the borrower, the borrower's financial sophistication, whether the bank advised the customer and owed a duty of care and whether any limitations of liability applied.

Assessing quantum for PPI, i.e. the amount of compensation to be given, was also straightforward and usually simply the amount of the premium—likely to be a fairly modest sum in absolute terms. Conversely, in IRHP cases, banks usually take the position that the compensation due is the cost of the product actually sold less the cost of a product which was fairly sold. Meanwhile, because the costs of IRHPs were often high in absolute terms, in many cases the result of paying the higher charges had knock-on detrimental effects on the customer's business, generating substantial consequential loss claims.

Three results of these differences may be observed. First, the redress schemes for swaps have been much more contentious than the PPI scheme. Indeed, there was an application for judicial review of a decision by a s.166 of the FSMA skilled person, KPMG, appointed by Barclays Bank, to reject a customer's claim for consequential losses.[31]

Secondly, claims management companies have been much less successful in handling IRHPs than handling PPI. The handling of swaps complaints is not amenable to automation in the same way as PPI and, whilst some claims management companies are successfully operating, they are really doing so as quasi-law firms, staffed by a mixture of qualified lawyers and financial experts.

Thirdly, unlike in relation to PPI, litigation has featured fairly highly. Claimants have sought to pursue claims in the courts. Reported decisions have included *Titan v RBS*,[32] *Green v RBS*,[33] *Crestsign v National Westminster Bank*,[34] *Thornbridge v Barclays Bank*,[35] *WW Property v National Westminster Bank*,[36] *Elite Property v Barclays Bank*,[37] *Flex-E-Vouchers v RBS*,[38] *Property Alliance v RBS*[39] and *Orchard v National Westminster Bank*.[40]

In each of these judgments, the bank successfully defended the claim. However, anecdotally and in the author's experience, other cases have been settled by banks making substantial payments shortly before trial.

Global restructuring group

As mentioned above, the publication of Dr Tomlinson's report in late 2013 articulated serious concerns as to GRG's conduct. The central findings of Dr Tomlinson were that businesses suffered the following:

[28] FCA, "Interest rate hedging products (IRHP)" (2016).
[29] FCA, "Progress of sales through stages of the review as at 30 September 2016—All banks" (2016) available at: *https://www.fca.org.uk/publication/data/aggregate-progress-final.pdf* [Accessed 23 March 2018].
[30] FCA, "Interest rate hedging products (IRHP)" (2016).
[31] *R. ((on the application of Holmcroft Properties Ltd) v KPMG LLP* [2016] EWHC 323 (Admin); [2017] Bus. L.R. 932; [2016] A.C.D. 67.
[32] *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2010] EWHC 211 (Comm); [2010] 2 Lloyd's Rep. 92; [2012] 1 C.L.C. 191.
[33] *Green v RBS* [2013] EWCA Civ 1197.
[34] *Crestsign Ltd v National Westminster Bank Plc* [2014] EWHC 3043 (Ch).
[35] *Thornbridge Ltd v Barclays Bank Plc* [2015] EWHC 3430 (QB).
[36] *WW Property Investments Ltd v National Westminster Bank Plc* [2016] EWCA Civ 1142; [2017] 1 Lloyd's Rep. 87.
[37] *Elite Property Holdings Ltd v Barclays Bank Plc* [2016] EWHC 3294 (QB).
[38] *Flex-E-Vouchers Ltd v Royal Bank of Scotland* [2016] EWHC 2604 (QB).
[39] *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch).
[40] *Orchard (Developments) Holdings Plc v National Westminster Bank Plc* [2017] EWHC 2144 (QB).

- the bank artificially distressed an otherwise viable business and through their actions puts them on a journey towards administration, receivership and liquidation;
- once transferred into the business support division of the bank, the business is not supported in a manner consistent with good turnaround practice and this has a catalytic effect on the business' journey to insolvency; and
- insolvency process lacks fairness and accountability leading to financial implications and biased outcomes to the detriment of the business owner.[41]

Dr Tomlinson stated that, in the first stage of the process, RBS "engineered a default" on the part of a borrower in order to move the business in order to move it from its usual management into GRG. Dr Tomlinson identified mechanisms which RBS used to do this, such as including reassessment of loan to value, putting borrowers in breach of covenant, technical breaches of covenant such as late submission of information which have no bearing on the performance or viability of the business and remove or change to facilities. He quoted from an ex-employee whistleblower who described how businesses would be "offered to GRG", who would decide whether to take them based on the value that GRG winding up the business would generate for the bank.[42]

That led to a number of actions. RBS responded by instructing the law firm Clifford Chance LLP to conduct an independent review of the central allegations made by Dr Tomlinson. That review was published in April 2014.[43] It largely concluded that Dr Tomlinson's findings were not supported by the evidence reviewed. In particular, it was stated that no files were identified which fitted the description of the bank engineering a default or artificially distressing a customer.[44]

Also, in 2014, the FCA announced that it would commission a review of GRG's actions, appointing Promontory Financial Group and Mazars to conduct an independent skilled persons report under s.166 of the FSMA.[45] That review was originally to be concluded by the end of 2015. It was ultimately concluded in September 2016. The FCA published a high level summary in November 2016 followed by an interim summary in October 2017.

The FCA review found that the most serious allegations in Dr Tomlinson's report were not upheld. However, the review identified significant concerns about SME customer treatment by RBS and that SME customers believed very strongly that they did not receive the support they could have reasonably expected in a period of extreme financial stress for many SMEs.

In November 2016, RBS announced, with the agreement of the FCA, a GRG complaints process. It was overseen by a retired judge and included a refund of fees paid by SMEs. The actions of GRG, the delays in finishing and publishing the review and concerns as to the extent of redress provided by the complaints process, led to considerable media coverage of the matter, campaigns by non-for-profit groups such as Bully Banks and debates in parliament.

Litigation has also been underway. The only case to reach final judgment, which involved allegations of the mis-selling of IRHPs, the conduct of GRG and also London Inter-bank Offered Rate (LIBOR) related allegations, was *Property Alliance v RBS* in the High Court[46] and on appeal.[47] The claims made, including in relation to GRG, were dismissed. Another case also involving allegations that a borrower was improperly transferred to GRG is *Hocking v Royal Bank of Scotland Plc*. In late 2016, its trial was adjourned pending the *Property Alliance Group* trial.[48] A third involved a complaint against administrators appointed by RBS, which was struck out.[49]

However, those cases appear to be the extent of the reported judgments involving these allegations against GRG. Given that the reported scale of the problem, the fact that it how now been well publicised since 2013, some five years ago and the lack of any other viable route to obtain redress, it would be expected that more cases than these would have been pursued to trial. It is also observable that a number of action groups, such as the RBS GRG Business Action Group,[50] have threatened to commence group claims against RBS in relation to the matter, but have not actually done so.

The cause of this relative absence of litigation activity is likely to be a combination of the financial circumstances in which the claimants find themselves and the complexity of the factual and legal issues. As regards the former, borrowers put into GRG were either insolvent or in financial difficulties. Accordingly, it is reasonable to assume that these borrowers will have in many cases lacked the financial resource to commence litigation.

As regards the latter, a claim that RBS breached its obligation to a borrower by declaring a default under a loan facility by "engineering a default" is a relatively novel one, and less straightforward than the type of

[41] Tomlinson, *Banks' Lending Practices* (2013), s.3, p.5.
[42] Tomlinson, *Banks' Lending Practices* (2013), s.4, pp.5–6.
[43] RBS, "RBS responds to Clifford Chance report into allegation of systematic fraud" (17 April 2014) available at: *http://www.rbs.com/news/2014/04/clifford-chance-report-into-allegations-of-systematic-fraud.html* [26 February 2018].
[44] Tomlinson, *Banks' Lending Practices* (2013), p.11, para.2.14.
[45] FCA, "Update on independent review of Royal Bank of Scotland's treatment of business customers in financial difficulty" (17 January 2014) available at: *https://www.fca.org.uk/news/statements/update-independent-review-royal-bank-scotland%E2%80%99s-treatment-business-customers* [26 February 2018].
[46] *Property Alliance v RBS* [2016] EWHC 3342 (Ch).
[47] *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2018] EWCA Civ 355.
[48] *Hocking v Royal Bank of Scotland Plc* unreported 3 November 2016 per Asplin J.
[49] *Berntsen v Tait* [2015] EWCA Civ 1001.
[50] RBS GRG Business Action Group webpage available at: *http://www.rbs-grgbusinessactiongroup.org/* [26 February 2018].

mis-selling claims seen in PPI and IRHP complaints. A party is entitled to exercise a contractual discretion such as calling a default for its own benefit, providing it does so in good faith and neither arbitrarily nor capriciously.[51] Accordingly, the legal test is to show that RBS acted in bad faith. This is tantamount to fraud and so is highly dependent on obtaining internal documentation showing conduct of this gravity in relation to a particular borrower.

Conclusions as regards payment protection insurance, interest rate hedging products and Global Restructuring Group

These three financial services sector scandals can be seen to have a number of striking similarities, not least in the way in which customers are alleged to have been mis-sold and mistreated by banks.

They also have important differences. In terms of volume, PPI complaints numbered over 10 million, whereas IRHP complaints appear to have numbered around 30,000. No statistics are available for complaints about GRG and its equivalent within other banks, such as the Lloyds' Business Support Unit. However, given that the Clifford Chance review of GRG covered only 138 customers,[52] it is reasonable to suppose that the total numbers of customers affected by this type of conduct across all the banks will be much lower than the numbers affected by IRHPs.

In terms of complexity, whilst some PPI claims were litigated, the majority were processed via largely automated review processes, handled by individual customers or claims management companies on one side and banks and the FOS on the other, evidencing the fairly straightforward nature of the complaints. IRHPs complaints are substantially more complicated than PPI claims, demonstrated by the various High Court proceedings they have generated as referred to above. However, GRG related claims are more complex still, depending upon the application of novel legal principles and obtaining adverse disclosure from banks.

As a result of those differences, the scandals have been addressed with varying degrees of "success" from a consumer point of view. From that point of view, PPI has been a success. Consumer bodies and regulators engaged with the problem. Banks offered complaints procedures and the FOS offered an appeal process. Individual consumers were not required to become involved in expensive litigation but could either make complaints themselves, or instruct claims management companies to do so on a "no win, no fee" basis, without giving up excessive shares of the recoveries if the complaint was upheld (a typical claims management company fee being around 30% of the compensation obtained).[53]

Conversely, the way in which IRHPs have been handled has attracted a great deal of public criticism, including, for example, in the FCA debate in the House of Commons on 1 February 2016.[54] Nevertheless, in that case, the FCA has successfully implemented a scheme for redress for consumers. In the case of GRG, no such scheme has been established, leaving affected consumers with the prospect of having to bring litigation which, as explained above, is largely not possible. Indeed, this has been acknowledged by the FCA itself in its recent interim report stating:

> "the work highlighted a gap in support for smaller businesses with genuine grievances about business banking conduct issues that could benefit from impartial assessment and quick resolution".[55]

The conclusion that can be drawn from the above is that mass redress schemes work well for straightforward complaints, not for more complex ones. However, equally, it can be seen that the current litigation processes suffer from serious access to justice issues; claimants had limited success bringing IRHPs claims in court and were largely unable to pursue GRG claims in court. The result is that a modestly resourced customer (i.e. a typical individual or SME) with a meritorious but complex and modestly valued complaint against a bank will be in an invidious position, in having to incur considerable legal fees against an opponent with superior financial resources.

Finance services tribunals

Background

How can this problem be addressed? One proposal put forward by barrister Richard Samuel, which has already been considered by the All Party Parliamentary Group for Fair Business Banking and parliament, is for specialist financial services tribunals to be established to offer an alternative forum in which claims involving banks and consumers can be effectively litigated.

He put forward the proposal in a series of three articles published in the *Capital Markets Law Journal* between 2016 and 2018.[56] They have gathered considerable support, including from the FCA. His third article, published in January 2018, focussed on explaining the benefits to the financial services sector in adopting the proposal.

[51] *Socimer International Bank Ltd (In Liquidation) v Standard Chartered Bank London Ltd (No.2)* [2008] EWCA Civ 116; [2008] Bus. L.R. 1304; [2008] 1 Lloyd's Rep. 558 and *British Telecommunications Plc v Telefónica O2 UK Ltd* [2014] UKSC 42; [2014] Bus. L.R. 765; *Times*, 24 July 2014.
[52] Clifford Chance LLP, "Independent Review of the Central Allegation Made by Dr Lawrence Tomlinson in Banks' Lending Practices: Treatment of Businesses in Distress" (11 April 2014).
[53] MoneySavingExpert.com, "Is it worth using a PPI claims company?—10 things you need to know" (27 April 2012) available at: *http://blog.moneysavingexpert.com/2012/04/27/is-it-worth-using-a-ppi-claims-company-10-things-you-need-to-know/* [26 February 2018].
[54] "Financial Conduct Authority", *Hansard*, HC Vol.605, col.710 (1 February 2016).
[55] FCA, *Interim Summary: A report on an independent review of Royal Bank of Scotland Group's treatment of small and medium-sized enterprise customers referred to the Global Restructuring Group* (October 2017).
[56] Samuel, "Tools for Changing Banking Culture" (2016) 11(2) CMLJ 129–144; Samuel, "Tools for Culture Change" (2016) 12(3) CMLJ 277–298; and Samuel, "The FCA Has Now Listened" (2018) 13(1) CMLJ 3–25.

The genesis of the proposal is to compare today's financial services culture with the workplace culture of the 1960s. He explained how, from the mid-1960s onwards, specialist employment tribunals had been established which gave individual employees an effective way to enforce their rights against employers, that the number of reported employment tribunal judgments gave rise to a body of case law in support of those rights and that this in turn was a factor in a change in the workplace culture generally.

Mr Samuel's article pointed to three reasons why employment tribunals offered effective recourse for employees when the general courts did not. First, the costs-free regime, differentiating it from the general courts where the principle is that that loser pays the costs of the winner. This, he said, enabled employees to risk proceedings when otherwise they would not have done. Secondly, specialisation, having specialist employment lawyers chair the tribunals alongside wing members from the business and labour communities. Thirdly, the process having both inquisitorial and adversarial elements, meaning that employees still obtained their "day in court", but, especially when unrepresented, would benefit from the tribunal making its own inquiries so as to arrive at the right result, rather than relying solely on each party's submissions.

Mr Samuel proposes financial service tribunals modelled closely on employment tribunals, and including those three key features, in order to benefit from those same advantages. However, will those three features be sufficient to deliver effective access to justice in financial disputes of the types discussed above?

Costs-free regime

The general rule of English civil litigation is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order.[57]

This general rule would seem, at first blush, to favour a better rather than a worse funded opponent. This is because it enables a meritorious claimant with limited resources ultimately to recover not only its substantive damages, but also its legal costs, from a well-funded defendant.

However, it is generally accepted that, in fact, this principle, often described as costs shifting, discourages impecunious claimants from litigation. As Briggs LJ has stated: "a recoverable costs regime is, on its own, by no means a clear promoter of access to justice".[58]

Briggs LJ identified two reasons for this. First, the risk of having to pay the defendant's costs discourages claimants from pursuing claims. That is particularly the case where an SME brings, for example, an IRHP or a GRG related claim. A claimant will have a degree of control over its own costs. This is not absolute control because, unless it is able to negotiate a fixed fee with its lawyers at the outset (which is rarely offered), the claimant may face a choice between paying more to its lawyers or having them cease to act. However, the claimant does have control in the sense that it can decide how to run the case, and so limit costs, and ultimately act as a litigant-in-person or discontinue if its own costs become prohibitive. Conversely, a claimant has much less control over the defendant's costs, being limited only by the rules as to recoverability.

Secondly, the prospect of recovering costs from the other side can act as a driver to increase costs. Once legal costs become part of the damages sought, then it can make economic sense for a party to invest more in its own costs in the hope of maximising the prospects of recovery. Costs become the tail, wagging the dog.

Accordingly, there have been a number of significant inroads into the concept of costs shifting in recent years. In April 2013, the threshold for claims allocated to the small claim track was increased from claims under £5,000 to claims under £10,000.[59] Jackson LJ's report on civil litigation costs of 2009 proposed that recoverable costs for certain fast track cases (i.e. with claim values of up to £25,000) be fixed, stating: "The ideal is for costs to be fixed in the fast track for all types of claim."[60] Jackson LJ emphasised again the need for this in his supplemental report of 2017, identifying a general scheme of fixed recoverable costs as a primary way to control costs effectively and stating in relation to SMEs that:

> "It is essential that [SMEs] should have access to justice. The Federation of Small Businesses argues that there should be [a fixed recoverable costs] regime for commercial cases up to £250,000."[61]

Another proposal which went further than this was Leveson LJ's recommendation that a specialist arbitration scheme be set up to handle media claims, with the process held on a "cost free" basis.[62] Further variants are "one way costs shifting", where one party may be responsible for the other's costs but not vice versa, and "qualified one way cost shifting" (QOWCS), which is where one party may be able to recover costs but subject to a cap. QOWCS applies to personal injury and statutory fatal accident claims.[63] It is also worth noting that employment tribunals do not have a fully cost-free regime. The general rule is that the parties bear their own costs but, in exceptional circumstances, a costs award can be made against a losing party.[64]

[57] CPR Pt 44.2 (Court's discretion as to costs), P. Hurst, *Civil Costs*, 5th edn (London: Sweet & Maxwell, 2013), para.5–001.
[58] Briggs LJ, *Civil Courts Structure Review: Final Report* (July 2016), para.6.28.
[59] CPR PD 26, para.8.1(1)(a).
[60] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (December 2009), Executive Summary, para.2.9.
[61] Jackson LJ, *Review of Civil Litigation Costs: Supplemental Report: Fixed Recoverable Costs* (July 2017), Executive Summary, paras 2(i) and 10.
[62] Leveson LJ, *An Inquiry into the Culture, Practices and Ethics of The Press: Report* (November 2012), Pt J, para.6.10.
[63] CPR Pt 44.13 (Qualified one-way costs shifting: scope and interpretation).
[64] *Gee v Shell UK Ltd* [2002] EWCA Civ 1479; [2003] I.R.L.R. 82; (2002) 99(49) L.S.G. 19 at [22].

Should the proposed financial services tribunal be simply "cost-free" or have a more nuanced costs regime? The award of costs in exceptional circumstances has not prevented employment tribunals from providing an attractive forum for claims by employees and it would seem sensible that a financial services tribunal can sanction exceptional behaviour by either party. It may also make sense to introduce a fixed costs regime, perhaps with an element of QOWCS. It could be said to be fairer to successful claimants to be able to recover costs against banks, especially as banks will have no problem paying them. Equally, it could also be said that it is important for claimants to have some degree of costs risk themselves in order to discourage unmeritorious claims.

In the author's view, a regime which takes into account all of those factors, but still nevertheless has simple rules that avoid the need for detailed professional advice around costs required in multi-track litigation, can be devised.

Specialist tribunals

The second limb of the proposal is that the financial services tribunals be modelled on employment tribunals and so comprise a legally qualified chair with two further lay members. In employment tribunals, the lay members have traditionally been drawn from the two sides of the employment world, namely one from business and the other from labour. Mr Samuel comments:

> "This: balance of legal expertise and employment experience gives the system a sense of 'buy in' from society, and therefore, a sense of ownership by the practitioners, among whom there is the confidence to develop both the law and the culture."[65]

Mr Samuel suggests that this concept would transpose into financial service tribunals by having a lawyer with specialist financial services disputes expertise as chair. One of the benefits of employment tribunals was that they resulted in the development of a body of case law through solicitors and counsel becoming employment law specialists. There are already many judges, counsel and solicitors who specialise in financial services. There ought, therefore, to be a pool of practitioners with the requisite background to be appointed as tribunal chairs.

The shift of cases out of the county courts (and potentially divisions of the High Court) to specialist financial services tribunals ought therefore to ensure that cases are heard by a suitably qualified judge. Indeed, this would mirror the establishment of the Financial List, which is a specialist cross-jurisdictional list set up to address the particular business needs of parties litigating on high value financial matters.[66]

Alongside the chair, there would be two lay members. The transposition here would involve one member from the bank's side of the fence, i.e. from the financial services industry, and one from the consumer's side, i.e. from a small business background.

It should be noted that, in the employment context, there has been a move away from appointing lay members in all cases and many claims, including for unfair dismissal, may be heard by an employment judge alone.[67] Having said that, following a recent consultation, the government commented that

> "… non-legal members are a vital part of the Employment Tribunal judiciary, bringing unique skills and expertise to the Employment Tribunal system. Non-legal members provide a valuable contribution to the decision-making process in tribunals, helping to ensure that the panel is well informed, as well as providing an alternative, non-legal based viewpoint".[68]

It is submitted that lay members in financial services tribunals would serve two key purposes. First, given the public mistrust of financial services sector conduct and the hitherto available mechanisms for redress arising from the matters referred to above, having a lay member from the consumer side would be an important way to build public confidence in the system. Having a lay member from the bank side will provide balance. In addition, in some cases, it may be that the lay member from the financial services profession can provide specialist knowledge. To take the examples referred to above, such a member could provide input as to how IRHPs are structured or how banks' business restructuring units are commonly operated.

Inquisitorial approach

The third limb, having financial services tribunals adopt an inquisitorial approach, is perhaps best viewed as the adoption of a feature of tribunals generally rather than employment tribunals in particular. Whilst employment tribunals have a broad discretion to decide the procedure to be adopted, they are under no general duty to adopt an inquisitorial approach.[69]

However, it has been noted that whilst the Tribunals, Courts and Enforcement Act 2007 does not impose a specific model or approach, it has marked a general shift away from mirroring court litigation and towards procedural flexibility which can include the tribunal acting inquisitorially.[70]

This same movement can be observed in the court system. The expansion of the jurisdiction of the small claims track, which has a less formal and therefore more

[65] Samuel, "Tools for Changing Banking Culture" (2016) 11(2) CMLJ 129–144, 138.
[66] CPR Pt 63A (Financial List): pursuant to CPR 63A.1(2)(a), disputes must generally be valued at £50 million and over to be allocated to the Financial List.
[67] Employment Tribunals Act 1996 s.4(3).
[68] *Reforming the Employment Tribunal System: Government Response* (February 2017), para.76.
[69] *Joseph v Brighton & Sussex University Hospitals NHS Trust* EAT/0001/15/JOJ.
[70] R. Thomas, "From 'Adversarial v Inquisitorial' to 'Active, Enabling, and Investigative': Developments in UK Administrative Tribunals" in L. Jacobs and S. Baglay (eds), *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Surrey, UK: Ashgate, 2013), Ch.3, p.54.

inquisitorial approach, by the increase to the applicable financial thresholds, is one example of this. Another was a speech given by the Lord Chief Justice when he raised the possibility of courts adopting more inquisitional processes.[71] Leveson LJ made similar recommendations that tribunals appointed by his proposed arbitral body for the determination of media claims adopt an inquisitorial approach.[72]

However, merely mandating or allowing financial services tribunals to adopt an inquisitional approach will not be a panacea to the procedural problems that have affected the resolution of financial services claims in the past. As the Lord Chief Justice pointed out in his lecture,[73] on one level an inquisitorial approach can manifest itself simply in an interventionist approach to case management. The Lord Chief Justice commented, however, that it is more than that because: "the essence of the change would be a much greater degree of inquiry by the judge into the evidence being brought forward".[74]

It is difficult to disagree with that. However, the fact is that an inquisitorial approach will only yield results if the tribunal is presented with the appropriate evidence. In the author's view, this will necessitate increased case management. If the tribunal is to inquire into (i.e. in some cases positively suggest) what legal and factual issues need to be addressed, then there will need to be at least one pre-trial hearing at which the tribunal can give guidance on the relevant legal issues and explain the evidence that it requires each side to produce. That evidence is likely to have three main elements. First is documentary evidence. In financial services claims such as those arising out of IRHPs and GRG, the bank has typically had more documents, and so more onerous disclosure obligations, than the customer. The relevant documents can include both those specific to the transaction in question, and also those relating to systems and practices across the organisation. Disclosure will require careful management by tribunals to ensure that responsive searches are carried out by defendants but also that, especially in a cost free or fixed cost regime, defendants are not placed under undue pressure by the costs of disclosure and claimants are not permitted to embark on fishing expeditions.

The second is witness evidence. Tribunals will have greater freedom to direct parties as to who they want to hear evidence from and what this evidence should cover. Tribunals will also be able to question witnesses directly rather than relying on cross-examination. That ought to enable a more equal playing field and more focussed evidence than the usual adversarial procedure. However, it will be important that a more interventionist approach does not result in the perception that the tribunal is taking sides in the dispute.

Third is expert evidence. Here, there are important differences between employment and financial services disputes. The latter are more likely to require detailed technical expert evidence than the former, for example, around the effect of hedging and calculation of consequential damages in IRHP disputes. These are matters that a lay tribunal member who, although being an experienced financial services professional, may nevertheless be unable to meaningfully analyse; and certainly not on the hoof in the course of a hearing. However, an inquisitorial approach could result in a tribunal instructing their own expert, which can provide a significant costs saving as compared to each party instructing their own expert. The Civil Procedure Rules (CPR) have allowed for a "single joint expert" to be appointed for some time.[75] This occurs rarely in practice because of the reluctance of parties to lose control over the expert evidence. However, it would be a natural part of an inquisitorial approach and the parties ought to be reassured that an expert and proactive tribunal will manage the single expert appropriately, making party appointed experts (or "shadow experts") unnecessary.

Financial threshold

In the author's view, there is one further important element of the proposal which needs to be considered. This is the maximum financial value of claims which may be submitted to the new tribunal.

The current upper limit for FOS claims is £150,000. That has been identified as being too low to allow resolution of some claims by SMEs, for example, IRHP claims which involve consequential losses. Raising the threshold to £600,000 has been mentioned in a recent FCA consultation paper.[76] However, that would still leave a large distance not only between that and the lower limit of Financial List claims (£50 million) but, perhaps more pertinently, the lower limit of claims which can feasibly attract a package of third-party funding and adverse costs insurance, thereby allowing claimants to pursue them without having access to funding.

This lower limit is generally seen as around £5 million. Although new entrants to the expanding litigation funding market may drive this figure down, for funders and claimants each to make the necessary returns, this is likely to remain in the millions of pounds. Based on this, there is an argument that the claim value limit should be well in excess of £1 million, so as not to prevent SMEs pursuing these types of claims.

Having said that, banks may consider it unfair that they are locked into a costs-free regime for claims of this size. There may also be a concern that this will oust the jurisdiction of the court further than is desirable. This will therefore be a key issue to be decided upon.

[71] Lord Thomas, "Reshaping Justice", Speech delivered to the organisation "Justice" (3 March 2014).
[72] Leveson LJ, *An Inquiry into the Culture, Practices and Ethics of The Press* (2012), Pt L, para.22.
[73] Lord Thomas, "Reshaping Justice" (2014), para.29.
[74] Lord Thomas, "Reshaping Justice" (2014), para.29.
[75] CPR Pt 35.7 (Court's power to direct that evidence is to be given by a single joint expert).
[76] FCA, *Consultation on SME access to the Financial Ombudsman Service and Feedback to DP15/7: SMEs as Users of Financial Services*, CP18/3 (22 January 2018).

Discussion and conclusions

It can be seen from the above that the proposed financial services tribunal would meet a need which has been identified not only by bank customers but by the FCA. The proposal's key elements have much in common with current trends in dispute resolution.

One way to assess its likely efficacy is to consider whether the handling of the three conduct scandals referred to above would have been improved had financial services tribunals been established at the relevant times. As far as PPI is concerned, the process for handling PPI claims would most probably have not benefitted from the proposed tribunal. The claims, which were individually modestly valued and straightforward, have largely been brought by claims management companies and processed by banks.

However, the time which it has taken to resolve PPI claims generally has disadvantaged both consumers and banks. As noted above, it took from the first PPI judgment in 1993 to 2005 for Citizens Advice to raise its super-complaint to 2010 for the FSA to propose remedial actions by banks. These actions will continue until mid-2019. This timeframe of almost 30 years is undesirable as far as compensating individual consumers is concerned and must also cause problems for the financial services industry. Mr Samuel has identified that one of the benefits of an industry-specific tribunal is that it can assist in "culture building". Part of that would be bringing to light particular problems within the financial services sector. It can readily be imagined that if PPI claims, rather than being dealt with in county court cases up and down the country which are unlikely to be reported and may not attract the attention of regulators and the press, were instead funnelled into a specialist tribunal, they would have come to the attention of the FSA earlier than they in fact did. Accordingly, whilst a financial services tribunal would not have assisted with the resolution of the majority of PPI claims, it would have helped PPI to be identified as a problem in the first place.

As regards IRHP and GRG claims, a financial services tribunal would have provided SME claimants with greater access to justice. These are precisely the type of claimants for which the current court system is not fit for purpose. As noted above, if the tribunal had been set up, some claims might nevertheless have been too large to fall within whatever financial limit was imposed. However, claimants would then at least have a choice, for example, between using the tribunal but accepting that a proportion of their losses are unrecoverable, or instead going to court.

A tribunal would also, in the author's view, help to identify conduct problems and enable case law to be developed. This is because relevant claims would attract attention by being grouped together. The High Court judgments relating to IRHPs referred to above arose out of different divisions of the High Court in different locations. Having them channelled to a specialist tribunal ought to have allowed the type of legal issues which were resolved in *Green v RBS*[77] in the Court of Appeal in 2013 to have been addressed earlier.

As noted above, the tribunal proposal has gathered expressions of support in parliament and from the regulator. Mr Samuel's third article from earlier this year focussed on explaining why the tribunal would also be in the financial services industry's interest, notwithstanding the industry would be expected to fund it and that users from the industry could be seen to be in a worse strategic position than in court in relation to individual cases.[78] His core argument is that an effective dispute resolution platform will restore consumer confidence and so increase financial services business both from national and international customers.

It remains to be seen whether the industry buys in to this argument. It is undoubtedly the case that the tribunal could be expensive. Each tribunal will require three members to be paid. As noted above, an inquisitorial approach is likely to require more case management, which will further increase tribunal costs, by shifting them from the parties to the tribunal itself. However, this must be balanced against the very real problems facing individuals and SMEs in obtaining access to justice and the damage this has caused to public confidence in the financial services industry. The tribunal proposal is a bold but compelling idea to repair that confidence.

[77] *Green v RBS* [2013] EWCA Civ 1197.
[78] Samuel, "The FCA Has Now Listened" (2018) 13(1) CMLJ 3–25.