

Treasury Committee

Oral evidence: SME Finance, HC 805

Wednesday 16 May 2018

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Members present: Nicky Morgan (Chair); Charlie Elphicke; Stewart Hosie; Mr Alister Jack; John Mann.

Questions 159-206

Witnesses

I: Andrew Green QC, Blackstone Chambers, Cat MacLean, MBM Commercial, and Richard Samuel, 3 Hare Court Chambers.

Examination of witnesses

Witnesses: Andrew Green, Cat MacLean and Richard Samuel.

Q159 **Chair:** Thank you all very much. There is one familiar face and two others have joined for this panel as part of our SME finance inquiry about the possibility of a tribunal. I am going to ask the panel to introduce themselves, for the benefit of those watching.

Richard Samuel: Hello. I am Richard Samuel. I am a barrister at 3 Hare Court, with a background in employment and corporate disputes.

Andrew Green: I am Andrew Green, a barrister at Blackstone Chambers.

Cat MacLean: I am Cat MacLean. I am a solicitor with a firm in Scotland that is based in Edinburgh. We have been doing financial litigation on the borrower side for the past 10 years.

Q160 **Chair:** Thank you all very much for being here. Obviously there is considerable interest in this evidence session—both in the room and, as we know from other debates, outside. Ms MacLean, I want to start with you and consider the barriers that small businesses currently face when seeking to resolve disputes with their banks. This is a very broad question, but how significant a barrier is the imbalance in resources between a large bank and a small business?

Cat MacLean: It is absolutely huge and very often insuperable. For example, we had one quite high-profile and very long-running case—it lasted for eight and a half years altogether. Totting up the fees that were issued on our side alone—they come to over £600,000, and that is in Scotland, which is generally a cheaper jurisdiction than England. That is one thing if you have a reasonably large entity that is litigating against a bank, but if you have somebody who is essentially an individual—in business, but a very small SME—it is almost impossible.

Q161 **Chair:** Could you give us some other examples of behaviour that large entities—mainly banks, in this case—are able to take advantage of that reflect that imbalance?

Cat MacLean: For years I quoted to my clients a phrase that I thought was said by Winston Churchill, and then when I researched it, I found it was not Winston Churchill at all. It was some very obscure Roman writer who said: "Let him who desires peace prepare for war." What I mean by that is that I know that what those clients really want to do is just sit around a table and say, "Let's sort this out." Obviously, they would like to sort it out on one basis and perhaps the bank would like to sort it out on another, but really what they want is to say, "Let's have a discussion." That is almost always impossible. People who are embarking on trying to advance a claim against a bank need to understand that they have to be absolutely prepared, financially and emotionally, to take this right to the door of the court, and I mean literally the door of the court. It is not that financial institutions will never settle and never resolve, but generally



HOUSE OF COMMONS

speaking they like to try to play it out for as long as possible, in the hope that those individuals will give up—perhaps because they have run out of money and also because litigating for years and years is extraordinarily punishing.

Q162 **Chair:** I agree with that. How much banking misconduct and customer mistreatment is hidden behind out-of-court settlements and in the use of non-disclosure agreements? I am not asking you to quantify it, but in your professional experience, given the cases that you have handled—

Cat MacLean: I suppose, essentially, a fair amount, in that if a case is settled—a case will be settled because the bank thinks that ultimately there is a reasonable risk that they are going to lose and the adverse publicity is not what they want. And generally speaking, when cases are ultimately resolved at mediation or through a negotiation offline, it will be subject to a confidentiality agreement. It is almost never the case that the litigant is free to go away and talk about it.

Q163 **Chair:** The Committee has heard that banks typically retain large panels of lawyers, and a condition of being retained is that the firms must not take on any claims against the bank. Is that something that you recognise, and how difficult does that make it for SMEs to seek legal representation?

Cat MacLean: It absolutely happens and I can understand why it happens, because that bank may properly feel that if that firm is allowed to take on claims against them the firm of solicitors will inevitably have information and knowledge that could create potential conflict. So I can understand why it happens. The difficulty, however, particularly in a jurisdiction such as ours, which is exceptionally small, is that it is then very difficult for an SME to find a firm willing to take on a bank. With our very long-running case—the eight-and-a-half-year case—I think we were the fourth set of lawyers who were asked to deal with it. It so happened that we were not on a bank panel, and therefore we were able to. But it is very hard for SMEs to find a firm that is not on a bank panel or isn't hoping to be on a bank panel.

Q164 **Chair:** Presumably that is a consideration in taking on future work, because if the firm at some point decided in future to bid for panel work, are you aware that banks then say, "We might like to appoint you, but you are going to have to find new lawyers for the clients you are acting for against us"?

Cat MacLean: I do not have any specific knowledge or specific examples, but it undoubtedly is an issue, particularly if you have a very busy department over here, which does quite a lot of bank security work, for example. That litigation team is just not going to be permitted to take on claims against banks. So yes, it does happen.

Q165 **Chair:** All three of you might have a view on this. One of the other tools is disclosure, particularly of—you talked about barriers to justice—overwhelmingly large numbers of documents. I just wondered whether that was something you had encountered—Ms McLean, first, but Mr



HOUSE OF COMMONS

Green and Mr Samuel, if you have experience, as well.

Cat MacLean: You will definitely want to hear from both Andrew and Richard, because my experience will be very different from theirs, because in Scotland we do not have disclosure as you know it, which is a plus and a minus. It is possible to recover documentation from an organisation such as a bank, but effectively what we have is the equivalent of an order for specific disclosure; you have to be very specific about what you are looking for, so that you don't get deluged by vast quantities of documentation. That doesn't happen to us, but it is very difficult for us to recover documentation from banks. Our problems are perhaps different.

Richard Samuel: I have some experience of this. They are not unique to banking, because it is a general system that we are talking about: the courts and the obligation of disclosure in the courts. But I have sat in rooms with lawyers who work for large corporations, not banks, who have said very candidly, "Yes, we wouldn't do it if it didn't work."

Andrew Green: I don't have any particular experience of disclosure in the context of disputes between SMEs and banks. I am not sure that I have anything to add at this stage.

Q166 **Chair:** Broadly, are you aware of any other tactics or practices that large organisations—mainly banks, in the case we are looking at—will use in order to put themselves at an advantage compared with smaller, less resourceful claimants?

Richard Samuel: You have to bear in mind that when any organisation or individual is in litigation, the gloves are off. There are a set of rules that we, the public, set, or the Government set, and it is a bit unfair to say to the banks, "Do anything else other than play by the rules." It is not ADR; it is litigation—this is my little piece to the Committee. It is described as a primary dispute resolution forum, as in somewhere where the dispute is dealt with in public, and according to the law, which means that people's careers are on the line, or their businesses or their lives are on the line, in which case it is unfair to ask anyone to pull their punches. So you just have to be very vigilant that the rules that you create for them to play by actually create something as close as we can get to a level playing field. That is what is wrong, from my perspective, coming from an employment law background, with a generalist primary dispute resolution forum where you have got two parties with a vast—I don't think there can be a greater—imbalance of power between the two. That is what the tribunal systems do; that is what they are set up for.

Q167 **Chair:** So you say that the tribunal system is there to help create a more level playing field between parties of completely different sizes and resources.

Richard Samuel: Absolutely. If you look at anything—in an employment tribunal, the employer is more powerful than the employee. With landlord and tenant, it is landlord-tenant; if it is the state versus an individual, for example at an immigration tribunal or a tax tribunal, you have got one enormous organisation called the state against the individual. The point is



that the rules in a tribunal, and the culture that is built around those rules, have as a specific objective the flattening-out of the power imbalance that exists between the two parties, in order to give the weaker party proper access to justice. That is the perspective I approach it from.

Cat MacLean: One of the issues surrounding that is that the law, as it stands at the moment, tends to assume that the parties before it do not have that huge imbalance of power. These are two parties that both voluntarily contracted with one another and therefore the playing field was even. That is what the law and judges suppose, and of course the reality is very, very different.

Andrew Green: Now that Richard has raised this thorny issue of a new financial services tribunal, perhaps I can say something about it.

Q168 **Chair:** We are going to explore more generally, teasing out some of the details. I don't know if there is any sort of overarching point you want to make.

Andrew Green: I do have some overarching points. The important starting point is to recognise that we have a judicial system that is truly outstanding. And it is more than capable of resolving the sorts of disputes that we are talking about between SMEs and their bank. So there is absolutely no problem there. Indeed, the High Court can take disputes from £100,000.

Against that background, it seems to me that you need a pretty compelling reason to set up a new financial services tribunal, covering—I think Richard's suggestion is from £100,000 up to £2 million, or possibly even £3 million, £4 million or £5 million. So you need a compelling reason to do it.

The compelling reason—as I understand it, having read various articles by Richard and various other documents—is that there is a real problem that many SMEs simply can't access the court system and the principal reason for that—as I understand it, or as I understand the argument goes—is that it is because of the costs of doing so. And there are two aspects of that. First of all, there is the cost of instructing your own lawyers and then there is the costs rule, whereby if you lose you might have to pay the bank's costs. As I understand it, that is the compelling reason for having this new financial services tribunal.

Now, the "starter for 10" issues seem to me to be twofold. First, is there actually any compelling evidence that SMEs are being deprived of access to justice because of these cost concerns and, if so, to what extent is that the case? Then the second point is that if they are being deprived of access to justice by those cost concerns, would a financial services tribunal resolve the issue? Those are the two starting questions that you have got to ask. I will just address each of them very briefly.

The first question, in other words, is: are costs actually causing SMEs a problem, so they cannot access justice? I am not aware of any evidence to that effect, but as I understand it Simon Walker has now been instructed—



HOUSE OF COMMONS

I think that it was last week—by UK Finance to address precisely that issue. Hopefully he will be able to provide some evidence there, but unless he identifies that this is a real problem, I don't see any compelling evidence, or compelling justification, for even considering a financial services tribunal.

You then come to the second question: would a new financial services tribunal resolve the costs problem? At the moment, I don't really see how it would have a massive impact, because for financial services claims of between £150,000 and £2 million or £5 million by SMEs against their banks, you are generally talking about relatively complicated, sophisticated problems. They will need to instruct lawyers, and those lawyers will then be part of a process in which there will be pre-action disclosure, pleadings, disclosure, witness statements, expert reports and a trial. That will be very expensive, and it will be just as expensive as in the High Court. At the moment, I don't see how that helps.

You have then got the problem of the costs rule. I think Mr Samuel has suggested abolishing the costs rule, as is the case in the employment tribunal. However, it seems to me that there are several problems with that. First of all, it may well be that a lot of SMEs would actually like to be able to recover their costs from the losing party, on the assumption that the SME wins, so the abolition of the costs rule may not actually be a good idea from an SME perspective. The other point is that the costs rule is generally seen as an important aspect of fairness. Again, you need to consider that before simply abolishing it.

I am sorry; I know I am rambling on a bit, but I think these points are quite important to set the parameters of the debate. Another important point on costs and access to justice is that if SMEs are being deprived of access to justice because of costs, presumably the same is true of others, including consumers and other small businesses outside the financial services sphere. Are we going to create new tribunals for them? All of these questions need to be asked and answered before going down the financial services tribunal route.

Chair: That is very helpful. We will allow others to come back on those points. I think we will tease out some of those issues in other questions. I will hand over to Stewart, but if there is something at the end that we haven't covered, Mr Samuel, I promise that you can come back and tell us.

Q169 **Stewart Hosie:** We are going to carry on with this very subject, don't worry.

The all-party parliamentary group on fair business banking is of the view that a gap exists between the Financial Ombudsman Service and the High Court, and that a tribunal is needed to fill that gap—that is the shorthand version. UK Finance—a trade body for banking—told the Committee that it does not believe that the case for that has been established. Mr Green, you have laid out your scepticism and the questions as to whether that is necessary or would work. Mr Samuel and Ms MacLean, what are your



HOUSE OF COMMONS

views on the requirement for a tribunal as an alternative dispute resolution platform between the FOS and the courts? Do you support the creation of such a body?

Richard Samuel: I will, if I may, answer your question, Mr Hosie, with reference to what Mr Green said. His speech was designed to set the parameters of the debate, but I don't think he set the parameters of the debate accurately. We are not in a forum here where we have evidence before us in the sense that we do in a court. We proceed from a false basis if we ask where the evidence is for this. You have just heard the evidence, which is plain, about the difficulties that claimants face when bringing tribunals. It doesn't take a great leap of the imagination to imagine that a small businessman or woman will think twice about suing a big bank.

The view that I take is actually not very different from the view that the FCA took in its submission to you, which is that it can see the compelling reason for a tribunal operating in that space. Paragraphs 22 to 29 of the submission seem to me to be very well argued. They say that there is a clear problem; they talk about small businesses bringing these claims, and they identify cash-flow stresses, for example, as one thing that prevents those businesses from bringing claims against banks. That is nothing more than common sense. Evidence aside, in a forum like this, I do not see what more one can say.

The other difficulty that I had with Mr Green's speech was that he tried to identify the sole reason for the tribunal as one that is based simply on cost. I do not think it is. I entirely agree with Mr Green that we are blessed with the gold standard of judiciary around the world, and they deploy something called the English common law, which is again a gold standard quality of law. It is adopted around the world by commercial parties because it is so good.

One of the great things about the English common law is the principle of freedom of contract and the certainty that creates for parties. The wholesale markets in banking love that—it is just what they are after—but when you move into a regulated market such as retail banking, where you are talking about very well advised, very wealthy, very well equipped banks interacting with people who are effectively walking in off the street, even if they are running a business, freedom of contract does not cut the mustard.

I do not have to make that case to you, because there is an enormous rulebook created by the FCA that is designed to take us away from pure freedom of contract—that exists already. The big question then, when considering whether there should be a tribunal to help determine disputes between banks and retail consumers of credit, is who are the best people to decide what is in that FCA handbook—such private law rights as there are in it at the moment?

That is when the English common law courts that Mr Green talks about, which are indeed so good, can fall short, in the same way that employment tribunals have been created to determine employment



HOUSE OF COMMONS

disputes because English judges sitting on their own do not have the breadth of expertise to decide questions of good industrial relations. They rely on wing members. They rely on somebody from the business side, the CBI, and somebody from the unions to help them decide best practice—the kind of stuff that we see promulgated through ACAS codes and statutory guidance; the kind of thing that HR professionals have come to live with in the employment world.

That is why the English common law courts fall, in my respectful submission, so short in this area, because we are moving a long way from pure freedom of contract to the application of detailed regulatory obligations of a public law nature and a private law nature to the markets. It is the markets, as much as the consumers, that want clarity. That is what a tribunal can bring and the common law courts can never bring, because they do not have that expertise—that breadth.

Q170 Stewart Hosie: Much as I am sure that we could have this debate, and be very erudite, for some time, I am conscious of time and I have a number of other questions to get through. I will take that treatise as shorthand for, “Yes, an alternative tribunal system is a jolly good idea.”

Ms MacLean, UK Finance has argued that the number of cases that warrant redress in excess of the FOS limit of £150,000 is very low. Is that your view, or would you disagree?

Cat MacLean: I would disagree. I do not think the number of cases where redress is higher than that is low. There are a significant number of claims where the redress that ought to be made is significantly higher than that. In relation to the Financial Ombudsman Service more generally, I can say that in 10 years of undertaking this type of work, I have never received a favourable FOS decision for any of my clients—ever.

Q171 Stewart Hosie: Can I ask about the £150,000 before I come on to what you said about FOS? You say that in a number of cases it is substantially higher than that. Will you break that down and say how much is for mis-selling and how much is for penalties, interest, consequential losses and subsequent losses? Where does the balance lie in the sorts of cases you have had?

Cat MacLean: It is very difficult to say. It is very variable. Every case is different. Many cases will have an element of many, if not all, of the different heads of claim you describe, so it is hard to generalise. The point I would like to make about the Financial Ombudsman Service is that it may work well for consumer issues where the issue is straightforward—where an individual has been charged/ for going over their overdraft limit and, as a matter of fact, they didn’t. However, the kinds of claims that my clients have made before they come to me or that we make on their behalf—it is a mixture—seem just to be beyond the capability of those who deal with them at FOS. There seems to be a real difficulty understanding any of the complexities. I just do not feel that FOS is fit for purpose for the kinds of disputes we are talking about.

Q172 Stewart Hosie: From my experience of dealing with exactly the same



HOUSE OF COMMONS

sorts of cases, I would probably agree. However, let's move on. The FCA is consulting on proposals to give SMEs access to FOS. To what extent would that weaken the case for creating a new tribunal? Or would that simply be a daft idea because, as you say, FOS is not fit for purpose at the moment?

Cat MacLean: I would not go as far as saying it is a daft idea, but, for the reasons I have outlined, I do not think that would be a good idea and I do not think it would serve clients well. A financial tribunal system is far and away the better way to go, for the reasons that Richard has already outlined.

Q173 **Stewart Hosie:** Mr Samuel, what is your view on giving SMEs in particular and retail customers access to FOS rather than a new organisation? Is there any merit in that?

Richard Samuel: There is no merit in giving them access only to FOS. They should certainly get access to FOS as well as a tribunal, because FOS is a form of ADR—one of many—and every dispute resolution process needs a vibrant ADR forum to help people settle their disputes when they cannot be resolved in the tribunal itself. Employment tribunals have ACAS. They need each other; they do well off each other; they develop together the body of knowledge that helps resolve these disputes, because they collect together people who have a real commitment to the area and develop knowledge over time. They complement each other.

Q174 **Stewart Hosie:** I have two final questions; the first is for you, Mr Samuel. In the past, the FCA set up a number of ad hoc redress schemes to deal with cases of misconduct or mis-selling. How would you assess the effectiveness of those schemes, and what would the benefits of a tribunal be in comparison with those ad hoc schemes?

Richard Samuel: One of the reasons the FCA's submission to this Committee is so good is that they have realised that the schemes they set up in 2013 for swaps and things like that fell well short of the mark. They describe their strengths very accurately in their report. Where it is obvious what harm has been done and the overriding factor is to get consistency of outcome, they work, but that is very rare, particularly in a swaps environment, where neither of those things is true. You need a tribunal system that is independent of the FCA—and independent of everything else—that can hear the evidence and come to the conclusions that it needs to in response to the evidence, not impose conclusions on the evidence, as FCA schemes inevitably do. That is their nature.

Q175 **Stewart Hosie:** Finally, Ms MacLean, how different do you think retail customers and SMEs would have found things in the interest rate hedging product world—Clydesdale Bank TBLs, for example—if their cases had been heard by an independent tribunal rather than under the current system, which many of them had to go through?

Cat MacLean: My personal view is that they would have had much better outcomes. I can say anecdotally that we saw very different approaches in the FCA review process—different outcomes depending on which bank was



HOUSE OF COMMONS

involved. That should not have been the case. Different banks were applying slightly different criteria. There was real inconsistency in decision making. There was a sense that the wrongdoer was the person sitting and making the decisions, which cannot be right. A financial tribunal system would give greater hope to a lot of people. I would imagine that the outcomes would have been a lot better.

Q176 **John Mann:** Mr Green, have you ever been in an employment tribunal?

Andrew Green: No, I have not.

Q177 **John Mann:** Why would an SME in my area going to a financial tribunal require costs? Why would it require expenditure?

Andrew Green: Sorry, why would what require expenditure?

Q178 **John Mann:** An SME from my area going to a new tribunal—why would they require expenditure?

Andrew Green: It seems to me that the sort of disputes they are likely to be dealing with, as against their banks, are likely to be relatively complicated disputes and they are likely to need to instruct lawyers.

Q179 **John Mann:** Why?

Andrew Green: I entirely agree that you don't have to instruct lawyers; you can of course do things yourself. But if you are making a £2 million, £3 million or £4 million claim in this financial services tribunal, it is presumably a claim that is extremely important to your future survival, the likelihood is that you will want to instruct lawyers to advance it for you.

Q180 **John Mann:** You just leapt to £4 million or £5 million. What about £150,000 or £200,000?

Andrew Green: The same point. You can have extremely complicated disputes at £150,000, just as you can at £2 million or £10 million.

Q181 **John Mann:** Can you not have very simple disputes over that as well?

Andrew Green: Yes, absolutely.

John Mann: So an advantage of the tribunal system would be—you itemised some of the costs.

Andrew Green: Yes. Well, I didn't itemise costs; I itemised aspects of litigation.

John Mann: It is not necessarily the case that witness statements require expenditure.

Andrew Green: No, but that is the case in the High Court as well. You, as an SME, can represent yourself in the High Court.

Q182 **John Mann:** We just had a session on Maxwellisation. Was it not the case that it was Mr Maxwell who had a strategy of always putting money in



HOUSE OF COMMONS

court, to ensure that people who didn't have money couldn't go to court against him?

Andrew Green: I don't recall.

Q183 **John Mann:** Isn't that a process that can be used in court, whereby, in essence, you can put money into court, by various means, in order that the small person can't go against the big person, because what they risk in court is that the big person keeps throwing money at it?

Andrew Green: Inevitably.

Q184 **John Mann:** Is that not a system that a tribunal system does not have?

Andrew Green: You say that it's a system that a tribunal system doesn't have. We have not set up this financial services tribunal, so we don't know what rules it will or will not have.

John Mann: Okay, a tribunal system comparable to an employment tribunal system.

Andrew Green: If what you are going to do is effectively mimic the employment tribunal system, I can certainly see that.

Q185 **John Mann:** What's wrong with doing that? You itemised a series of costs and I have thrown you the example of Robert Maxwell of how cost and throwing money at it is used as a tactic in courts.

Andrew Green: Why wouldn't they be able to do that in the financial services tribunal?

Q186 **John Mann:** In an employment tribunal, they can't do that, can they?

Andrew Green: No, but in an employment tribunal presumably you can still have the employer lawyered up with top firms of solicitors putting the other side under great pressure.

Q187 **John Mann:** Under great pressure?

Andrew Green: Yes. Asking for disclosure.

Q188 **John Mann:** What is the problem with that?

Andrew Green: I thought that that was one of the problems that Cat identified as the power imbalance. You are not going to be able to eliminate a power imbalance by a financial services tribunal.

Q189 **John Mann:** But can you ever eliminate a power imbalance when you have got a major multinational bank against a small business who believes they have been done over?

Andrew Green: No.

Q190 **John Mann:** Therefore under a tribunal system there is no risk to the SME taking the case, is there?

Andrew Green: Well, it depends on the rules of the tribunal system.

Q191 **John Mann:** Indeed. What about under the rules of the employment tribunal system?

Andrew Green: What you have now done, Mr Mann, is you have already created your financial services tribunal, and it has a “no costs” rule. One of the points I raised right at the outset was that a lot of SMEs might actually want a costs rule, because they might want to be able to recover their costs if they are successful.

Q192 **John Mann:** What do you think, Ms MacLean?

Cat MacLean: While you can never eliminate the power imbalance, I think you can do an awful lot to make things fairer. I think a tribunal system would do that, not least because it is a simplified process and procedure and it is much more fast-track than would be the case either in the High Court in England or in the Court of Session in Scotland. I have spent eight and a half years litigating one case. You cannot litigate an employment tribunal for eight and a half years.

There are ways and means of dealing with the costs issue. Qualified one-way costs shifting, for example, is one such way that would perhaps help deal with the issue that Mr Green is describing. While I agree that you cannot eliminate the imbalance, there are lots of things that you can do to make the playing field more level. I think a financial tribunal system would do that.

Q193 **John Mann:** Mr Samuel, isn’t one of the advantages of something that is in some way vaguely comparable to the principles of an employment tribunal system that the big financial institution could not win simply by throwing money at the case?

Richard Samuel: There are two elements of the tribunal system that stop extreme abuses and imbalance of power. The first is that if you lose, you do not have to pay the other side’s costs—broadly speaking, that is the position. That means that you can bring litigation without betting the company. Hardly anyone is willing to bet their company; they will only do it if they have to, and if they have to, they probably can’t. That is why you don’t end up with lots of banking cases going to trial.

The second thing about an employment tribunal is that there is an inquisitorial element to it. The FCA has identified that. What that means is that what happens in a tribunal is not what happens in a court, where the judge just sits there—I am painting it in black and white, effectively, and rather unfairly to judges—and it is the lawyers and the parties who move. In a tribunal, there is a balance. The parties still move and take the points they want to take, but if the tribunal sees a point that it is interested in, it has a statutory power to say, “I want to look at this point.” The specific reason they have that is that many people who come before employment tribunals do not have lawyers, so they need a lawyer sitting on the tribunal to say, “Wait a minute, there is a point here that we need to be looking at to deal with this case fairly.”



HOUSE OF COMMONS

Those are just two big headline ways in which tribunals can redress power imbalances, but in a sense I am surprised it is an issue. We have something called the Tribunals, Courts and Enforcement Act 2007, which is a huge superstructure that runs these tribunals. It does so for a reason, which is primarily about reducing imbalances of power, and secondly about creating specialist subject matter tribunals.

I have come to this from an employment law background. When the FCA's mass redress scheme started going wrong, I looked across to see what was going wrong there. The question for me was not how Mr Green is phrasing it, "Why should we have this?", but it was, "Why haven't we got this?" We have specialist family courts, specialist employment tribunals, specialist landlord and tenant first-tier tribunals, and specialist WTO. You can shake a stick at the number of specialist tribunals, but not in finance.

Q194 John Mann: Is it your experience, Mr Samuel, that a trade union official, professional or lay, representing an employment tribunal has a definably worse success rate than a lawyer?

Richard Samuel: No, I wouldn't say so. This is purely anecdotal from me, but the point goes to culture again.

Q195 John Mann: No, no, it goes to more than that. I suppose I should declare an interest: I used to be responsible for the training of trade union officials in going to employment tribunals nationally, for the TUC, so I know a little bit about the subject. I think the evidence is that they have a better success rate. I am sure that could be argued, but there is no evidence that their rate is worse. What is to stop small business organisations setting up their insurance system—let us call it that—whereby they employ some specialist advisers who could take tribunal cases if there was a dispute? There would be nothing to stop that, would there?

Richard Samuel: No.

Q196 John Mann: If they did, wouldn't the rational way in which that worked be the way that trade unions work in that not every case is taken because some cases are hopeless? Yet someone has been sacked at work, and just because they have been sacked at work it does not necessarily mean they have a justifiable claim. Similarly, just because someone says they have a dispute with the bank it does not mean they necessarily have one. Therefore, wouldn't it be very simple to set up some straightforward systems that would in themselves act as a form of quality control?

Richard Samuel: It is people like you who are around the system who are able to advise the people who have the claim as to whether they have a good claim or not. Those are the systems that build up around it. At the moment, if you are talking about operating in the common law courts, you have to go to a firm of lawyers: a very expensive firm of lawyers, or you have to try and shop around and find somebody who will help you for free. But if you create the tribunal—it may be that the trade unions are a good example—there are people who are there to help people in those



HOUSE OF COMMONS

situations with insurance or whatever it is. There is no reason why the CBI should not be doing that for its small business community.

Q197 John Mann: But it's worse than that if you go to court, because you get a part 36 offer even where there is a liability that has been accepted, and you have got to beat that offer in essence to win on costs, so there is a pressure to settle low within the system, even if your case is absolutely categoric—

Richard Samuel: Absolutely. It's a game of poker.

Q198 John Mann: Which also means, therefore, that the likelihood of signing a disclosure agreement in order to top up that is even bigger. Am I not getting what goes on? And people like Robert Maxwell have put money into court repeatedly in order to stop people, because they have not got the money to keep going. Isn't that the point of a tribunal system?

In terms of the limits, as you said, Ms MacLean, you had not had a case that had succeeded with the Financial Ombudsman Service, and I am trying to think of one that I have had that succeeded. I've got one at the moment—I've just picked it up—where it is astonishing how wrong they have got it. They have not worked out in three years—I have just taken it over for a constituent—what the issue is, and it is a pretty big one.

There are systems that do work very well, but this does not appear from my experience to be the best one in terms of allowing people redress. Is there not a case, not just within a tribunal system, for reducing it down below £150,000 to allow people to take smaller claims for redress when it comes to SMEs and a tribunal system?

Richard Samuel: I conceive of these two things running alongside. You have got ACAS and the employment tribunals. ACAS is open to anyone to go along and have the conversation, try and be creative and find a consensual solution to a dispute. There is no limitation on that. The way I would approach it is not to look so much at what the limitations are, but is the central case made.

Q199 John Mann: With respect, I can't let you get away with that. There has to be a limitation. We could argue about what the lower limitation is; I am simply floating the idea that some of the discussion is perhaps pushing that too high. But it seems to me that to put a rational case, there has to be an upper limitation.

Richard Samuel: To come back on that, if you take the issue of sexual misconduct, sexual discrimination, there is no upper limit in the employment tribunals for that. If you look across at the Competition Appeal Tribunal, there is no upper limit there. There is concurrent jurisdiction between the chancery division of the High Court and the Competition Appeal Tribunal—full jurisdiction, but they bring different things to different parties.

Q200 John Mann: Yes, but there, although you are looking at defining a quantum, in essence, if it is a discrimination case, the critical issue that you are trying to ascertain is that there is discrimination. If I advise



HOUSE OF COMMONS

people on such cases, I can tell them pretty certainly whether I think there is a case on discrimination. Trying to work out what the quantum might be—that is probably where we would consult somebody else. I wouldn't be plucking it out of thin air. But the question of quantum would be quite key in terms of limitation—in terms of what a maximum limit would be.

Richard Samuel: Absolutely. Although it is difficult to assess damages for sexual discrimination, the point remains that in an employment tribunal, there is no cap to it as there is for unfair dismissal. I don't think it is necessarily the case that one should go into this situation saying, "We're going to have to cap this." We can work out where the demand is. It may be that it is natural that it fits at £2 million or £5 million. I don't know; I've just put those figures out there.

What I do know is that in response to the articles that I have written, the Law Commission have expressed interest in doing the real research into this idea, and there are two ways they can do it. They can either bring it on to their own agenda, in which case they have to go and talk to every Department of State and get their sign-off, or a Department of State approaches the Law Commission. I have it on good authority that you are quite influential with the Treasury. If you were to invite the Treasury to ask the Law Commission to do the legal research, the analysis and the consultation that will be necessary to bring this idea into effect, it may well be that the Law Commission can provide these answers for the Committee, so that we know where the right place to draw the line is. I am not in a position to do that at the moment—

Q201 **John Mann:** Mr Samuel has made a point about systems running in parallel. When it comes to, say, discrimination cases, isn't that kind of the point? What tends to happen is that because there is a system there, there is a tendency to give a reasonable offer—not necessarily what could be achieved, but a reasonable offer—and there is often a tendency for people to accept that, because it seems a lot of money. Actually, a lot of those cases end up not going anywhere near; they are settled precisely because there is a system that is risk free for the individual.

Cat MacLean: Can I make a point about the upper limit and concurrent jurisdiction issue? In Scotland, we have the Court of Session, which has a privative jurisdiction threshold of £100,000, so you cannot litigate below £100,000 there. We have the sheriff court, where you can litigate from zero upwards, but it has no upper limit, so you can have a claim for £150,000, £200,000 or, indeed, £1 million, and you can litigate it either in the sheriff court or in the Court of Session. It works perfectly well; it's fine. There are reasons why some people might choose to litigate in the sheriff court. Many people will choose to litigate, if it is a higher-value case, in the Court of Session. I don't particularly see any reason why there needs to be an upper limit, because there may be a small business that has a very large claim, but they don't necessarily have the funds or the appetite to be litigating in the High Court. They might choose to do that—

Q202 **John Mann:** Do you think there ought to be a requirement in the sense



HOUSE OF COMMONS

there is in the ACAS system? I'm talking about it being a necessity in advance to try some alternative dispute resolution. Do you think that would be a rational—

Cat MacLean: I think that would be sensible and rational. In Scotland, we do not have any specific requirement that parties must consider mediation and at least give a reasoned response for why they are not going to mediate. I see that as a big lacuna in our jurisdiction. If you are setting up a tribunal system like this, it would make a lot of sense to have that requirement so that, at the least, a discussion and perhaps a negotiation process take place. Many SMEs simply want to get round a table.

Richard Samuel: Can I pick up on that as a final point on sexual misconduct and why that is such a good analogy? You have identified the point that the claimant does not risk financial ruin if she loses. That is one of the factors. The other factor is that you create a realistic possibility for the more powerful party that the person is actually going to bring that claim in a public forum and have it decided according to the law.

You could call it the Weinstein effect. Unless that is a real possibility—that a woman is going to sit and give evidence in a tribunal and say, "This is what happened"—the more powerful party can treat disputes as just a cost of business. Of the 10 starlets who turn up to audition for an interview, three might say yes, seven say no, and five complain. If you have to pay three off, you get them to sign an NDA. What changes everything is if any one of those women can bring a claim in an employment tribunal, as they can in this country, and bring a claim for discrimination in the application for a position. That brings the Armageddon scenario to the more powerful party as well. It is not just the end of the woman's career; it is the end of Weinstein's career. That is how creating the realistic possibility of somebody bringing their claim to be decided in public and according to the law changes behaviour and changes culture.

Q203 **John Mann:** My final question is, isn't the other advantage of having some kind of tribunal system that the person who believes that they have been totally done over but who has no access to any money at all, has never been through the courts system before and has never been to lawyers before—such as the 2,000 coalminers who came to me in disputes with solicitors, including very big firms of solicitors—can feel confident, as there is no risk to them, that someone like me could take a case and win, in that case, 99% of the time? The same thing could happen here with a tribunal system: an SME could come to me and risk nothing by letting me take the case, if it is one of the businesses in my constituency, against the biggest banks, and if their case is good, have a reasonable chance of winning.

Richard Samuel: 100% right.

Cat MacLean: Absolutely.

Andrew Green: Can I just raise a point in response to something you said a few moments ago? You said that the abuse of the costs rules, particularly part 36, is the reason why there is a need for a financial



HOUSE OF COMMONS

services tribunal. One possible solution, rather than having a new financial services tribunal, is to change the costs rules—use the High Court, but simply change the costs rules. There is no reason why SMEs should be treated differently from other consumers, so other consumers who have this power imbalance could benefit from your change of costs rules in the High Court. That is one point I wanted to make.

Q204 **John Mann:** That would be good for society at large, in my view. I do not see why that healthy change could not run alongside having an effective tribunal system, but thank you for your input.

Andrew Green: I'm sorry; the final point I want to raise is the point about there being great excitement at the idea of the new financial services tribunal requiring people to go to mediation. Again, that is something that the High Court generally requires people to do—or certainly expects people to do. Again, we come back to the point that I raised at the start, which is that at the moment, we have a superb judicial system. I think one still needs a compelling reason as to why to create a financial services tribunal in that context.

Q205 **Chair:** I have two final questions. One that is probably more to Mr Samuel, but the others might want to answer, about your work on this. What needs to happen, if there were to be appetite, apart from the Treasury asking the Law Commission to look at this? Have you looked at what legal changes or changes to legislation are needed? Do there need to be changes to legislation?

Richard Samuel: I don't think that there need to be huge changes to the legislation. I know that the FCA said, in a very broad statement, that it needs primary legislation, but I am not sure I understand why that should be the case. If you go back to the employment situation, it is simplified. You have two primary Acts—the Employment Tribunals Act 1996, which sets up the tribunals system, and the Employment Rights Act 1996, which grants rights to the employees and says that, if those are breached, employees can go to the employment tribunal.

We have the Tribunals, Courts and Enforcement Act 2007, which is a superstructure that runs all the tribunals now, and the Financial Services and Markets Act 2000, which gives various rights under section 138D. There are also a whole series of statutory instruments operating under that, although there are arguments about whether the rights of private persons should be increased or not.

It seems to me that it is a matter of statutory instruments being created to create a new chamber in the tribunals service to deal with these, and if thought appropriate, an amendment to the various people who can claim under section 138D so that they can bring their claim in a financial services tribunal. If it needs primary legislation, it seems to me that it would be the kind of regular, minor amendment that goes through Parliament—Brexit aside—rather than creating a new structure. That is not the same.



HOUSE OF COMMONS

On the point about moving away from the English judiciary, I am not suggesting that we should do that. All of those judges who sit in the courts can also put their hat on for a tribunal. They are the right people, but they need by them people who have experience of either being a small businessman or of the financial markets, who can tell them how the market operates. They would provide the context so that those judges can help, with their colleagues, to make the right law and get the right answers, which is what it's all about.

Q206 Chair: I understand that. I have a final, broad question for all of you. I will ask Mr Green to suspend his scepticism for a second. Do you think that having a tribunal, in the way that is suggested—plenty would need to happen before that might occur—would change the culture of the banking industry? I think that is what many of the campaigners are looking for, in terms of that levelling of the playing field and that redress. Mr Samuel, you have talked about publicity and drawn analogies with other incidents. Could all of you give us a quick response?

Richard Samuel: I absolutely do. Sticking with the sexual discrimination angle, until you give the victims or the complainants of that kind of behaviour the right to go and have their story heard in public and to have it ruled on according to the law, there is no downside. You might have to pay somebody off with a bit of money or sign an NDA—"Right; thank you very much"—but you carry on. That is what it seems Weinstein did for decades. If you gave any one of those victims this opportunity, he would have thought twice about doing that.

These people will not want to appear in an employment tribunal. I have cross-examined them and they do not enjoy it. For their careers, they will stay away from that. You can see how the human resources departments of companies have used the product of employment tribunals. They study those judgments very carefully and produce guidance, and then turn around to the workforce and say: "You've really got to take care of this stuff, otherwise it will be you who will be cross-examined by someone like Richard Samuel, and you won't enjoy it either."

That is when the people at the top of the tree start saying, "You better do this, otherwise I am going to be for the high jump—and I don't want to be there." That is what changes culture. You have to close that loop, and there have to be consequences for actions.

Andrew Green: I don't think it will change the culture. If the regulator imposing fines to the tune of hundreds of millions of pounds hasn't changed the culture, the idea that a financial services tribunal will do so seems to me to be a little unrealistic. The second point to note is that it is for Parliament and the regulators to change culture, not for a financial services tribunal, which will deal with individual claims and determine them in accordance with the law. Personally, I don't think it will change the culture.

Cat MacLean: You will not be surprised to hear that I disagree with that view.



HOUSE OF COMMONS

Chair: That's fine; we like good, healthy disagreement on our panels.

Cat MacLean: The point about fines is an interesting one. I have a view about fines, which is that they do very little to put things right—to that extent I agree with Mr Green—partly because the wrongdoing associated with the fines is not matched up with the victim. You can have a bank that is fined a very large sum of money, perhaps for LIBOR manipulation, but the people who have been affected by LIBOR manipulation are not receiving any sort of redress. That is the first issue.

I also think that if a bank is fined, it does not really have an impact on the individuals within that bank who are carrying out the day-to-day banking work. To that extent I entirely agree with Richard that culture is about people. I know and accept that many banks are grappling with this issue of altering their culture and are really working quite hard at it, but unless you have the kind of threat that Richard was describing, which a tribunal will have in very practical terms, to the individuals—there are people out there who are not behaving terribly well towards their SME customers—it is hard to change cultures. It is like the ocean-going tankers; it is very difficult to get it to shift round. The kind of threat that a tribunal system and the laying of evidence will have will really help to drive the cultural change that banks need.

Richard Samuel: If I may, it is a mistake—I don't mean to pick on Mr Green—to say that it is a matter for Parliament and the regulator to change culture. Last year, the Supreme Court decided the case of *Unison v. Lord Chancellor*, where it overturned the decision of Chris Grayling—a Lord Chancellor who is not a lawyer, but a management consultant—to increase employment tribunal fees by 600%, at which point the number of people who made applications to the employment tribunal dropped by 90%. It was overturned as unconstitutional. If you read paragraph 72 in the judgment, you will see that he explains in very clear language how it is the work of the courts and the tribunals of this country to ensure that the norms of behaviour which our laws require of the citizens are understood and put into effect. That includes culture. It is wrong to say that it is not the job of the tribunals to do that work. It is 100% the job of the tribunals to do that work.

Chair: Thank you. That was a fascinating discussion. As Stuart said, we could have been here all afternoon. There is probably a whole lecture series to be launched on the back of the evidence we have heard this afternoon. Thank you for being here and for your generosity with your time; it is much appreciated. I know that some of you have submitted evidence, but if there are further things that come out of this session where you want to expand on what you have said or put something else on the record, please feel free to write to us. But for this afternoon, we are grateful for your time.