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COMMONS DEBATE 30/11/17: BRIEFING NOTE

Why a Financial Services Tribunal (FST) Would Be Good For Small and Medium Enterprises (SMEs) and Banks

What's the SMEs' Problem?

SMEs cannot afford to sue banks in court when things go wrong. Courts are expensive, slow, and, if you lose, you pay the bank's legal costs. It means banks are beyond the reach of common law justice. That's the problem.

Isn't there an Ombudsman to Deal With their Problem?

There is an Ombudsman, the FOS, but it does something different: it facilitates settlement disputes between SMEs and banks under £150k. It does not administer the law. It arranges for 'fair and reasonable' settlements.

Why is it Important that the Banks are Within the Reach of the Law?

Just think about it. In a democracy, we are meant to respect the law. We do so partly because we want to be good citizens. But we also do



it because we know that if we break the law, chances are, the people we hurt will use the civil or criminal courts to force us to obey the law. Take away the chance that the people we hurt can drag us before the courts and the rule of law breaks down. That is why banks have behaved badly: they have no reason to fear the courts or FOS.

So How do We Bring Banks Within the Reach of the Law?

Simple. We do what we always do when there is a dispute between a powerful party and a weak party. We take the disputes out of the Courts and the Ombudsman systems and we put them use the Tribunal system.

What is the Tribunals System?

It is a quick, low-cost version of the common law Courts. It is run by the same departments which run the Courts system: the MoJ (the Ministry of Justice) and HMCTS (Her Majesty's Courts *and Tribunals* Service). HMCTS runs the Employment Tribunals, the Competition Appeals Tribunal, the Immigration Tribunal, the Tax Tribunal, the Land Tribunal etc. etc..

What is Special About the Tribunals System?

They are specialist and they make it easier for claimants to claim: the fees are low, the loser does not pay the winner's costs, they are less formal and you do not need a lawyer to run your case. **But they still**



make law, just like our common law Courts. You can appeal from them up the chain to the Court of Appeal and to the Supreme Court.

Do Tribunals Really Make a Difference?

You bet they do. Think about employment. In the 1960s the common law courts still spoke of 'master and servant'. Our culture has moved on because of rights of fair treatment and non-discrimination. No regulator made that change. Tribunals did, by deciding cases which were reported in the press. The boss who groped a woman's bum at the Christmas party suddenly had nowhere to hide. Tribunals empowered women against the boss. They will empower SMEs against banks.

Why Can't We Use the Ombudsman to Empower SMEs?

The Ombudsman is a private way of channeling small payouts from banks to SMEs. It is Harvey Weinstein buying women off cheaply and quietly. Private payouts have not empowered women and will not empower SMEs. Change in the behaviour only comes about in public. In a democracy we have one sure way of forcing good behavior on the powerful: giving victims the opportunity to air their complaint in public and to apply the law to it. Only tribunals can do that to banks.

Is the Ombudsman a Bad Thing?



No, it's a great thing. Lots of cases need settling. What is bad is that, right now, just like Weinstein's starlets, SMEs have nowhere else to go but take whatever money is offered through the FOS. We need to give those SMEs the chance to see their bank's documents and have their 'day in court'. As long as those two things remain an illusion, bad behavior by banks will continue just as before.

Wouldn't it be Difficult and Expensive to Create an FST?

No. There already is one. It is run by HMCTS. It operates under the **Courts, Tribunals and Enforcement Act 2007**. It is staffed by senior members of the judiciary who co-opt expertise from the relevant markets to sit alongside them. There is a Senior President of the Tribunals (Sir Ernest Ryder of the Court of Appeal) and a High Court Judge in charge of each specialist 'Chamber'. All it would need is expansion of capacity of an existing Chamber or creation of a new one **by statutory instrument. No primary legislation is necessary.**

Who Would Pay For It?

The banks, of course. They already pay for FOS (I told you they like it). They also pay for the FCA's ad hoc mass redress schemes, which the banks administer themselves, overseen by their best buddies, the big four accountants. In 2013 the banks paid their buddies £145m to check they were compensating unhappy customers properly. (That is why the FCA's scheme ended up in the High Court being judicially reviewed.) In the same year the entire Employment



Tribunals cost the taxpayer £80m. Get the banks to pay for an FST and run those cases through it instead of the FCA's dud scheme: the banks will save money.

Beyond that, Why is a Tribunal Good for Banks?

When they get their heads around it, they will realise that they are going to make money out of it. They have made money in the past by offering generous terms for dispute resolution. Think about direct debits: dispute a payment and the money goes straight back in your account under their 'guarantee'. Buy dodgy goods or services on a credit card and, believe it or not, you can sue your bank.

Why be so generous? Because the cost to the banks of dealing with a few disputes is nothing compared to the money they make on all the sales that the generous dispute terms generate. The trust the terms generate drives sales. It will particularly help drive international sales as English Courts are about the most expensive in the world – and much, much more expensive than in Europe. A tribunal where a European borrower could resolve disputes cheaply with his own lawyer by his side (and English co-counsel) would drive sales there.