RESPONSE TO THE TREASURY COMMITTEE'S INQUIRY ON SME FINANCE

By the Transparency Task Force

https://committees.parliament.uk/call-for-evidence/3178/

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ABOUT THE TRANSPARENCY TASK FORCE AND OUR SUBMISSION

The Transparency Task Force (TTF) is a Certified Social Enterprise that exists to make an impact, not a profit. The mission of the Transparency Task Force is to promote ongoing reform of the financial sector, so it serves society better. For further information about the Transparency Task Force see here.

The Transparency Task Force campaigned for the Treasury Committee to open an inquiry about SME Finance and our campaign was very well supported by a wide range of stakeholders including many Parliamentarians.

It therefore follows that we are very grateful that the inquiry has been opened and that we are able to provide our submission - we thank the Committee for that.

Our campaign letter includes this ask:

We write to request that the Treasury Committee launches a new investigation into the issue of SME Finance, and in particular into the topics of misconduct, regulation and redress for small and medium-sized firms mistreated by banks.

Our response is substantial and it focuses mainly on the topics ***of misconduct, regulation and redress for small and medium-sized firms mistreated by banks.***

That is because we have many members that are or previously have run SMEs and raised finance; only to then have serious disputes with their banks and then become very disappointed, disillusioned and disheartened by the way their disputes have been handled, often with additional frustration through then also interacting with the Business Banking Resolution Service (BBRS).

As such, our submission centres mainly around a response to these questions, from within the Regulatory Issues part of the consultation:

- Do SMEs have adequate and appropriate access to a complaints procedure when in dispute with their bank or lender?
- How well does the Financial Ombudsman Service (FOS) work for small business complaints?
- Should commercial lending to SMEs be brought into the regulatory perimeter?
- How effective has the Business Banking Resolution Service been, and what lessons can be learnt from it? ***- most of our response relates to this topic.***

In many ways, our response is a cry for help.

It is an earthy and passionate cry for help for and on behalf of the many SMEs that have been let down badly by the BBRS. Many of these individuals have been the victims of serious banking misconduct that has truly blighted their lives over many years. They are hurt, they are angry; and they have a sense of righteous indignation that is easy to understand and frankly, admire. They're not quitters and they know they are in the right.

You can totally understand why they feel as they do - they have been battling for years to get the compensation and justice they deserve. The "Faces of Financial Crime" discussion paper that we launched in Parliament in the Summer of 2022 has 22 case studies of individuals that have suffered terribly due to the kind of criminality and malpractice, malfeasance, misconduct and mis-selling that the BBRS was meant to resolve.

Of the 22 case studies, 7 relate to individuals that have suffered at the hands of the banks. You can read their stories on pages 30 to 39 here. Their stories were as painful to tell as they are to read and we will be forever grateful to those who stepped forward and climbed the emotional wall needed to speak out in this way. We are very grateful to each and every one. But sadly, the reality is that there are *thousands* more such cases.

The BBRS should have gone a long way to deliver justice, compensation and closure for thousands of individuals - that was its essential purpose. But it has fallen very short of that, and given that the failure of the BBRS has adversely impacted thousands of people, often very seriously, this is obviously a major public interest issue.

We therefore need to know what has gone wrong, and what the underlying reasons for its catastrophic failure have been; and that's why the Treasury Committee's inquiry is such a much-appreciated opportunity to shine a light on the topic - sunlight is the best disinfectant; and this inquiry is a great big ray of sunshine.

And for those that may take the view that none of this matters because the BBRS is closing at the end of the year anyway, it is hyper-important that such a position is challenged robustly. Because if we don't fully understand what has gone wrong with the BBRS and why, there is a very real risk that the flawed 'DNA' that has caused the BBRS to be a grotesque failure will reappear in the next iteration of a redress scheme designed to deal with disputes between banks and businesses; and such an elementary mistake would be truly tragic.

Rather, we should take a similar approach to how the aviation industry operates when a plane crashes; they keep investigating until the precise causes of the crash are known, and engineer-out the likelihood of something similar happening again.

We must now do the same, for the same reasons - lives have been ruined, and lives have been lost.

Many unpaid volunteers have worked together to write our response, and the sum total of the resource available to them has been £0.00.

We know our response doesn't have all the finesse and impressiveness that an opposing submission from UK Finance, the banks and the BBRS will have, but we hope you judge our response not by the lack of its sophistication but by its content and the honest character of those that wrote it.

Please note that we have tried to make a genuine attempt to distinguish between what we know to be fact that we can prove to be so beyond any reasonable doubt, with hard evidence; and that which we sincerely believe to be true but may not have hard proof for.

We are available to give in-person testimony to the Committee, and would propose four individuals:

- **One with direct experience of being on the SME Liaison Panel of the BBRS;**
- **One with experience of being on that Panel and also BBRS' Independent Steering Group;**
- **One with extensive experience of many SME cases that have been treated unfavourably and unfairly by the BBRS;**
- **And TTF's Founder, who has given evidence to three Parliamentary Committees previously**

The collective insights of those witnesses would, we believe, provide profoundly valuable and rather unique evidence that is directly relevant to this inquiry and its aims.

For further evidence of the grave concerns many of our members have had about the BBRS, we should mention that we have run several events dedicated to it, as listed below. The full recordings are available to you - we urge you to watch them, please, because you will then fully understand the strength of feeling there has been about the BBRS, and the very long list of issues that are wrong with it:

- 13th December 2022
  "Why the BBRS is not fit for purpose; and what must now be done about it"
  Video: https://youtu.be/c1W_Mmeuqqs?si=VbwIFofDtBKV3XVF

- 31st January 2023
  "***The Role that Tribunals could play in Settling Disputes Between Businesses and Banks***"
  Video: https://www.youtube.com/watch?v=Vu6K0NNpyVE&feature=youtu.be

- 16th February 2023:
  "The BBRS - What's left to be said?"
  Video: https://youtu.be/SLS0iC-_gVg?si=RsiCWhvqev2zHJBv

- 18th July 2023:
  "BBRS - the debate, the inquiry, its latest report and what needs to happen next"Video: https://youtu.be/n40lgSXbB88?si=2e7_BBC3KG7PvbO0 #

- 8th August 2023:
  "Responding to the Treasury Commiteee's Inquiry on SME Finance/BBRS"
  Video: https://youtu.be/KhrFDLZd33A?si=0ELvCF0lLTHtq0FH

- 29th August 2023:
  "Swaps: Mis-selling or outright fraud? ...and why the FCA's recent letters are factually incorrect"
  Video: https://youtu.be/9ku2ygBXL44?si=U4dpzLMsm3UcV7jv

EXECUTIVE SUMMARY

The Business Banking Resolution Service (BBRS) was established to handle compensation payable to victims of malpractice by UK banks, including the kind of egregious malpractice referred to in Violation Tracker UK, see here.

There has been serious and sustained criticism of the BBRS from a wide range of stakeholders for its poor performance including by a senior Parliamentarian who publicly commented "Quite frankly, the scheme is currently a shambles and a complete embarrassment to UK Finance and the seven member banks who designed it."

Furthermore, the BBRS has conducted itself in such a way that there have been numerous resignations by key stakeholders at a senior level, including a respected lawyer who publicly referred to the BBRS as being 'completely defective' and expressing her concerns that if she remained, she was in danger of "being complicit with a cover up".

The BBRS' many failings has meant it has been a great disappointment to the many banking misconduct victims who had been duped into believing it was going to be a fair and equitable way forward.

Trust and confidence from all key stakeholders that were to interact with the BBRS is a prerequisite for its credibility and legitimacy; and without it, the BBRS cannot claim it has been fit for purpose. We therefore respectfully submit that the BBRS is a failure, Its poor performance has been a major public interest issue and a serious concern for Parliamentarians. The facts show that the Scheme has not achieved its intended goal of providing redress and closure for a meaningful number of prospective claimants.

Here's a list of issues that have caused the BBRS to be the catastrophic failure that it has been; it's a long and inter-connected list that starts with an issue that is the genesis of everything that follows; and all ten of the issues are part of our response to the Committee's question

"How effective has the Business Banking Resolution Service been, and what lessons can be learnt from it?", and all are covered in detail within the main part of this document:

1. **Did the FCA know the BBRS would not work?** We strongly suspect that the answer to that question is 'yes' and as such the BBRS was not established in good faith. Not only was the BBRS doomed to fail, we posit that it was designed to fail. All this happened under the watch of Andrew Bailey, who at the time of BBRS discussions in 2017/18, was CEO of the FCA.

   The underlying motivation was the desire to protect the balance sheets of the banks. Andrew Bailey was central to protecting those balance sheets during the Global

Financial Crisis; and he then went on to defend those very same balance sheets when the mis-selling by the banks was revealed.

2. **The FCA was wrong to subcontract to the BBRS.** It was a gross dereliction of duty by the FCA to allow disputes between banks and businesses to be dealt with by a voluntary scheme established and run by the banks. The regulator should regulate. That's its very purpose.

3. **The BBRS is not a distinct enterprise as claimed,** We believe that its relationship with the banks means the BBRS has been wrongly and misleadingly suggesting they are bound by arrangements between it and the 7 participating banks; we posit that they are not, and that it has therefore misled.

4. **Has the BBRS been operating as an unauthorised claims management company?** If so, and we believe it has, it is in direct breach of FCA regulations; and the FCA has turned a blind eye to those breaches. We appreciate that this is a novel point of view, but we believe it to be true.

5. **The BBRS is not independent as claimed**. The evidence shows that crafty changes to the BBRS' Articles of Association meant that the Bank Appointed Member (BAM) was established as a company named Resolution Services Ltd, which has been in control of the BBRS. The BAM/Resolution Services Ltd is controlled by the banks, thereby exposing any claim that the BBRS to be independent being a falsehood. We suspect the changes to the Articles means the BBRS has breached corporate governance and Companies House procedures; and that those acts may be criminal.

6. **The eligibility criteria is wrong**. The eligibility criteria itself and the way it has been applied have both been gamed in order to minimise the redress payable, meaning that thousands of potential claimants who were victims of banking misconduct have been unfairly excluded from the redress scheme - a massive miscarriage of justice.

7. **The supposedly independent Post Implementation Reviews were misleading**, resulting in a completely false narrative being published. SME representative input to the Reviews was largely ignored, all of the authors were selected by the banks - not one of the individuals thoughtfully proposed by the SME representatives were selected. The Reviews have been a whitewash.

8. **Trust and confidence between banks and businesses has not been restored**, despite that being one of the formal objectives of the BBRS. If anything, the state of trust and confidence between banks and businesses is now worse not better; and that has contributed to the corrosion of the banking sector's reputational integrity, and both the FCA and Treasury which are meant to be governing it.

9. **The banks have wasted their shareholders' money on the BBRS.** Tens of millions of pounds belonging to the shareholders of the 7 participating banks has been wasted, through no fault of their own.

10. **The redress results achieved,** in hard, bottom-line number terms, have been unacceptably poor; which shows that the banks have succeeded in their aim to minimise the impact of redress on their balance sheets. However, if anything, the BBRS has been too successful - it has become obvious to all that the BBRS has been a sham from start to finish.

OUR CONCLUSIONS AND PROPOSED NEXT STEPS - SUMMARY

The failure of the BBRS has led to the continuation of very serious consumer detriment and a waste of time for the victims that can never be reclaimed. We hope our response will show that the many individuals that have doubted the authenticity of the BBRS, who have believed that it has not been fit for purpose, and that it has simply set out to minimise the amount of compensation payable by the banks regardless of the merits of each claimant's case; have been right all along.

And as explained earlier, we also hope that those that may take the view that none of this matters because the BBRS is closing at the end of the year anyway, must be robustly challenged. This is vital because if we don't fully understand what has gone wrong with the BBRS and why, the mistakes of the past may be repeated in the future, and that would be tragic. And it would also mean those *individuals* whose decisions, conduct and actions have caused carnage would escape scrutiny and challenge - they don't deserve to be let off lightly - they should be formally and publicly held to account, and if the evidence warrants it, their conduct should be formally investigated.

In terms of practical next steps, we believe the best way forward is for four important things to happen:

Firstly, we would like the Treasury Committee, as part of this inquiry into SME Finance, to ask questions of the BBRS, the 7 participating banks, HM Treasury, the FCA and Andrew Bailey to get to the bottom of what really went on, and in particular to explore whether the assertions we make in this submission are correct. We know precisely what questions need to be asked, and to whom.

Secondly, for the Treasury Committee to open an inquiry to explore the relative merits of the FOS being given an expanded remit to deal with disputes between banks and businesses; or whether a statutory independent tribunal, preferably a modification of the existing Financial Services and Markets Tribunal, is the best way forward from here. We believe the right conclusion is Tribunals; just as it was in 2018, but this time we hope the banks don't use their immense power and influence over the Treasury to stop the right thing from happening.

Thirdly, for the Treasury Committee to champion the introduction of reforms to enable incorporated entities to be able to make use of Data Subject Access Requests (DSARs). As we explain later, doing so would be truly transformational in relation to the asymmetry of disclosure issues that thwart SMEs getting justice. It would be a positive step that would not get any push-back from any stakeholder with integrity. It would provide a right to access

information for SMEs that would result in the resolution of countless historic cases, it would deter banks and their employees from committing offences because of the right of the SME to obtain any and all information. This is a 'low hanging fruit' reform opportunity that would be easy and inexpensive to introduce and we urge the Committee to pick up on it.

Fourthly, for the Treasury Committee to open an inquiry into a matter about the conflicted interests and priorities within the FCA; the tension between prudential and conduct regulation that keeps causing serious problems. The FCA simply cannot do both things well and prudential considerations always seem to trump conduct considerations, which means consumers are always being let down.

Before turning our attention to the detailed explanation of each of the issues 1 to 10 referenced above, we now cover off other items of interest to the Committee.

DO SMEs HAVE ADEQUATE AND APPROPRIATE ACCESS TO A COMPLAINTS PROCEDURE WHEN IN DISPUTE WITH THEIR BANK OR LENDER?

The simple answer is 'no' and there are many reasons for that conclusion, including:

The FCA are wrong to take the position that 'they don't deal with individual cases'

The start- point to addressing this matter is to consider the role of the FCA in upholding consumer protection as directed by Parliament under legislation and at an operational level through Government and the Treasury. Parliament largely relies on the Treasury Committee to scrutinise the extent to which the FCA is adequately discharging its duties.

Financial services are predominantly regulated under the framework of the Financial Services and Markets Act 2,000 (FSMA), in addition to common law, and by secondary legislation through statutory instruments or regulatory rules and guidance.

FSMA: The FCA's general duties

(1) In discharging its general functions the FCA must, so far as is reasonably possible, act in a way which—

(a)is compatible with its strategic objective, and

(b)advances one or more of its operational objectives.

The consumer protection objective

(1)The consumer protection objective is: securing an appropriate degree of protection for consumers.

(2)In considering what degree of protection for consumers may be appropriate, the FCA must have regard to—

(e)the general principle that those providing regulated financial services should be expected to provide consumers with a level of care that is appropriate having regard to the degree of risk involved in relation to the investment or other transaction and the capabilities of the consumers in question

On this basis it is reasonable for Parliament, the Government and consumers (including SMEs) to rely on the FCA discharging its general function in securing an appropriate degree

of protection and ensuring that financial services provide consumers with an appropriate level of care.

Consumer protection is without question the responsibility of the FCA not the FOS. Indeed, the FCA is required to exercise its various functions in a way which is consistent with ensuring the FOS constitutes an 'ADR entity' within the meaning of the EU's directive 2013/11/EU on consumer ADR.

The catastrophic error of the FCA has been to conflate the process of dispute resolution with ensuring that financial services provide consumers with an appropriate level of care. The FOS is non punitive and is not charged with any regulatory or disciplinary function.

Central to achieving the FCA's objectives are the application of the extensive powers, including sanction, given to it by Parliament to deter financial firms from causing consumer harm.

It is inconceivable that the FCA can secure its consumer objective by adopting the policy, without any legislative basis, of refusing to 'deal with any individual cases' as this totally negates any possibility that the FCA can regulate the firm being complained about or secure an appropriate level of care for the complainant.

It is our very firm contention that this policy has been a significant driver in compounding levels of consumer harm as 'self-supervised' FCA authorised firms have been able to rely on consumer complaints regarding breaches of FCA rules and evading any FCA scrutiny.

Further, the FCA is depriving itself of the essential knowledge which is a prerequisite to determining the emergence of thematic developments in consumer harm.

Persistently very high numbers of consumer complaints being upheld at the FOS that relate to FCA rule book breaches bear testament to the fact that deterrence is being ineffectively applied. The Treasury Committee may find it instructive to discover what percentage of FOS 'upheld complaints' involving breaches of the FCA's handbook resulted in FCA sanction in any one year.

In response to Parliamentary concern that the FCA is failing to achieve the levels of consumer protection required, the FCA embarked on a 'Transformation Programme', this included an assertion that a more proactive approach to supervision and regulatory enforcement would be applied.

A slavish persistence in not dealing with 'individual cases' betrays a serious disparity between the rhetoric and the reality.

Failure to deal with individual cases is also inconsistent with the express expectations of the Government, the Treasury and no doubt the Treasury Committee too.

On 13 August 2021, John Glen MP, then Economic Secretary to the Treasury said; in relation to an individual case, the following (emphasis added):

"It is worth noting that whilst the Government sets the legal framework for the regulation of financial services it does not have investigative or prosecuting powers of its own and cannot intervene in individual cases. The mortgage industry is regulated by the Financial Conduct Authority (FCA), whose day-to day operations are independent from Government control and influence. As your constituent may know, the FCA supervises the conduct of mortgage lenders and intermediaries. The FCA will take action against lenders and intermediaries that are found to be in breach of the FCA rules. This can include warning a firm and requiring it to take action to ensure future breaches do not occur, ***imposing a fine on firms and requiring them to arrange for customers who have lost out to be compensated****, and ultimately preventing a lender from undertaking any further mortgage lending activity".*

Accordingly, the FCA clearly does have a duty as the competent authority, to protect consumers individually and/or collectively where it finds harm and resolution is beyond the scope of the FOS and has jurisdiction to take action against lenders who breach FCA rules and also to arrange for consumers to be compensated.

The FSMA general prohibition is the basis for the authorisation and exemption scheme that regulates financial services and the Regulated Activities Order sets out the specific categories.

Authorisation of financial firms is under the remit of the FCA and the general prohibition does not apply once a person is authorised, even if they are not authorised to do the activity that they are engaged in. Consequently, great reliance is placed upon the FCA to supervise the conduct of the firms that it has authorised and to take action where regulatory requirements have been contravened.

It is Parliament that is reliant upon and responsible to the electorate for ensuring that the FCA achieves effective levels of regulatory enforcement and to make sure that the levels of consumer protection are upheld.

FSMA confers very substantial powers to make both general and specific rules that are not subject to direct Parliamentary control. The autonomy of the regulator acting to make important rules, effectively without any democratic oversight, is contentious and remains highly problematic, as recent court cases have confirmed (see here) bringing into sharp focus the conflict between primary and secondary legislation. This may explain a recalcitrance on the part of the regulator but does not absolve it of its statutory duties.

The extent of the FCA's unilateral interpretation regarding its independence in decision making is also contentious and problematic. Perhaps the most damaging FCA self-appointed policy regarding the protection of consumers is the adoption of the practice of not dealing

with ‘individual cases’. We think that by doing so the FCA is acting ultra vires i.e. beyond the lawful scope of its powers, because in effect it is wrongly disapplying primary legislation passed by parliament under the latitude of its ‘independence’ in its decision making powers (secondary legislation) afforded to remove it from immediate political influence, not to overrule legislation. This constitutes an abuse of its powers. Additionally, for many reasons, we say that the FCA’s policy here is not rational.

This has proven to be a grave error of policy but not one that we are suggesting originated with any malign intent. We accept that a large proportion of disputes are suitable for the FOS but it is clearly absurd to maintain that all cases are. Indeed, it is part of the FOS’ job to determine the nature of the complaint.

The FCA has repeatedly stated that it was not set-up by Parliament to deal with individual disputes and that this is the sole remit of the FOS. This stance presupposes that no individual dispute/complaint has any element that relates to the FCA’s duties or functions even when a complainant provides legitimate evidence that it does and/or the complaint is deemed unsuitable for the FOS.

FSMA, s 225(1) states that: *the FOS was*

‘set up so that ’certain disputes may be resolved quickly with the minimum formality by an independent person’.

Again, dispute resolution is not synonymous with ensuring that financial services provide consumers with an appropriate level of care or that all cases are resolvable by the FOS.

We strongly believe that the FCA policy of not dealing with individual cases is misconceived and has been detrimental to trust and confidence in consumers, particularly in SME’s whose widespread and well documented mistreatment by the Bank’s has led to a serious risk aversion in borrowing to invest in business expansion because there is little expectation that the regulator will ensure their fair treatment by the banks.

It can easily be argued that in fact there is no such thing as an ‘individual case’ or an ‘individual offence’ when it comes to banks or financial services. If it has occurred once, it is almost inevitable it has occurred before and will occur again, and likely already on a significant scale.

The FCA has used this position in cases such as the Lloyds Banking Group’s mortgage prisoners and abuses of mortgage customers in payment difficulties, despite knowing when claiming they were ‘individual cases’, that each case was in fact one of more than 500,000. It is a false but convenient excuse.

This issue of the FCA not handling 'individual' cases is an important reason why SMEs do not have adequate and appropriate access to a complaints procedure when in dispute with their bank or lender; and the same of course applies to consumers in general.

The costs of taking a case to Court are far too prohibitive

In relation to the possibility of the SME using the courts to deal with bank disputes, the harsh reality is that the Courts are, in effect, only available to the wealthy few and even then, the asymmetry of resources often leads to very unfair judgments.

The court system requires very substantial means just for the SME to pay their own costs, which typically include solicitor, counsel and expert fees, as well as court fees and other costs. Further, the general principle is that the loser pays the costs of the winner. That means that, even if an SME can afford its own costs, it is very unlikely to be able to take the risk of paying the bank's legal costs if they lose. The banks do not face that same financial pressure and can easily pay an SME's legal costs if they lose. This strongly discourages SMEs from commencing legal action, or if they do, puts pressure on SMEs to settle early at a discount. Further, if SMEs do make it to a full trial, they have an inequality of arms because the banks' legal team will be better resourced.

And while the individual SME is typically dealing with just their own case, the legal team of the bank may be handling many similar cases, with the resourcing costs spread over all of them. This increases even further the likelihood that the bank will be happy to put huge resources into winning the case against the SME.

Because of the asymmetry of resources some of the SME claimants do not plead their case very effectively, often engaging poor quality legal teams and court appointed experts. The banks have been very clever at allowing such poorly argued cases to go to judgement. This has enabled some very poor judgements to be made as case law. In contrast, when SMEs have prepared their arguments very well, using the legislation as written, the banks have sought to settle before getting to judgement to avoid setting a precedent.

Precedents are very important - if the case is somehow linked to an issue that might set a precedent for other cases - possibly hundreds or even thousands of cases - the banks may well take the view that it makes sense to spend a virtually unlimited amount of money to win the case, or drag out the case for as long as possible until the SME eventually folds and is thereby defeated.

Here's a good example of the kind of distortion of justice that can happen:

In 2002, Paul Carlier won a landmark judgement against Chase Manhattan in respect to a Restricted Stock Vesting. An arguable case that took 18 months from claim to trial and judgement - the judgement was issued on the same day after Judge's two hour

deliberations. He had legal representation throughout and with a barrister also instructed for the trial and in weeks leading up to it.

The claim was for £35,000; and Mr Carlier won. He was awarded full costs plus interest. But his total legal bill for the whole case was £24,000. Chase Manhattan legal costs up to the day before trial (when Linklaters representing them disingenuously sent over their costs to date as a means to force a drop hands proposal on the Court steps) was £68,000.

Based upon responses from various legal professionals, the estimate for Mr Carlier's costs to pursue such a claim today would be in excess of £200,000 and the likely costs for the bank would exceed £500,000. This is due to rising costs and the multitude of time wasting practises that bank lawyers now routinely use to drag out a case for as long as possible, all of which have to be dealt with by claimant lawyers, and at a cost.

Where's the justice in that?

This unlevel playing field created by the Courts is not an easy issue to resolve but the one policy area that might make a difference is if independent statutory tribunals were made available, and also if SMEs could more easily form class/group actions.

And whilst on the topic of policy areas, another reform that would make a positive difference is in relation to Data Subject Access Requests (DSARs). We have all seen in the UK in recent weeks, through the Coutts/Nigel Farage debanking scandal, that an individual's right to a DSAR from a bank can be effective in creating a more level playing field between the bank and its client. But this right to a DSAR presently only applies to an individual. We would like to extend this right to businesses - both sole traders and limited companies - that meet the definition of a SME. This could be restricted in scope just to financial services firms, who in theory have a fiduciary duty to such customers, and to the FCA as the conduct regulator for financial services firms.

It should be noted that RBS' (inappropriately and deceptively named) Global Restructuring Group, Lloyds Banking Group's (inappropriately and deceptively named) Business Support Unit and the IRHP frauds etc. all occurred in the first instance because the bank and their employees knew that these SMEs were never likely to ever be able to obtain the information that exposed what they were a victim of. And so few if any have had justice because of their lack of rights to access this information for FREE, and could actually only obtain it via litigation that none of them can afford.

We have seen the information that a 'sole trader' IRHP victim received in response to a DSAR. "Smoking Guns" of evidence galore and a very appropriate level of compensation was paid. The victim got to see everything the bank and employees said and did behind the scenes. What they did was truly shocking, but fortunate that the status of the victim as a 'sole trader' meant they were able to obtain the evidence for FREE, followed by significant

compensation as a result. WHEREAS, all other SMEs have been deprived of such information. Indeed, in the FCA's IRHP review, customers were not entitled to see what the bank put forward as the 'case file' for their case to the skilled persons. Invariably it falsely represented the facts and damages.

Not only would such a right to access information for SMEs resolve countless historic cases, but it would deter banks and their employees from committing offences because of the right of the SME to obtain any and all information. This is a 'low hanging fruit' reform opportunity that would be easy and inexpensive to introduce and we urge the Committee to pick up on it.

SHOULD COMMERCIAL LENDING TO SMEs BE BROUGHT INTO THE REGULATORY PERIMETER?

Yes.

The behaviour of the major UK banks in the run up to and following the Global Financial Crisis has clearly illustrated that there is an enormous knowledge and power asymmetry in the relationship between banks and their SME customers. TTF believes that bringing SME lending and banking within the regulatory perimeter of the FCA for conduct related matters should be done and it would make a material difference in reducing that asymmetry.

Regulatory guidance should provide SMEs with some additional and much needed protection in sales processes up front and just as importantly mean that the FCA cannot refuse to get involved in investigating systemic complaints against banks after the fact. The main issue to agree on is what criteria should be used to separate SMEs from large corporates, who should continue to operate outside the regulatory perimeter. Given the large financial resources needed to access the UK courts the criteria agreed should be pretty large in terms of both net assets and turnover.

HOW WELL DOES THE FINANCIAL OMBUDSMAN SERVICE (FOS) WORK FOR SMALL BUSINESS COMPLAINTS?

The FOS is well suited to dealing with relatively low value and relatively straightforward cases. But it is not suited to dealing with complex disputes between banks and businesses.

Statutory independent tribunals would be far better for those sorts of disputes, and it must be stated that the decision to not introduce the means by which tribunals could be used to deal with such disputes some four years ago was a very big 'mistake'.

Four years and a great deal of money have been largely wasted getting to this point during which time there has been ongoing suffering for thousands of victims of banking fraud and misconduct. In hindsight, it is now crystal clear that the idea of a statutory tribunals framework would have been a far better approach. Since the BBRS experiment has been tried but failed, the intervention of the Government is now needed to create a route to justice, through a modified statutory tribunals framework.

Modified because there was a tribunal process set out in Schedule 13 of the FSMA 2000 and it still exists reflecting the changes made to the Courts and Tribunal Service which is under the office of the Lord Chancellor. It is called the 'Financial Services and Markets Tribunal' and is allocated to the Upper Tribunal. The Tribunal is paid for by HM Treasury on a budget submitted by the Lord Chancellor. HM Treasury recover that annual cost from the FCA as Regulator who includes it in calculating the annual levy on licenced firms. So it is a self-funding operation paid for by the firms licensed by the FCA, as Regulator, to trade in the UK.

It was not contemplated that the Regulator and/or the Secretary of State would not use their powers to obtain Restitution and would not use the powers to obtain Restitution Orders. In fact the FCA has used its powers in reported cases such as Asset Land Investments plc v FCA (2016) UKSC 17 that confirmed the FCA had the power to obtain restitution orders and granted those made to the court. In the deliberate action of refusing to use its power there is access to the Upper Tribunal because it is a decision of the Regulator that is complained of. This does not bring the licenced firm into the process and that is what is necessary to allow the Upper Tribunal to have a direct role in determining the conduct of the licenced firm and issuing a Restitution Order which would be an order of the Upper Tribunal.

A modification by Statutory Instrument laid before Parliament is all that is required. A task for the Economic Secretary to the Treasury as the responsible Minister. Or the Secretary of

State Business and Trade with responsibility for many Regulators and the Regulators Code so has oversight of effective regulation in the UK.

The extensive support for the idea of using independent statutory tribunals is shown at the TTF event about the topic:

- 31st January 2023
  The Role that Tribunals could play in Settling Disputes Between Businesses and Banks
  Video: https://www.youtube.com/watch?v=Vu6K0NNpyVE&feature=youtu.be

However, we note from the Westminster Hall Debate about the BBRS that was held on 11th July 2023 that the Government seems keen to move forward by giving the Financial Ombudsman Service (FOS) an expanded remit to deal with complex disputes between banks and businesses. Or, putting it another way, the Government seems keen to not make use of a statutory tribunals approach.

Why is that, when so many other stakeholders aligned with the idea of achieving fair outcomes for businesses in dispute with banks want an independent statutory tribunals approach?

That's an important question, especially when you consider the last time an alternative to statutory independent tribunals were proposed and rejected, it led to what many predicted would happen - a calamitous outcome through a failed BBRS.

Let's revisit what happened last time the Government got its way on this:

John Glen MP, in 2018, in his capacity as Economic Secretary to the Treasury, when facing calls in a Parliamentary debate for a Tribunal to be established as the vehicle for dispute resolution for firms, said:

"A number of contributions have also focused on the proposed new tribunal system to deal with financial disputes between banks and SMEs. As the industry, the FCA and the Treasury progress discussions on this issue, all avenues will be considered. The FCA is undertaking a review, and it launched a discussion paper on SMEs in November 2015……We will see what the proposals are and respond accordingly."

In October 2018 the FCA published the findings of their review and on the Tribunal issue concluded:

"We have publicly stated our support for a tribunal that could deal with disputes that fall outside the ombudsman service's remit. We see a role for both an extended ombudsman service and a tribunal, as they meet different needs. For example, the ombudsman service's expertise lies in providing a quick and informal process for financial services disputes. A tribunal, on the other hand, would provide a more formal, court-like approach for some higher value disputes, or disputes involving complainants above the ombudsman service's eligibility thresholds. However, we do not have the power to set a tribunal up. This would require primary legislation and is therefore a matter for the Government."

Having said that he wanted to have the FCA findings prior to making a decision, Mr Glen duly disregarded those findings when they were supportive of a Tribunal system, and instead pursued the alternative that was proposed and sought only by the banks, UK Finance and others lobbying on behalf of bank interests. Mr Glen fails to mention the existence of the Financial Service and Markets Tribunal assigned to the Upper Tribunal under the Tribunals Courts Services under the Tribunal Courts and Enforcement Act 2007 and The Transfer of Tribunals Functions Order 2010 SI 2010/22 amending the FSMA Schedule 13. The Upper Tribunal is part of the office of Lord Chancellor and is located at Upper Tribunal (Tax and Chancery Chamber), 5th Floor Rolls Building Fetter Lane London EC41NL email uttc@justice.gov.uk Tel 020 7612 9730.

Mr Glen also has not in correspondence or debates in Parliament explained the Financial Guidance and Claims Act 2018 and the provision for a levy under the FSMA for expenses of a single financial guidance body. The impression is that the BBRS is the only non government agency available over which the FCA has no responsibility which is contrary to Part 2 of the Financial Guidance and Claims Act 2018 which places the responsibility of Claims Management services clearly with the FCA. The Compensation Act 2006 (now repealed) on transfer to the FCA under Section 419A of the FSMA, was recently considered in the Supreme Court's decision R (on application of PACCAR INC and others v Competition Appeal Tribunal and others 26th July 2023 [2023]UKSC28. Damage based agreements (DBA) funding in litigation falls within the express definition of claims management services which includes the provision of financial services or assistance.

BBRS has received, it is said £32m, in financial assistance to manage the bank's claims position and it has been very successful in neutralising third party claims. Whilst the PACCR case was about enforceability of DBA's, FSMA s419A (2) in subsection (1) (other services) it is discussed as being capable of a broad interpretation of Claims Management Services. So much so it captures all DBAs and Litigation Funding Agreements (LFA) as unenforceable arrangements. The advocacy arrangements with BAM (Bank Appointed Member) is managing the claims process through BBRS and it is arguable that makes BBRS a claims management service for which it is being paid by the banks subscribing to BBRS and should be regulated by the FCA under s419A(2).

So why is the Government so keen to avoid having something other than statutory independent tribunals to be the way forward?

The simple answer is because the Treasury and the Banks would not have control over what happened; it would be down to the merits of the case, i.e. what was actually right, fair and just. And as such it would negate the possibility of the banks getting their way regardless of the merits of the case; which is what the BBRS has been about since the very beginning, and it's why the Government are now trying to push hard for the Financial Ombudsman Service (FOS) to be tasked with dealing with disputes between the banks and businesses.

Why is it important the FOS is not tasked with handling disputes between banks and businesses?

There's a long list of very good reasons:

- The FOS is not geared up to deal with complex financial disputes and has no track record of experience of dealing with complex cases of any nature - it is just not built to do that;
- The FOS does not have sufficient resources to challenge the banks' extensive financial and legal resources - they will be outmanoeuvred by the banks; legal teams despite the fundamental merits of the claimants' cases;
- There is a woeful lack of asymmetry and fairness when it comes to disclosures, whereby banks can see and comment on complainants' evidence whereas complainants lack a corresponding right. This is grotesquely unfair as it means that complainants struggle to secure the evidence that might prove their complaints - we urge the Committee to look into this matter the next time the FOS leadership is before it;
- the banks exploit that asymmetry through which an already uneven playing field is made even worse;
- The perjury rules are lax; and given the size of the cases that could be brought, the temptation for banks to wander from the truth will be great. It must be noted that there have been many cases of banks submitting false evidence even in Court cases (details available on request); so the propensity for banks to do so in a perjury-lax environment such as the FOS means it will be an unreliable route to fair justice for the claimants;
- The poor reputation of the BBRS (for all the reasons explained in this submission) is in part caused by former FOS employees who had been specifically recruited into senior executive roles within the FOS to act as Assessors. The conduct of some of them in the BBRS was shown to be incompetent at best, but please also note there

have even been serious allegations of dishonest conduct by some of the ex FOS employees - further information available on request. As such, the reputation of the FOS has also been damaged;

- There is no effective external appeal mechanism i.e. appeals can only be heard within the FOS. So if a claimant strongly disagreed with the outcome of a FOS decision and the internal appeal decision the only option available would be judicial review - far too complex and far too expensive for they typical claimant to pursue successfully;

- Decisions made by the FOS cannot be overturned - there is only scope for criticism of its decisions by the Independent Assessor, but no scope for decisions to be overturned;

- The whistleblowers who spoke out about the FOS in the 2018 Dispatches Undercover: Who's Policing Your Bank? programme explained, the FOS is already overworked - it cannot cope with what it already has. Furthermore, it is plagued with well-known issues around poor recruitment, training, management and leadership;

- The FOS' relationship with the FCA is too close and cosy. The FCA controls the FOS' budget, is responsible for all the senior hires and fires. This closeness is a reputational issue for SMEs, many of whom have witnessed how badly the FCA have stood up for their interests - allowing the formation of the BBRS being the most obvious example but others include the FCA's appalling response to the Swift Review about IRHP mis-selling - a response so poor it has resulted in an APPG taking the FCA to court by way of a Judicial Review; and of course the FCA's unjustified defence of RBS in relation to the notorious Global Restructuring Group, where it took the position that there were isolated cases rather than a systemic issue which the balance of evidence clearly showed to be the case;

All these reasons mean there is no basis in logic to believe that the FOS is going to be able to routinely and reliably provide justice to SME owners with banking disputes, and therefore could not bolster the level of trust and confidence that needs to be rebuilt between banks and businesses.

The failure to introduce independent statutory tribunals for disputes between businesses and four years ago, and the (deliberate) ineffectiveness/unfairness of the BBRS has been extremely costly for SMEs. In particular, they have suffered because the banks have 'run down the clock,' resulting in thousands of SME claims being time-barred under the Limitation Act. The banks have therefore been protected from claims, whilst the victims of their malpractice, malfeasance, misconduct, mis-selling and even outright fraud have been denied justice. The completely unnecessary delay in the introduction of tribunals has also

meant that some victims have died whilst waiting for justice, and thousands have had to live in relative poverty and shattered wellbeing for years.

This must now stop; the mistake of not empowering tribunals to be used to settle disputes must not now be repeated - TTF and its members feel very strongly about this - strongly enough to make the issue a key theme in our next Rally for Better Financial Regulation.

And of course, whilst we cannot undo the loss of four years for the victims, or wipe from their memory the anguish, distress and righteous indignation they have experienced; and whilst of course we cannot bring back to life those that have died waiting for justice; we can of course do the right thing and ensure a special provision is applied to waive the Limitation Act as it would otherwise time bar the cases - that could, and should be done, in an effort to ensure justice is seen to be done; an effort that would be both noble and necessary.

It is accepted that waiving the Limitation Act is a significant step to take, but unless it is done, how else can justice be seen to be done?

We must remember that it is not the victims' fault that:

- The banks lobbied HM Treasury to decide against the introduction of independent tribunals
- HM Treasury ignored the balance of evidence supporting tribunals and did what the banks wanted them to do - initiate a voluntary, bank-controlled redress scheme that was literally accountable to nothing and nobody
- The FCA, through its CEO Andrew Bailey was motivated to limit the amount of redress the banks would pay because of the tension between prudential and conduct regulation
- The FCA wrongly subcontracted their responsibilities to the banks, and were thereby complicit in what is now easy to see was a deliberate attempt to deny justice to the victims
- The banks and the FCA put in place the BBRS, which has now, beyond any reasonable doubt, been proven to have been a sham from start to finish

How could the Limitation Act be waived?

We suggest that a balanced, proportionate and risk-limiting approach could be taken whereby where it is shown that claims caused by breaches of the Financial Services and Markets Act 2000, that the Limitation Act be waived, and the clock to start again when the relevant legislation is brought in.

HOW EFFECTIVE HAS THE BUSINESS BANKING RESOLUTION SERVICE BEEN, AND WHAT LESSONS CAN BE LEARNT FROM IT?

We will now turn attention to the detailed explanation of each of the issues 1 to 10 referenced in the Executive Summary; combined they go above and beyond the Committee's question above.

A simple and direct response to the question to begin with is that the BBRS has been completely ineffective for the claimants, whilst being totally effective for the banks; and the main lesson to be learned is that virtually everything about the BBRS must never be repeated again.

1. DID THE FCA KNOW THE BBRS WOULD NOT WORK?

We shall first restate what is in the Executive Summary:

We strongly suspect that the answer to that question is 'yes' and as such the BBRS was not established in good faith. Not only was the BBRS doomed to fail, we posit that it was *designed* to fail. All this happened under the watch of Andrew Bailey, who at the time of BBRS discussions in 2017/18, was CEO of the FCA.

The underlying motivation was the desire to protect the balance sheets of the banks. Andrew Bailey was central to protecting those balance sheets during the Global Financial Crisis; and he then went on to defend those very same balance sheets when the mis-selling by the banks was revealed.

We have received insight from a credible source who is familiar with the FCA's consideration of potential dispute resolution mechanisms for SMEs, who explained how the regulator came to endorse the BBRS proposals.

They described how SME representatives had put forward proposals for a tribunal, which the FCA quickly dismissed. This was determined with minimal analysis or discussion to understand whether the proposals were feasible or desirable.

This was because, internally, the position of the FCA was already clear. There was no appetite at the top of the FCA to re-open legacy cases and for significant additional redress to be paid. This aligned with the view of the banks.

At the heart of this was a conflict between prudential and customer regulatory objectives, which the separation of the FCA and PRA has never fully addressed. FCA Senior Managers

(including then CEO, Andrew Bailey) had been closely involved in rescuing the banks during the Global Financial Crisis and were cognitively aligned with the banks in that, with the backing of the HM Treasury, they were overly focussed on the prudential risks and were reluctant to do anything that would weaken the banks' balance sheets.

However, the FCA was also coming under considerable pressure from constituency MPs, the Treasury Committee and the media to address SME concerns. The regulator recognised that it needed to be seen to be acting and therefore quickly backed the BBRS, despite being aware that it delivered few of the features that SME representatives demanded, that it had limited eligibility, and that it was unlikely to result in anywhere near the levels of redress that SMEs were hoping for.

The outcomes and current criticisms of the BBRS were therefore foreseen when the FCA endorsed the proposals. The FCA pressed ahead regardless, favouring short-term expediency over the delivery of a well thought out and effective process.

The same root cause – prudential objectives are prioritised over fair customer outcomes

The BBRS story follows a now familiar pattern. Faced with what it sees as competing objectives – customer redress versus preserving the banks' capital buffers – the FCA prioritises the latter.

In our view, nothing illustrates these conflicting objectives more clearly than the following extract from the FSA's September 2012 Board Minutes, with the Managing Director of the Prudential Business Unit candidly stating:

> ***'there could be some prudential risks arising from the cumulative fines and redress costs relating to conduct issues and the FSA was working with some firms on how to mitigate these'***

The Managing Director of the Prudential Business Unit was of course Andrew Bailey, who would go on to lead the Prudential Regulatory Authority before returning as CEO of the FCA in 2016 and then taking up the role of Governor of the Bank of England in 2020 (moves that were hardly likely to lessen the conflicts between prudential and customer centric thinking).

Literally days after the Board was told that the regulator would be working with firms to mitigate redress costs, as documented in the Swift report, the FCA met with HM Treasury and the Banks to discuss ways to limit the scope of the IRHP redress scheme. As Swift puts it, "at the stroke of a pen" the FCA introduced the so-called "sophistication test" which, "gave a regulatory free pass to the banks as they were not held liable for mis-selling to 10,000 customers."

Importantly, Swift debunked the usual FCA excuse that, while it is minded to do the right thing for customers, it is prevented from doing so by legalistic, lobbying banks. As

documented in his report, the sophistication test that excluded thousands of customers was the FCA's idea.

Our source has confirmed that this is also what happened when the FCA was considering dispute resolution mechanisms for small businesses. The FCA's rejection of a tribunal and endorsement of the obviously limited BBRS was not the result of lobbying from the banks (although of course this went on), rather it reflected the FCA's, and in particular Andrew Bailey's, prioritisation of strong bank balance sheets over fair customer redress.

These case studies clearly demonstrate that the UK's 'twin peaks' model of regulation is not functioning in the way that was envisaged. The separation of the FCA and PRA ought to have freed the FCA to pursue an unequivocally customer focussed agenda when it came to banks. However, the FCA is clearly unable or unwilling to do this.

2. THE FCA WAS WRONG TO SUBCONTRACT TO THE BBRS

It is our understanding that the Financial Conduct Authority has no powers to abdicate from its duties under the FSMA 2000 (the Act). As a creature of statute it is limited to conducting itself in accordance with the Act. It can obtain whatever assistance it needs to perform those statutory functions but must remain in control as it retains responsibility for all regulatory matters under the Act.

BBRS seems to have been created as a company limited by Guarantee as a not for profit entity. This means there are no shareholders receiving a return on purchasing shares or having shares issued to them. There is no share capital and none can be created. It can make distribution of cash and assets on being liquidated (wound up) and in the Articles of Association first adopted, only the last £10,000 was to be returned to the funding banks or go to charity. The funding banks would control the accounting of BBRS to make sure there were not large sums in BBRS' control at the time of winding up as such sums would have to be distributed to similar not for profit organisations or charity.

3. THE BBRS IS NOT A DISTINCT ENTERPRISE AS CLAIMED

As mentioned earlier, a person (legal or natural) *cannot have an enforceable contract with itself.* It is our understanding that BBRS claim they have signed binding contracts of participation with the 7 banks volunteering to join the scheme and that the scheme rules are also bound by an enforceable contract with the 7 banks so the eligibility test is one such 'contract term' the BBRS cannot ignore. They can ask the particular participating bank to waive the contract term but it cannot be forced to do so by BBRS.

If the BBRS is not independent as defined in law the arrangements with the 7 banks could be seen to be inequitable contracts and the 7 banks and BBRS could be challenged on issues such as goodwill, misrepresentation and damages. As the three companies (BBRS, BAM being Resolution Services Ltd and the Banks are connected it is arguable they do not have legal capacity to create an enforceable contract with themselves. If the BBRS is controlled by the BAM it is a misrepresentation of its independence. It is also plausible to say it is potentially fraud under Fraud Act 2006 (S2 False representation, S3 Failing to disclose information, S4 Abuse of position) designed to retain the gains already made from the 7 banks' *irregular* activities, the ruse of independence being simply a method of covertly restricting compensation that would otherwise be paid.

S26 of the Enterprise Act 2002 provides a definition of distinct enterprises and the changes made by BBRS to its Articles of Association and the creation of the Participation Deed and so called Scheme Rules could be seen as clear evidence that the participating banks, BAM and BBRS on eligibility predetermines the potential success or outcomes of claims. BBRS say these are contract documents but in reality because the 7 banks and BBRS could be said to not be distinct enterprises they could be deemed to be contracts within the same enterprise.

As mentioned earlier, a person (legal or natural) *cannot have an enforceable contract with itself.* This is the principle of legal capacity. The banks have created contracts in the process of selling derivatives which are between departments of the same bank and then 'enforced' them in the insolvency or mortgage redemption process to charge break costs. Refer Waddington Trustees 1980 v Royal Bank of Scotland [2015] EWHC 2435 (Ch) and same parties rerun [2017] EWHC 834 (Ch) which dismissed RBS's claims as unenforceable. We therefore posit that it is misleading and disingenuous for BBRS to suggest they are bound by such arrangements as between it and the 7 banks - BBRS has misled.

4. HAS THE BBRS HAS BEEN OPERATING AS AN UNAUTHORISED CLAIMS MANAGEMENT COMPANY?

We believe the FCA has allowed the acquiescence of its responsibilities to an unregulated entity to be established as a claims management business. Doing so has avoided any regulatory or supervisory role for the FCA. It is plausible to say this is ultra vires, meaning beyond its powers to do or grant exemptions to being licenced under the Act. (Ref: The Financial Services and Markets Act 2000 (Claims Management Activity Order 2018 - Part 2 establishes that claims management services are to be regulated within the scope of the Financial Services and Markets Act 2000 FSMA. Claims Management Companies "CMCs" are businesses which provide advice or other services in relation to making compensation claims. This was a transfer from the Claims Management Regulation Unit "CMRU").

The law around Claims Management Services has recently been reviewed by the Supreme Court in R (on application of PACCR Inc) v Competition Appeal Tribunal (CAT) [2023 UKSC 28 Majority decision 26th July 2023 reviewing the relevant statutes as the Compensation Act (CA) 2006 and the FSMA s419A which are in broad terms in focussing on the types of activity rather than the actors. (s4 Compensation Act 2006). The FCA's role is from 1st April 2019 when transferred from the Ministry of Justice and s419A and CA 2006 was repealed. Claims Management definition is largely in the same terms as s4 of the 2006 CA. It is our view that the BBRS does not promote itself as a claims management service to avoid being regulated. It is our view that the FCA and HM Treasury seem content to allow that to be accepted in order to have deniability of any misconduct by the BBRS. The BBRS is however providing 'other services' as stated in s419A (1) and subsection (1) other 'services' includes (a) financial assistance, (b) legal representation (C) referring or introducing a person to another and (d) making inquiries.

Although it claims itself to be a 'resolution service' it is a claims management service that should be regulated by the FCA because of the other 'services' it provides and controls. The FCA would have powers to look at the terms of using the BBRS service and determine if they were transparent, fair, equitable and without institutional bias in favour of the banks who control BBRS through the BAM.

5. THE BBRS IS NOT INDEPENDENT AS CLAIMED

The badly compromised governance structure of the BBRS means the directors are not truly independent. That's a problem because the BBRS was sold to stakeholders as being independent. The participating banks fund it, and as the saying goes "he who pays the piper calls the tune". The banks also get to "mark their own homework". So we have a rather bizarre situation where the banks are the judge, jury and proven perpetrator, and as such we feel totally justified in referring to the BBRS's governance structure as 'badly compromised'.

The participating banks created a company, known as the Bank Appointed Member (BAM). It is jointly owned by them and it has the power to block the directors from exercising key powers they would normally be expected to hold. See page nine and the final page of the Articles of Association, here. The BBRS' supposedly independent leadership team is disinclined to push through change without the approval of the BAM, and it cannot mandate that it does. Furthermore, there are also concerns about the independence of some of the adjudicators because they include former bank employees who sold Interest Rate Hedging Products, which are the basis of many victims' claims. Are they not therefore obviously conflicted and anything but independent?

The Discovery of the Bank Appointed Member (BAM)

For reasons we could speculate about, it seems there may have been some changes to the governance arrangements for the BBRS as it was going live/after it went live.

We understand that as far as BBRS is concerned it has filed its PSC 008 (see here) statement of truth because it is pursuant to Statute. If it is wrong then our understanding is that would be perjury under s5 1911 Perjury Act or Fraud Act 2006 s1,S2(a) (b) and that the BAM is a Person of Significant Control and or a Registrable Relevant Legal Entity (RRLE).

Furthermore, we understand that a Special resolution by BBRS Members was passed on 12th February 2021 and notified to Companies House (CH) by Nick Hornsby, Company Secretary. It was stamped by CH 16th February 2021.

The Special Resolution reads:

'*THAT, with effect immediately following a go live completion call between the company and the financial institutions funding the Company, the draft articles of association (which, for the purpose of identification, was attached to the Resolution) be adopted as the new articles of association of the Company in substitution for, and to the exclusion of, the Company's existing articles of association.'*

The adopted articles of association attached to the Special Resolution were not filed at Companies House.

Why not?

The Business Banking Resolution Service was formed and registered on the 10th July 2019, Company no 12096333. It is a company without shareholders, only Members and is limited by Guarantee of the Members at £1 per Member (recorded in the Statement of Guarantee as Teresa Graham, Nicolette Berenice Turner, John Macloud). The first set of Articles of Association were filed and it is these Articles that we understand were replaced by the Special Resolution. On formation there were disclosed several Members (persons) of significant control because each of the declared Members had more than 25% of voting rights but not more than 50% (100 divided by 3 = 33%). So on formation there were only 3 Members. There was no relevant legal entity declared as a person of significant control or as an Officer of the Company. The Officers of the Company listed are Lewis Shand-Smith, Paul Uppal and Lucy Armstrong. On 12th February 2021 BBRS served notice to Companies House (CH) (form PSC08) - "The Company knows or has reasonable cause to believe that there is no registrable person or registrable relevant legal (PSC) entity in relation to the company."

It is our understanding that the BBRS would not release the names of the current Members, specifically the BAM when such information was requested by SME Panel members. This left any interested party having to make an application in accordance with s116 of the Companies Act and which could have then allowed BBRS to refer the request to the courts to argue insufficient grounds for releasing the names which the Court may have agreed and then BBRS could have sought a substantial costs order under s117 against the person making the s116 application. The same kind of restrictive tactic as a SLAPP. ['Strategic Lawsuit Against Public Participation' to intimidate and financially or psychologically exhaust opponents by the improper use of the legal system designed to silence criticism. Ref : Fact sheet UK Government latest update 20th June 2023 references LONDON CALLING a report published April 2022 by the Foreign Policy Centre and ARTICLE 19 stated 70% of SLAPP cases were connected to financial crime and corruption.]

We submit that this is not an appropriate position to take for a not for profit and supposedly transparent organisation that is charged with rebuilding trust between the banks and businesses that they have harmed.

Is the Bank Appointed Member a Person of Significant Control?

It has been central to the development of the BBRS from the outset and a prerequisite for it to have any credibility/integrity/legitimacy, for it to always be, and for it to always be seen to be, independent. The importance of this point cannot be overstated.

It would seem entirely reasonable to believe that if the Bank Appointed Member had the ultimate control of the BBRS Rules and eligibility, then it would be a Person of Significant Control.

The BBRS Register confirms that the company registered as the BAM is called the Resolution Service appointed Member Limited, Company Number 13183202

At the time of writing, the Directors are:

- Simon Amess, Managing Director, Commercial Banking Control Function at Lloyds Banking Group
- John Baldwin, Head of Commercial Clients at Santander UK
- Paul Bastow Head of Lending Products and Pricing, Director, Barclays Business
- Peter McIntyre, Head of Business Banking at HSBC
- Matthew Tuck, Head of Product, Service and Operations at NatWest
- Guy Williamson, Head of Customer Risk, Conduct and Complaints at Virgin Money
- Joanne Wilson, Head of Customer Service Delivery at Danske Bank

Whilst we do have a list of the Directors, we do not have a current list of Members for BAM and believe it would be helpful if that information were known. The Members in the Statement of Guarantee are listed as HSBC UK Bank Plc, Lloyds Bank, Barclays Bank, Natwest Bank, Northern Bank Danske, Clydesdale Bank and Santander UK Plc. As the Members normally are the guarantors it is plausible to say these banks are the Members of BAM, but we do not know that for certain.

There are important questions about the BAM that deserve to be asked and answered:

- What did relevant individuals such as the Economic Secretary to the Treasury and any relevant Parliamentarians know about the BAM; when did they know it; how did they learn about it; and what did they do once they had been made aware?

- Which individuals were in a Director role at the BBRS when the Articles of Association were changed and the BBRS was created; what was the involvement of any of the BBRS Directors to the changes to the Articles of Association and the creation of the BAM? Was there any variance between statements made in public about the independence of the BBRS by any of the Directors and the reality; and if there was a variance, were they aware of it at the time?

- Osborne Clarke LLP was the law firm giving advice to the SME representatives. What was the role of Osborne Clarke LLP in relation to the changes to the Articles of Association and the creation of the BAM; and who were they responsible to - the BBRS or the SME Representatives; and what were their Terms of Engagement?

Note that in the Appendix we provide access to several opinions from a KC supporting the notion that the BBRS was not independent.

6. THE ELIGIBILITY CRITERIA IS WRONG

The lack of independence of the BBRS has led to the Scheme's Eligibility Criteria being unduly limited, resulting in almost all prospective claims being excluded. The eligibility criteria has been a contentious point throughout the life of the BBRS.

It's as if it were a rerun of the 2012 Voluntary Review Scheme that the FSA agreed could be used to obtain restitution for Retail clients. Retail clients are defined under Directive 2004/39/EC 21st April 2004 fully transposed into the FSMA by S.I. November 2007 - Article 4 (12) 'Retail client' means any natural or legal person who is not a professional client. Then, arbitrarily changed the statutory criteria of Retail client by introducing a sub group called Sophisticated Retail client who were to be excluded from the scheme. The Regulator and the Secretary of State have subsequently refused to use their power under s 382 of the

FSMA 2000 to obtain interim or final Restitution Orders for the excluded Retail Clients. £2.2Bn has been paid out to those in the 2012 scheme (FCA figures) and nil to Sophisticated Retail Clients.

Even though this decision by the FSA is described as an arbitrary decision by the Treasury Committee (11th Report March 2015) and plainly wrong by John Swift KC in his 2021 review for the FCA, the FCA simply say they disagree with Mr Swift's opinion, but offer no explanation as to why the FCA disagrees. UK Finance is reluctant to change the criteria and there is disagreement about whether the Scheme rules are being interpreted correctly.

The extremely low number of cases that have been resolved means the BBRS has not achieved its central purpose - to resolve a meaningful number of cases. When the BBRS was being established, UK Finance estimated that some 60,000 firms would be within scope for the historical scheme, which in theory deals with legacy misconduct cases such as RBS GRG, HBoS Reading, IRHP mis-selling, Lloyds BSU cases, bank signature forgery cases and more.

We believe that there should be no fabricated criteria other than the complainant being a Retail client. The FCA itself created a subclass called Sophisticated Retail client and John Swift KC in the FCA Review report of IRHP mis-selling said the FCA was *wrong* to do so. BBRS and BAM have gone further and applied the same criteria as the FCA and also an arbitrary cap on the quantum of possible awards.

Other eligibility issues include:

- Using the Gross balance sheet value of the business rather than the Net. For example, in one case the Gross balance sheet value was £9M, but the Net below £1M. Loan at time of gross asset circa £7.3m. And this excludes hidden margin.
- Whether the claimant has been involved in another redress scheme
- Whether the claimant has entered into a settlement agreement
- Whether the claim has deemed to be eligible to go to the Financial Ombudsman Service
- Whether the claim is not about banking
- Whether the claim is above or below the turnover thresholds
- Whether the bank concerned is not one of the participating banks; and so on.

The FCA criteria was described as 'arbitrary' by the Treasury Select Committee (TSC) in March 2015. Ref (Treasury - Eleventh Report Conduct and competition in SME Lending / section 4 Mis-sale of Hedging Products Par 86 quote "This was a definition agreed between the FCA and the banks that is not based on the legal definition of sophisticated" and Par 92 quote " The Arbitrary sophistication test…." referring to par 86.

The BBRS has taken the same arbitrary criteria of the FCA to determine cases submitted to it as ineligible. This goes against the publicly stated aim of the Regulator to the TSC and the Treasury to the House of Commons. Ref for the Regulator in the summary Point 14 quote "redress must be fair and reasonable" and that "redress should aim to put customers back in the position they would have been in had the breach of regulatory requirements not occurred".

In contract law this is the same as rescission of a contract. [Ref for the Treasury - Hansard 1st February 2016 Col 710 -749 Back bench Business 'Financial Conduct Authority' Col 745 time 9.48pm The Economic Secretary to the Treasury (Harriett Baldwin) Col 747] quote "The Government have made it clear from the beginning that mis-selling of financial products is unacceptable, and that businesses affected by it should be compensated".

The BBRS is a large and expensive continuation of conduct designed to deliberately inflict harm on statutorily defined Retail Clients and to remove their statutory rights associated with being defined as Retail Clients under the Financial Services and Markets Act 2000 (FSMA) with amendments including Market in Financial Instruments Directive 2004/39/EEC - Annex II fully transposed into FSMA by statutory instrument in November 2007.

The FCA's own Review by Mr John Swift KC considered by the Board of the FCA in September 2021 is clear the FCA agreed to the banks' request to exclude certain Retail Clients with no apparent (from what he was shown or told about by employees giving evidence to him) written determination of the consequences of their agreement to the banks' request to limit access to redress by creating a new class of Retail Client as a subset. John Swift KC describes that decision as *wrong*. The Swift review took 2 years to compile and cost the FCA £8.5m.

The former Chief Executive, Martin Wheatley, refused to participate. He had given evidence in 2015 to the TSC and appeared on a Panorama programme, so his views at the time were known. Mr Swift's report does not refer to either the TSC or the Panorama programme in which Mr Wheatley, former CEO of The FCA gave evidence/was interviewed.

The Courts have made it clear in Grant Estates v RBS (Lord Hodge) at paragraph 47 that legal persons do not have the right to bring an action for statutory breach under the FSMA s150 and that such a provision of denying access to the courts is permissible because the same Statute places a duty on the Regulator where irregular activity is found to obtain an order from the Courts for Restitution. This is something the FCA continues to refuse to do. The Secretary of State for Business and Trade has the same powers and has refused, so far, to use them.

A person who refuses to carry out a public duty for which they are responsible commits misfeasance in public office and or misconduct in public office. Both may change if the

recommendations of the Law Commission are accepted and put into Statute. Ref HC 1027 LC397 December 2020.

How was the 'right' (for the banks) level of redress arrived at?

The right level of redress should have been arrived at based on the fact pattern of each case and putting the SMEs into the position they would have been in had the banks' malpractice, malfeasance, misconduct, mis-selling and even outright fraud not taken place.

That's what should have happened but that's not what actually happened.

We believe, for the reasons explained earlier, that the FCA reverse engineered a level of redress that the banks would be happy with and adjusted the eligibility criteria to drive out that level. The process was completed by way of FCA employees working with the banks using a spreadsheet-based model that had been created.

The spreadsheet model was used to apply various 'what if?' scenarios, until a redress figure of about £2Bn was forecast.

The original estimate of how much redress would be paid out was about £20Bn, assuming the cases were dealt with fairly and equitably.

That revised approach therefore gave the banks some £18Bn; money on their balance sheets that should have been in the bank accounts of the SMEs.

The Oxford Dictionary definition of theft is:

N. The dishonest appropriation of property belonging to another with the intention of permanently depriving the other of it.

Has this therefore been the largest theft ever perpetrated in the UK?

Everything that has been explained in this section can summarised in just one simple metaphor:

The judge has protected the burglars, not the burglars' innocent victims.

The problems with Boundary and Concessionary Cases

The BBRS has publicly welcomed complaints and these might be processed through the appointment of a Customer Champion, someone appointed by the BBRS who will help the complainant prepare and write the complaint. The appointed Customer Champion, with any supporting documentation supplied by the complainant will go to a reviewer in BBRS and it is at this point the reviewer's response is that the complainant is ineligible for the BBRS

scheme. So called concessionary cases are allowed by the individual banks however the banks have the final say as to whether the case can progress. It is a rigid process that excludes many claims. They will be recorded as dealt with, suggesting the BBRS process has achieved a measurable objective which is quite inaccurate.

It is fundamentally wrong that the banks alone can determine what happens to Boundary and Concessionary Cases; and that their decisions cannot be challenged.

Where a complainant has new evidence not considered as part of any settlement they can apply to be a concessionary case. Where the company is in liquidation or administration they have to apply to the Insolvency Practitioner (IP) for the case to be assigned. If the IP is bank appointed there's little or no chance of getting the case assigned.

Once the evidence is gathered it is sent to the customer champion and the complaint is written up. The problem with the process is if it's not accepted by the bank that the complainant is complaining about, then the only route left is to appeal.

Once an appeal is lodged it's considered by an assessor but the complaint matter is not considered as per the extract below from a declined appeal notice:

Reasons for declined appeal 5.

Relevant extracts from the BBRS Scheme Rules are set out in Appendix 1.

6. Having considered the appeal, I must dismiss it because I am satisfied that it is manifestly clear in all the circumstances there is no possibility of the appeal succeeding in accordance with Scheme Rule AP5(4) (Notification of Appeals).

7. For the avoidance of doubt, neither the Eligibility Assessment nor this decision to dismiss XXXXXs appeal rely on assessing the merits of XXXXX complaint. I must decide whether it is manifestly clear in all the circumstances that there is no possibility of XXXXXX appeal of the eligibility decision succeeding. To do so, I must focus on the application of the BBRS eligibility criteria.

The appeal decline relies solely upon the extract below

13. For the reasons given above, I consider that it is manifestly clear in all the circumstances that there is no possibility of the appeal succeeding as no material errors of fact or law have been identified and so I dismiss this appeal.

They bypass the fact that the case is a concessionary one and rely upon the eligibility criteria alone. No consideration is given to the actual merits of the complaint

7. THE SUPPOSEDLY INDEPENDENT POST IMPLEMENTATION REVIEWS WERE MISLEADING

In this section we will show how and why the supposedly independent Post Implementation Reviews were gamed, resulting in a completely false and highly misleading narrative being published.

The minutes of the BBRS Implementation Steering Group meeting held on 9th February 2021 show that agreement was reached on the design of the scheme subject to 3 conditions, none of which have actually been met:

#1: That SME stakeholders would significantly influence the workings of post-implementation reviews, and that if it demonstrated that the eligibility criteria were too narrow, they would be changed. But the SME stakeholders were unable to significantly influence the workings of post-implementation reviews, and the eligibility criteria were not changed despite being far too narrow.

The reviews were not produced as intended - they were not independent - all the individuals that produced the reviews were selected by the banks; none of the individuals proposed by the SME representatives were chosen.

Furthermore, the testimony given by the SME representatives when interviewed for their input to the Reviews was largely ignored; Cat MacLean resigned shortly after the publication of the first review.

The reviews were a whitewash; they portrayed a false narrative that suited the banks agenda but they were fundamentally misleading and dishonest.

#2: That there would be ample scope for cases to be considered that fell outside the eligibility criteria on a concessionary basis. But there wasn't.

#3: That the caps on awards would be disregarded in practice i.e. that they were only contractual and would in practice be disregarded. But they weren't disregarded in practice.

So all 3 very significant conditions were not met; so on this point alone there is reason to doubt the legitimacy of the BBRS and the integrity of those that ran it - put simply the SME representatives had been tricked into accepting the scheme design - they had been deceived.

It must therefore be emphasised that the ongoing claims by the BBRS that the scheme design was fully and unanimously supported by the SME representatives is a false narrative.

Furthermore, a recording of the 9th February 2021 minutes shows a significant disparity between what was actually said and what was recorded in the minutes. Why? That recording may be available on request.

8. TRUST AND CONFIDENCE BETWEEN BANKS AND BUSINESSES HAS NOT BEEN RESTORED

This section is a particularly substantial and important part of our submission.

and UK Finance, the trade body for the banking sector, commissioned the Walker Review, which was published on 23rd October 2018. The Walker Review's recommendations included the establishment of a voluntary ombudsman scheme for larger businesses (who would be ineligible for the Financial Ombudsman Service (FOS)) and a voluntary scheme to consider historic SME banking disputes.

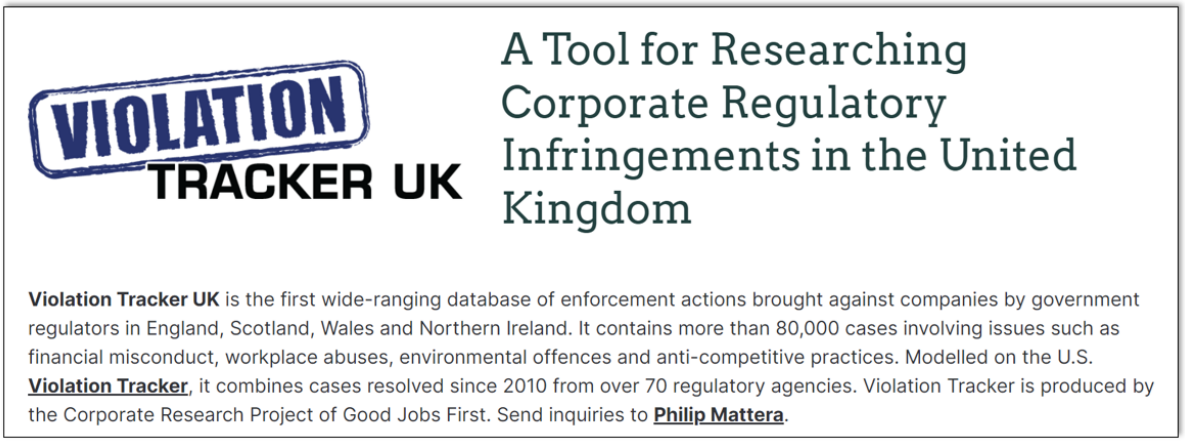
UK Finance published its response to the Walker Review on 1st December 2018. It outlined proposals made by seven UK banks (Lloyds Banking Group, Barclays, HSBC, CYBG, Danske Bank, Royal Bank of Scotland and Santander) to implement the recommendations in the Walker Review.

Importantly, The Walker Review also recommended the banks should seek to rebuild trust between them and SMEs through committing to a new system of dispute resolution to ensure past issues are not repeated. The BBRS is the organisation set up by the banks to deal with the Walker Review's recommendations.

But why would the FCA go along with what was proposed, given that it would give all the control over what happened to the banks? The tragedy is that it was even worse than the FCA just going along with what the banks wanted; the FCA actually wanted what the banks wanted, because Andrew Bailey, then CEO of the FCA was conflicted - because of the tension between the FCA's prudential and conduct remits.

Unsurprisingly, trust and confidence between the banks and business has not been restored; if anything it has been worsened. That's a problem because rebuilding trust and confidence was a central purpose of the BBRS, as expressed by then-Chancellor Philip Hammond. Some believe that the BBRS started off as an authentic, genuine endeavour by the banks to tidy up the many and extensive messes they created and for them to be rehabilitated i.e. to change their ways from the exploitative, predatory, dishonest, devious and profit-regardless-of-the consequences-and-the-carnage-caused entities that they were.

For context and an understanding of the scale of repeated irregularities we refer the Committee to the data held within Violation Tracker UK, which tracks infringements:



The data relating to the UK's Financial Services sector shows:

1. The UK's Financial Services sector to be the worst offending part of the UK economy, by a ridiculously long way
2. Hard evidence of the sector being relentlessly recidivist, and treating the imposition of fines as just a cost of doing business; and the FCA routinely failing to ensure good conduct in the market - the FCA's default response is to impose a fine on the innocent shareholders of the violating company rather than to hold the individual perpetrators responsible to account

The money received from fines at the time of writing has been £5,704,444,335 since the year 2010. That money goes to HM Treasury. No payments from these sums are made to victims of the irregular conduct. There is an uncomfortable perception HM Treasury effectively considers this as 'tax' revenue the financial services sector is willing to pay to continue irregular activities, and that the businesses see fines they pay as a cost of doing business. So long as the licenced firms can keep the financial gains made by the irregular activities which are much higher than the fines, and carry no risk of losing their licence (s19 FSMA) to trade in the UK irregular, activity will continue.

So far no bank has lost its licence. It is the customers of the banks from where these gains are made by the misselling of highly advantageous products to the banks and then forced liquidations of customers assets to recover debt secretly created by those sales such as credit margins, credit lines, shadow Management Obligation Accounts and break costs of derivatives. Cleary shareholders in publicly quoted licenced firms (banks) suffer reduced return by the Regulator levied fines but there is no sanction of the management of these

licenced firms. They generate and keep their remuneration packages and pensions. It is not difficult to understand why there is little trust and confidence in UK banks.

As a consequence, many believe the BBRS was *never* a genuine, authentic effort by the banks. Rather, that it has been something of a "rehabilitation smokescreen" designed to make it look like a fair mechanism had been put in place for businesses to get the compensation they deserved and that the banks were willing and able to undertake a "cultural transfusion" from the deceptive and exploitative organisations they were, to something honest and ethical.

An overview of the key issues as reported by many; all of which contribute to the erosion of trust and confidence

Here are the type of comments that have been made about the BBRS, whether in articles or on social media or even in books:

- It is a scheme that has **failed abysmally** to deliver on its original purpose
- Its seems that its purpose has morphed over time into being about **finding excuses to not pay compensation**
- There does **not seem to be much interest in exposing or punishing wrongdoing**, even criminal wrongdoing
- There have been many unresolved disagreements between the BBRS and the Independent Steering Group/SME Liaison Panel about how the scheme should operate. For example, there were disagreements about:
    - The style of the scheme that should be established
    - What the Award Limit should be
    - How to deal with historic complaints that had been through another review, but remained unresolved
    - How to deal with concessionary cases
    - How to manage the obvious conflict of interest issues caused by most if not all of the staff at BBRS being employed by or in some other way connected to the very organisations that the victims' complaints were about
- It is just a voluntary arrangement, with no statutory powers
- It seems to be **only accountable to the banks**
- Those that have been involved as representatives of victims have been very dissatisfied with the outcomes being achieved - SME Alliance is an example of this.
- Others have refused to formally engage with the BBRS, believing it to be a sham. ref: Snook v London and West Riding Investments Ltd [1967] 2QS 786 Lord Diplock 'No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived'
- The **eligibility criteria has been gamed,** to minimise payouts

- There should be no fabricated eligibility criteria - why should the **VICTIMS** of serious and **PROVEN** banking misconduct and in some cases **CRIMINAL FRAUD** have to compete to enter a compensation scheme that was set up to compensate them?
- The **BBRS criteria for eligibility – minimum turnover of £1mn and gross assets up to £5mn – are unfair and unreasonable** and represent an overzealous and bank-biassed topping and tailing of eligible complaints
- The Implementation Steering Group (ISG) concluded that the BBRS should not overlap with the Financial Ombudsman Service (FOS). However, **many cases eligible for FOS based on turnover and size were refused access for a range of reasons including complexity, insolvency or as a result of evidence or allegations of criminal conduct.** These cases have now also been unfairly excluded from the main BBRS scheme, as well as from any independent investigation and adjudication, which does not first rely on the goodwill of the bank
- **Caroline Wayman resigned as Chief Executive of FOS in March against the background of 158,000 outstanding complaints**. The emphasis of the BBRS should be placed on resolving complaints, rather than worrying about any overlap with another failing financial regulator
- Prior to the BBRS launch in February 2021, most reference to business size eligibility on the BBRS website, registration and pilot application forms referred to net assets. **But following the launch, this was altered to gross assets**, with the BBRS claiming the previous references to net assets were caused by numerous administrative errors. These have unfairly served the banks' position by ensuring the greatest possible blanket exclusion of SMEs, and in this case of those with assets, which were demonstrably the largest group historically targeted by the banks including Lloyds/ HBOS, Lloyds BSU, RBS' Global Restructuring Group (GRG) and Interest Rate Hedging Product (IRHP) mis-selling.
- **Improper adjudication for concessionary/boundary cases**: On 26th May, the BBRS policy adviser, Laurenz Gerger wrote: "We may be able to consider complaints that fall outside our eligibility criteria provided that we, the customer ***and the bank agree***. Where the BBRS considers that we should be able to look into a complaint, **we will ask for the bank's agreement**." It is entirely improper that banks, which are accused of serious professional misconduct and criminal fraud, should have any say whatsoever in deciding whether concessionary cases are admitted to the scheme. They are being allowed to act as judge and jury over their own wrongdoing. This represents a complete mockery of due process.
- **Criminal cases - total lack of accountability.** Since the first BBRS webinar, when victims were told that the BBRS would not consider criminal cases and they should always be referred to the Police, there has been a modest but unconvincing change of stance to suggest that cases, which involve criminality, can still be submitted. So, in May, Laurenz Gerger still recommended: "Where a customer alleges or suspects criminal conduct, we would urge them to notify the relevant authorities." However, it

has long been evident to victims that the “relevant authorities” are not enthusiastic about or resourced to carry out investigations into banking misconduct and fraud

- **Award limits have been set deliberately low.** The BBRS claims that award limits “were agreed by the bank participants and the SME representatives on the Independent Steering Group, recognising the award limits applicable to the FOS for smaller SMEs”. In fact, the award limit for historical cases of £350,000 has been set to be in line with, and no better than, that of the FOS in order to restrict the banks’ liabilities. In many if not most cases, this ceiling will prove totally inadequate but the bar has been set deliberately low, so that any awards above that level will be regarded as exceptional. Please note there is no cap on restitution in any of the legislation. Restitution means a person will be put back in the position they were in before the irregular activity took place. The words ‘irregular’ and ‘restitution’ in the primary legislation of the FSMA 2000 with amendments have a basis in the development of the law of rescission. Neither party has to prove or admit intent and neither party is in receipt of damages. There is clear legal precedent for approaching the calculation of restitution.

  Gerger: “We are able to recommend a higher award. The banks have contractually agreed to **consider** our recommendations for higher awards….If a bank disagrees with our recommendations, it must provide its reasons.” So, the perpetrators of wrongdoing are allowed to consider, but **are certainly not required to agree with**, awards above the £350,000 ceiling. Isn’t this purposefully unjust?

- **Proper compensation – often denied.** Gerger: “We can make an award for distress and inconvenience as well as for direct financial loss, consequential loss, interest and costs”. Everyone knows that amounts paid for distress & inconvenience (D&I) are paltry, hence the banks have agreed to pay them. Redress for direct & consequential loss (D&C) and the payment of statutory compound interest are an essential requirement. Any cap is a further arbitrary decision of the banks for their commercial gain by retaining the original gain from the irregular conduct.

The comments above have been provided to illustrate the kind of commentary about the BBRS that has been “out there” - sometimes on social media, sometimes in well-researched books and sometimes in publications such as The Times.

It is easy to see from those comments that the BBRS has failed to rebuild trust and confidence between banks and businesses.

Further evidence of the untrustworthiness of the BBRS and how it worsened the trust and confidence between businesses and banks

In this section we set out to show that the BBRS was promoted and sold as a mechanism that would compensate around 60,000 legacy cases that SMEs had with banks; and the many and varied concerns that a wide range of stakeholders had about the BBRS.

1. **From 13th December 2018:** Kevin Hollinrake MP, in his capacity as Chair of the APPG for Fair Business Banking (which had been a key stakeholder in the Independent Steering Group) set out in a letter numerous concerns that had still not been resolved at that time; several of which remain even to this day. We urge you to read that letter, because it covers concerns that remain of fundamental importance and help explain why, in our opinion, the BBRS has been an abysmal failure.

   It can be read here and it must be noted that it is crystal clear from the outset that *the BBRS was meant to be impartial and independently governed.*

2. **From 28th February 2019 to 2nd April 2020:** An email trail between numerous stakeholders setting out a wide range of concerns and issues. It provides a remarkable insight into some of the concerns, issues and tensions that have existed over a long period of time. It can be read here.

3. **From 11th March 2019:** A statement from SME Alliance (with important comments from others) about it accepting an invitation to join the steering group being established to deliver the Dispute Resolution Scheme. The reader is urged to note this particular pont:

   "The aim of the DRS is ***to provide a mechanism to compensate the more than 60,000 legacy cases SMEs have with banks*** *and financial organisations."*

   The statement can be found here.

4. **From 4th February 2020:** The Hansard Report that covers a debate about Lloyds, HBOS and the Cranston Review. It further highlights the many concerns that significant and senior stakeholders had about what was going on. The debate was ably led by Kevin Hollinrake MP and the Hansard Report is available here.

   Alternatively, it can be watched on Parliament TV, from 16:28, here.

It seems obvious to us that no objectively-minded person could conclude anything other than there have been persistent reasons for concern about the BBRS, that it has failed

abysmally to deliver to expectations and that it has worsened the level of trust and confidence between banks and businesses.

Highly questionable insolvencies

The roots to the issues the BBRS is meant to cover go all the way back to the fallout of the 2008 global financial crisis and the widespread misconduct by several UK banks against SMEs. More specifically the 'dash for cash' in 2008 which for example in the case of Lloyds Banking Group, Richard Dakin, the senior Lloyds Manager in charge, explains the strategy to liquidate £24Bn of loans is described by Property Week as the 'UK's biggest post-crash property sell off'. (Ref Property Week 11th July 2014 page32).

It was a programme of liquidation of loans with property backed assets held as security. The owners of those assets were not just holding vacant land or part-completed projects, but many operating businesses with employees and owners who had everything in the business. In fact these were even more attractive to sell because they were income producing. Bare land is not. 'Fire sale' does begin to describe the process.

The whole of the Banks' loan portfolio was chopped and diced to be attractive to potential purchasers lining up to buy assets at discounted prices. Some purchasers such as Cerberus have become well known names because of how they dealt with customers behind the loans they 'bought' at a discount to face value. Especially those customers who were SMEs. Their position was even more critical because of the mis-selling of derivatives resulting in claims for breakage costs of derivatives entirely due to the bank liquidating its own loan book.

Purchasers like Cerberus are not lenders to business but purchasers of distressed debt with a view to 'work out', meaning to recover more than they paid for the loan backed by fixed assets and any other security like owners houses etc. They are experts in working the UK insolvency system to their advantage.

The insolvency process produces very substantial income for the 'professionals' from the panels of selected firms established by the banks. In the £24Bn liquidation described by Richard Dakin the costs could easily have been 10% generating £2.4 Bn from one bank alone. Those costs would be deducted from the sale of the customer's assets as preferential creditors and paid before anyone else. Therefore it is at no cost to the bank.

Neither the bank or the professionals employed by the bank have any incentive to obtain fair value for the assets being sold. Just sufficient to pay the bank debt and their fees. The customer's equity is available to sell at a discount to market or fair value in a wider portfolio which might have loans in default ie loans/debt representing far more than the market value - below the water line, where full recovery is not possible and that is the point of 'cut and dice' to hide the individual loans in a portfolio.

A prospective purchaser selected by the bank knows this and has full disclosure which is analysed and drives the discounted purchase price they pay. The bank knows such purchasers make their profit from working out the portfolio and will look to in excess of 20% as internal rate of return (IRR). Time reduces the IRR so the longer it takes to work out the lower the real IRR. The purchaser has to take a view on that. To compensate the purchase price must be much higher and thus lower purchase price to end up after time at 20%. A closed process of selection capturing the big firms in all disciplines who then claim conflict of interest if approached by bank customers for advice and representation.

A convenient way of shutting out the bank customer from the best firms even if they can afford their fees. The panels of the different banks then have a degree of market influence on the sale of customer assets by off market sales. This can be described as a cartel where independent persons come together to fix pricing or supply to control or influence a market to their advantage.

It is Abuse of Dominant Position under Chapter II of the Competition Act 1998. The Competition & Markets Authority (CMA) however leaves complaints about licenced firms under FSMA with the FCA. “All roads lead to the FCA and not Rome, although it is as imperious as ever Rome was.” Interesting to note decisions of the CMA can be referred to the Upper Tribunal (s46) and includes third party referrals (47). It also contemplates group (class) actions as permissible (47A to E).

That is the model preferred by many customers/clients of the regulated banks with one exception a person bringing any case to the Upper Tribunal must not have to prove it has the financial resources to pay the bank's costs or cost orders as that will prevent legitimate claims being referred.

Clearly, the banks’ network of advisors, restructuring firms, valuation firms and administrators are parts of an ecosystem that can cause great harm to SMEs. There is clear evidence that a number of banks used close relationships with panels of 'approved firms'. These firms might have been legally appointed by SMEs and have their legal duty to the SME, but in practice were highly conflicted including having had staff previously seconded to the bank to improve their working relationships; the knowledge that they needed to stay in the bank's good books to remain on the panel of firms for future business.

This led to a range of grossly improper behaviour such as sharing client information with the bank when not authorised to do so; collusion with the bank about achieving the bank's objectives, again without the client's knowledge; some very 'low-ball' property valuations used to generate Loan to Value loan covenant defaults; and even actions taken to stop the client maximising sales proceeds.

This whole area is fraught with issues and conflicts.

Many of these firms obviously rely on substantial and lucrative instructions from the banks for a large portion of their work. There is evidence obtained in one case to show that one of the Big 4 audit firms were unhappy that they were not getting more work from Lloyds Banking Groups (inappropriately and deceptively named) Business Support Unit, so they literally discussed ways in which they could, essentially, appeal to the judgement of (or to 'suck up' to, to be more blunt) the bank so as to get more work. That kind of 'relationship management' can be phenomenally lucrative in this space, because it is so notoriously opaque.

The firms are further conflicted by way of the banks terms for inclusion on their lucrative panel of firms to whom they give work. Namely, and broadly, that the terms state that if a firm brings a claim or is involved in litigation against the bank, they will be suspended and/or removed from the bank's panel - consider the long-term adverse systemic consequences of this - perhaps it's an issue the Committee could ask the Competition & Markets Authority to into, as it must be contributing to a significant market failure.

The banks knew these firms would therefore be very highly motivated to do their bidding for them - why wouldn't they? Get an instruction by say the (also inappropriately inappropriately and deceptively named) Global Restructuring Group or the Business Support Unit to undertake an Independent Business Review (IBR), the firm instructed knew that they would get the lucrative role of Administrator if their 'IBR' set the business on a path to insolvency.

Records show that the firm doing the IBR, would subsequently be appointed as Administrator.

David Crawshaw of KPMG, for example, was known by the bank to be involved in the HBOS Reading fraud from certainly as early as January 2009, yet the bank ramped up their use of him thereafter. His 'stand out' instructions after January 2009 include Angelic/Angel, Easter Group and Ashwell Property Group. David Crawshaw engineered the 'IBR' to create an Insolvency situation, was appointed as administrator and within the first week arranged for a 'Newco' that was 92% owned by Lloyds Banking Group to buy the whole group for just £3 million. Three years later the bank would sell their stake for an almost £300m profit. Further details and sight of evidence potentially available on request.

The most effective solution would be to give the SME the sovereign right to choose an advisor from an industry wide approved list of professional firms and to remove the notion of bank panels.

Expectations Set that Were Never Realised

In this part we show how expectations were set in the minds of potential claimants, first by the Chancellor, and then by people working for the BBRS.

Expectations about the BBRS set by The Chancellor of the Exchequer

In January 2019, Philip Hammond in his capacity as Chancellor of the Exchequer wrote to UK Finance setting out very clearly what his expectations were of the BBRS as far as the Government were concerned.

His letter references:

- The idea of access for SMEs to fast, fair and cheap dispute resolution mechanisms
- The idea that the different perspectives are heard during the implementation of the schemes such that they were truly robust and independent
- The idea that the scheme would enable the banks and businesses to draw a line under historic cases and enable the parties concerned to move on
- That the Award Limit should go above £350,000 if the case warranted it
- That the awarding process should not be prolonged
- That the scheme should consider as many complaints as possible
- That each case is properly and carefully considered
- That the banks should learn from their mistakes and change their culture
- That once the backward-looking scheme is completed it should publish a lessons-learned document

Very importantly, in his letter the Chancellor stated that:

If it transpires that the scheme is not bringing resolution to a meaningful number of complaints, and as such is not going to achieve its objective of bringing closure to past complaints, then I would expect there to be further discussions around the scope of and eligibility for the backward-looking scheme.

It is our firm view that the reasonable expectations that were set out by The Chancellor have not been met, and we believe that any individual who objectively reviews the facts will come to the same conclusion. We therefore consider the Chancellor's letter to be of great importance and we urge the reader to study it in full, here.

Expectations set by other stakeholders

Beyond the Chancellor's letter there have been many other comments and statements made that have helped to set the understanding and expectations of stakeholders.

For example, expectations set by John Glen, when he was the Economic Secretary to the Treasury confirming the scheme was to be independent in response to a question from Christine Jardine MP - March 11th 2021

Furthermore, many expectations were set through the statements made at the events the BBRS organised. The transcripts of those events are helpful because they provide useful evidence of consistent public statements repeatedly made by numerous BBRS Executives which, it is fair to highlight, were at the time, reasonably considered as *significant personal assurances.*

It is our opinion that they clearly indicated to potential complainants, who were considering putting both their trust in those responsible, as well as investing significant time and resources into waiting for and then using the service, that the BBRS Executives and Board *had entirely independent powers* to carry out timely reviews of the suitability of what the overwhelming majority of stakeholders considered to be the unfairly restrictive, contentious and heavily criticised Eligibility Criteria being proposed at that time and which were ultimately put into practice post launch.

Most importantly, the BBRS statements made it clear that in relation to the post launch effectiveness and suitability reviews, the BBRS Executives would consult with **but did not require the express permission** of the panels representing either the banks or the SMEs, **to make any necessary changes to the BBRS Policies and Eligibility Criteria** to ensure they were fair and reasonable and effective and reflected lessons learned from conducting 'live' complaint reviews.

The *independent* powers of the BBRS were clearly and publicly lauded by BBRS Chair, Lewis Shand Smith and Chief Adjudicator Alexandra Marks, and numerous other members of the executive team, to personally assure potential complainants that applicants should not self-exclude and should register their interest and that the BBRS Executives and service **would strive to meet both Simon Walker's report recommendations as well as then Chancellor of the Exchequer, Philip Hammond's clearly communicated expectations** – including that the service should resolve a meaningful number of complaints, draw a line under issues of the past, learn lessons and thereby enable all concerned to move forward.

On the basis that no changes have ever been made to the BBRS Policies or Eligibility Criteria by the BBRS Executive over the two years since its launch – there clearly needs to be an independent investigation into how they appear to have critically failed to act, **as publicly promised**, on the evidence of extreme failure provided by the service's own disappointing reports of its results.

Please note that we are very sure there have definitely been no changes to the BBRS Policies or Eligibility Criteria. Moreover, it is our understanding that the BBRS has made it clear that it cannot make any, because the permission of the BAM would be required. Surely this alone undermines any claim that the BBRS is independent?

It was previously possible to find evidence of numerous misleading statements made and assurances given by the BBRS Executive by searching within the section on the BBRS website for event transcripts. This was the relevant link: https://thebbrs.org/news-updates/events/

Unfortunately, we are now no longer able to find them. They may still be on the site somewhere but we cannot now find them. If they have been taken down from the site, we can only wonder why. If they are still there we would like to be provided with a link to them by the BBRS.

Interestingly, if you click here you will see the BBRS' website 'site map' as it was on 21st September 2022. If you scroll down that site map and look at the 'News' section you will see the listing of various events that took place. That's where you would previously have been able to see the full details of each meeting, including the transcript.

But if you now click here, you will see the BBRS' website 'site map' as it was on 13th December 2022. The details of the events and the corresponding transcripts no longer seem to be listed.

Have the events and the transcripts been deliberately removed from the website?

And if so, why?

Fortunately, some detailed notes were taken whilst we were able to access the transcripts. And screen shots of the relevant pages were taken. That is very fortunate indeed, because without them we would not have the cast iron proof of what was said, by whom and when.

The following two, relatively short transcript segments should suffice to demonstrate that further investigation is required into the repetitive and misleading nature of the personal statements made by numerous BBRS Executives on the critical issues of 'independence' and 'eligibility'.

28 May 2020 - BBRS Webinar 1

"…JON MCLEOD: Great. Just another appeal to the audience members to keep pinging in questions. I have got a couple of fans here, some heavy users of the questions function who I am trying to service as we go along, so please keep those coming in, as we head into the last

half hour of the session. I want to spend a bit of time talking about eligibility which is a subject of great interest to those who have been hovering around the service. And I will, I guess, address the questions to Alexandra, because we know that there is an ambition for the scheme to consider as many complaints as possible. That is clearly an ambition which is laudable, but what "as many as possible" means in practice will clearly be something where there is a lot of detail to thrash out.

Alexandra, I wonder whether you could just talk to us a little bit about the progress in thrashing out those eligibility criteria and some of the issues around that…"

ALEXANDRA MARKS: "…But to go back to my earlier point. We are not proposing to have a sort of "computer says no" type approach to eligibility, where there is doubt about it. What I envisage happening, once we have gone live and we have got a settled eligibility policy, is that in those boundary cases we will invite the complainants to tell us why they think they should be eligible and we will invite the banks to tell us how they will respond to that. And as with any other kind of jurisdictional issue, and I experience this in courts on numerous occasions, it would then be for the decision maker to decide, on the basis of what the parties have said, where the right decision lies. And that is what I envisage we will be doing in deciding these knotty issues in go-live.

JON MCLEOD: "Would it be fair to say that, to a certain extent, eligibility will not be determined by prewritten rules, but by virtue of your listening to the substance of the case at an early stage, sympathetically and thoughtfully, to determine whether or not it would benefit or would be suitable for the service?"

ALEXANDRA MARKS: "Yes, certainly where the eligibility issue is not clear-cut. There are obviously going to be some circumstances, and I have outlined some of them, where, though disappointing, it is going to be a fairly clear-cut answer. But where there is doubt about it, then we will listen and explore and, what is more, we are not going to decide eligibility as "you are in or you are out", either as a tick-box binary kind of question where there is doubt at day 1. We will continue to inquire. It's also possible that eligibility issues will arise later on as the case progresses. It might be obvious right from the start, it might not be obvious, and we will make the decision to carry on…"

JON MCLEOD: "And on the question of annual review of eligibility or ongoing review of the eligibility, what is your approach there?

ALEXANDRA MARKS: "All our policies provide for there to be at least annual review, and so we will be doing that. And in fact an important feature that I should emphasise about our live pilot process is that it has enabled us to identify some really quite tricky issues, including on eligibility, which to be honest, we have not thought of, and when I say "we", it was

actually not me because I am not making the rules; I am trying to operate them. But the draft policies do not always contemplate the particular situation that we find ourselves faced with. Clearly, we are going to have some thinking to do about how to resolve those issues and that will feed into the process I described about finalising the eligibility policy before we go live. But it is not going to finish with the live pilot. We are expecting cases, because many of them are complex, they are difficult, they have been going on for a long time, to throw up unexpected issues, tricky issues, and those will continue to shape the way that we develop our policies in the future. We are not going to do it in isolation. ***Clearly, we are going to consult when we make changes to a policy in the future. But I would expect that that will be a regular feature of what we do in the future, yes…****"*

4 June 2020 - BBRS Webinar 2

"…JON MCLEOD: And then a couple of quick questions. So effectively the eligibility criteria will be finalised at the conclusion of the live pilot and clearly ahead of the launch this Autumn?

ALEXANDRA MARKS: Correct.

JON MCLEOD: That is the timeline. Will those criteria be reviewed, and will that be an annual review, or how does that work in terms of an evolving perspective on eligibility?

ALEXANDRA MARKS: Yes, they will be reviewed. ***It is important for me to say that the policies before we go live are to be signed off by the implementation steering group. They are not policies that are going to be made by the BBRS. Indeed, one might say that it would be wrong for us to do so, because we are implementing them.*** *But the policies are going to be signed off in time, obviously, for go live.*

But once we go live, we will be reviewing that eligibility policy, along with all our other policies, on at least an annual basis so that we can reflect things that we have learned from seeing cases. Obviously, we will not do it just off our own bat. We will consult with stakeholders, so that will include obviously the banks, but it will include the SME community as well, and that is one of the reasons that we are setting up liaison panels, which ***will be part of our governance structure****, to ensure that those voices are heard within the BBRS once we go live…"*

Please note that to the best of our knowledge, there is no reference in any of the full event transcripts to the Bank Appointed Member (BAM) referred to in this report.

The BAM was formed and is operated by the 7 participating banks. We understand that technically and legally it has full power of control/veto over any proposed and/or necessary changes to the original and contentious BBRS Policy and Eligibility.

We posit therefore that the BBRS Executives or Board cannot honestly be described as having the *independent* ability to make changes to such unfair, unworkable and contentious policy and eligibility criteria matters.

Clearly, from any potential applicant's point of view, the BAM's ultimate control over any changes to BBRS Policy and Eligibility, with the BAM being irrefutably a bank controlled entity, is entirely unfair, inappropriate and objectionable. In the same way it would be if a bank controlled entity had the same control over the Financial Ombudsman Service or the Financial Conduct Authority. That would obviously be outrageous, wouldn't it?

But that's basically what we have with the BBRS.

Here are the details about the BBRS events and the relevant transcripts. We encourage the reader to study them as they quite clearly show how the BBRS was promoted/sold to the victims; and how they were misled:

- This document provides an overview of BBRS' event programme
- 28th May 2020 1st Webinar transcript
- 4th June 2020 2nd Webinar transcript
- 16th June 2020 3rd Webinar Transcript
- 18th November 2020 SME Roundtable Event
- 1st December 2020 Westminster Pre-launch Parliamentary Briefing Event
- 15th December 2020 Stormont Pre-launch Parliamentary Briefing
- 19th March 2021 BBRS Holyrood Event invite
- 19th March 2021 Holyrood Parliamentary Briefing Event
- 14th April 2021 Missing Eligibility Explained Webinar

- 15th April 2021 Missing Eligibility Explained Webinar
- 17th May 2021 Missing Routes to Resolution Webinar 01
- 17th May 2021 Missing Routes to Resolution Webinar 02
- 28th June 2021 Missing Preparing Your Case Webinar
- 30th June 2021 Senedd event

We think it rather ironic that the root cause of the disputes between the SMEs and the banks was mis-selling by the banks; and that the BBRS itself was also something mis-sold by the banks.

Critical media coverage about the BBRS

In this section we share some of the media coverage; which we believe not only helps to highlight the issues, but also shows again how the BBRS has been a complete disaster in relation to rebuilding trust and confidence between the banks and businesses.

Please do glance through this sample of media coverage:

- The Times:
  Clive May, the 'humble brickie' who built a reputation for bashing bankers at RBS
- CBI:
  SME banking disputes must be resolved to make way for growth
- The National:
  Businesses must have 'meaningful redress' for misconduct
- Thomson Reuters:
  Business Banking Resolution Scheme on track for UK launch by end of year
- Thomson Reuters:
  Resolution service will shape small business customers' treatment, bank culture, says scheme chief
- Thomson Reuters:
  Concern mounts at time Business Banking Resolution Scheme taking to deliver for "banking victims"

- Thomson Reuters:
  Increased ombudsman powers, new business dispute body should deter SME treatment repeat, say MPs

- The Times:
  Businesses want changes to unworkable redress scheme

- The Times:
  Small Business Owners wait for Damages over Scandals

- City A.M:
  Compensation scheme that cost £23m to set up has yet to pay any redress

- The Times:
  Business Banking Resolution Service done on the Cheap

- SME Alliance:
  Press Release: SME Alliance Withdrawal of Support for the BBRS

- Yorkshire Post:
  Business Banking Resolution Service should be abandoned and replaced with independent review, says businessman

- Small Business, with comments by Kevin Hollinrake MP:
  MPs Calling for Banking Dispute Service to be Scrapped

- The Times:
  "Bank Redress Scheme Completely Defective"

- The Times:
  Banking Redress Chief Earns £1M despite paying only five claims

- First Voice:
  Banking resolution service comes under withering criticism

- Banking Action Network:
  BBRS - 'The Business Banking Rip-Off Service'

- Banking Action Network:
  BBRS - For the record and avoidance of doubt

- IBAS - Independent Banking Advisory Service
  This is an open letter to all UK Business Banking customers who have registered Banking Complaint Disputes with BBRS

- The Yorkshire Post
  Business Banking Resolution Service has lost credibility and must be replaced by tribunal, says MP

- Banking Newslink
  MPs launch inquiry into the financing of SMEs

- The Times
  Business Banking Resolution Service a 'real failure'

- Byline Times
  REVEALED: Victims of Banking Misbehaviour Let Down by 'Unfit for Purpose' Resolution Service

- Thomson Reuters Practical Law
  BBRS Closes SME Liaison Panel

- The Times
  Cynical closure of bank redress adviser panel prompts anger

Why have there been so many resignations?

Several leading figures who were involved with the BBRS have resigned:

- Within two months of its launch in February 2021, the Chief Executive, Samantha Barrass had left
- Within a short period, Peter Taylor had also departed
- Its director of communications, Jon McLeod also moved on
- Then the chief adjudicator, Alexandra Marks resigned
- A lawyer on the SME liaison panel, Cat Maclean also stood down, describing the BBRS as "completely defective" and worrying that if she remained, she was in danger of "being complicit with a cover up".
- Antony Townsend resigned as Chair of the SME Liaison Panel, which led to this comment from William Wragg MP, Chair of the APPG on Fair Business Banking:

"The BBRS lost the final shred of credibility it retained following the cynical dissolution of the SME liaison panel, which had for some time struggled against the prevailing headwind to ensure SME's voices were heard. Given its pitiful track record and exorbitant cost, it

looks like we might have to tear it down and start from scratch, a kick in the teeth for victims who have already waited far too long for their cases to be resolved. It has become clear that hopes for a voluntary system were misguided. Now is the time for a proper tribunal to get things moving and allow claimants to get on with their lives."

Has the BBRS used unfair contract terms?

It is believed that Clause 8 Indemnity Waiver of the BBRS release letter may be unfair; one cannot help wonder how many claims were not finalised because claimants refused to sign it.

Clause 8 Indemnity Waiver states:

8. I will release and discharge:

(a) the Bank, any members of the Bank's group, and all its current and former officers and employees; and

(b) BBRS, its Chief Adjudicator, all its current and former officers and employees, and any organisation working on its behalf,

from any liability that they may otherwise have to me as a result of BBRS considering the Complaint. This includes but won't be limited to any liability that might arise in connection with the Bank's provision of information and documents to BBRS, and any liability arising in connection with any Determination or Final Determination BBRS may make in accordance with its Scheme Rules or Award set out in it. (However it doesn't include any liability or other obligation the Bank may have under a settlement agreement that is reached to give effect to a Determination or Final Determination of BBRS).

In simple terms if a complainant SME agreed to these terms and the Bank provided information to BBRS that was unfavourable to the Bank, but BBRS in making a determination still sided with the Bank rather than the SME, then the SME would ordinarily be bound by the agreement and could not take and further legal action against either the Bank or BBRS for any negligence in assessing the complaint and or any previous obligations the bank may have had to SME.

Clause 8 is highly restrictive potentially acting as a "gag" and preventing a civil claim in court if a bank were to cite the agreement as being a reason why a court should immediately refuse to hear the claim any further, when the complaint had already been resolved via a mediation dispute resolution service provided by BBRS that refused the complaint and was unfavourable to the SME.

We argue the inclusion of Clause 8 may well breach clauses in the Unfair Contract Terms Act 1977:

2 Negligence liability.

(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

(2)In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

(3)Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.

***[F3**(4)This section does not apply to—*

(a)a term in a consumer contract, or

(b)a notice to the extent that it is a consumer notice,

*(but see the provision made about such contracts and notices in sections 62 and 65 of the Consumer Rights Act 2015).**]***

3. Liability arising in contract.

***F4**(1)This section applies as between contracting parties where one of them deals **F4**... on the other's written standard terms of business.*

(2)As against that party, the other cannot by reference to any contract term—

(a)when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

(b)claim to be entitled—

(i)to render a contractual performance substantially different from that which was reasonably expected of him, or

(ii)in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.

> ***[F5****(3)This section does not apply to a term in a consumer contract (but see the provision made about such contracts in section 62 of the Consumer Rights Act 2015).**]***

Again, such interactions between the BBRS and claimants will have undermined trust and confidence; and whether Clause 8 breaches the Unfair Contract Terms Act should be publicised and remedies of consequences sought.

Evidence that those representing SMEs have been far from happy with the BBRS

The BBRS often tries to claim that everything that it has done has been in agreement with those that have been tasked to represent the SMEs. That's an important claim, because if it were true it would suggest that they have behaved correctly.

But it isn't true.

For example, in October 2021, the BBRS stated that:

"Eligibility conditions in the scheme rules were unanimously approved in February 2021 by the Implementation Steering Group comprising seven bank representatives, eight (from) SMEs and an independent Chair".

However, Andy Keats, the leader of SME Alliance, a small business victims' group, resigned at this time saying:

"It is now clear that the eligibility rules do not achieve this objective and that they have, in fact, excluded most if not all of those seeking redress via the scheme."

He went on to state that he was not made aware that

"the Articles of Association for the BBRS were amended on 12th February 2021 in order to prevent the BBRS amending the rules of its scheme without the approval of an unnamed representative of the banks".

And to elaborate on this further, we now share an Email trail with the permission of Andy Keats of SME Alliance, one of the key SME representative groups.

Incidental information such as email addresses, phone numbers, references to somebody's health have been deleted without changing the meaning of the dialogue

…….

From: Andy Keats

Date: Wednesday, 2 November 2022 at 16:45

To: Andy Agathangelou

Cc:

Subject: RE: BBRS - Zoom Meeting

Good afternoon Andy,

Further to the email 02/11/2022 15:46 that Robert copied us into, Nikki Turner and I are witnesses to the BBRS setup process and as such we cannot join the meeting you have arranged for 13/12/2022 entitled 'The BBRS is not fit for purpose.'

As I said on the phone to you, and as you agreed, it would be completely counterproductive to use that meeting to attack the SME Alliance, which was a stakeholder in the BBRS setup, or Nikki or me personally especially when we cannot be there to defend ourselves.

However, the bottom line is that SMEA is and always has been unhappy with the BBRS, even before it went live, and this is amply illustrated by my 10/02/2021 email to the BBRS after the final 09/02/2021 ISG meeting and before BBRS went live on 15/02/2021 when I said:

Lewis, Samantha, Alexandra and Jon,

> ***Unfortunately, I feel obliged to withdraw the SMEA statement from the press pack. Please ensure that nothing is stated publically in respect of the BBRS that is directly attributable to the SMEA until further notice.***

I will re-think the statement that SMEA will submit and forward it as soon as possible. I do hope you understand that my reputation is on the line as well as the SMEA's.

SMEA and I really want the BBRS to be a success, I am afraid that as it stands the BBRS is in danger of being incapable of producing proper resolutions for many historic complainants, especially those with particularly egregious complaints.

I am deeply concerned, as you know others are, with the last-minute changes to the BBRS website and literature. I also highlight those historic complainants with the most egregious complaints will likely be deemed 'Boundary' (I cannot bring myself to use the new word to describe these cases) and then at the mercy of the banks once again. Similarly, complainants within the BBRS process may not achieve anything more than the £350,000 contractual compensation when higher figures are awarded. I would like to be able to say 'time will tell' but it seems the NDA's and lack of award transparency will likely prevent that too.

I know that you were not there at the outset of these negotiations (Lewis was of course) but I promise you that discussions/workshops in 2019 were positive and productive and very different to what is in black and white now.

Please be assured that I believe in the concept of the BBRS and will fight on and assist wherever and whenever I can.

Please acknowledge receipt of this unfortunate request and that it has been actioned.

Kind regards

Andy

I hope that the above demonstrates SMEA's position at the time of the final ISG meeting. Plainly SMEA is not in cahoots with the banks and the BBRS as some people like to say and claim we are. This email is for your information. It is not for public consumption but it serves to enable you to say that you have seen evidence of SMEA's position on 10/02/2021 five days before BBRS Go Live on 15/02/2021 and that it is obvious SMEA is very unhappy with what went on immediately before the final ISG meeting. That email was as perfect a prediction as someone predicting all the lottery numbers and winning the jackpot. Unfortunately, there are no winners, only losers in the BBRS system.

I hope this helps

Kind regards

Andy [Keats]

…….

On Wed, 7 Dec 2022 at 05:55, Andy Agathangelou wrote:

Hi Andy,

The main purpose of this email is to explain that I'm intending to share my screen with this email trail at the BBRS event I'm running on Tuesday.

I'm just checking you're OK with that? – I'll assume yes but come back to me swiftly if not please.

Kind regards,

Andy

Andy Agathangelou FRSA
Founder, Transparency Task Force; a Certified Social Enterprise
Chair, Secretariat Committee, APPG on Personal Banking and Fairer Financial Services

Chair, Violation Tracker UK Advisory Board

……..

From: Andy Keats

Date: Wednesday, 7 December 2022 at 07:27

To: Andy Agathangelou

Subject: Re: VERY HIGH PRIORITY: Re: BBRS - Zoom Meeting

Andy,

Re the email chain:

I am happy for my part of that email chain to be shown to those attending the TTF meeting on 13/12/2022. The BBRS SME Liaison Panel has a meeting with the BBRS and Bank Liaison Panel on 19/12/2022 and I am looking forward to understand how a 99.2% ineligibility rate can be acceptable to the BBRS or the banks when the purpose of the BBRS was to resolve the past, draw a line under it and for the banks to each produce a lessons learned paper to demonstrate they have learned the lessons of the past conduct, changed, and have processes in place to prevent the same occurring in the future.

The only lesson learned by the banks at the moment is that by dishonestly changing the eligibility rules at the last minute, (swapping an unnoticed 'or' for an 'and' in the Financial eligibility criteria, and by changing the date of financial assessment from the 22/04/2020 agreed date of 'act or omission' to 'date of complaint as two examples), and by putting the BAM [Bank Appointed Member] in place to have 'veto' on correcting the unauthorised changes, the banks can get away with it once again. More dishonesty = success is not a lesson that should in any way be possible, let alone a lesson learned!

The alternative scenario, that some apparently believe and vocalise is that, between 2014 and now, SMEA has been engaged in lobbying for a banking complaint resolution scheme and, when that was agreed, has then assisted the banks from 2019 to 2021 to set up an eligibility criteria that eliminates at least 99.2% of Historic legacy complainants leaving the complaints unresolved; Yes only 0.8% BBRS Eligibility rate leaving 99.2% of complainants still complaining.

What would be the point of that for SMEA? Oh yes - Apparently SMEA/Nikki Turner/Andy Keats have been paid several millions of pounds by the banks for our dishonest assistance. If that is indeed the case; Where are the £millions? Why am I still writing reports about dishonesty within the BBRS? Why did SMEA part fund a barrister opinion on the BBRS which

was expanded to the BBRS BAM (not funded by SMEA)? Why is SMEA now fully funding a KC opinion on the BBRS eligibility and Case Assessor practices? Why have I written a draft statement of truth concerning the BAM? Why does the SMEA still exist with all the £millions apparently in the bank or hidden in a secret offshore account? Why am I still driving a 2005 car? Why do I still have a mortgage? This is a conspiracy theory too far Andy. **The real question to ask is** - What's in it for the people spreading this obvious nonsense?

I hope that helps Andy.

Kind regards

Andy

Andrew M Keats

CEO [SME Alliance]

…….

On Wed, Dec 7, 2022, 9:42 AM Andy Agathangelou wrote:

Thanks very much for your note Andy

Your challenge that “an eligibility criteria that eliminates at least 99.2% of cases” is spot on, and I applaud you for making it.

Thank you also for giving me permission for publishing your part of this email trail, which continues as we write.

I spoke with Dirk Patterson of BBRS last week, and he followed up with this email, which I received on Monday 5th December, and which I will also publish as part of this email trail [my italics]:

……..

Dear Andy,

Thank you for your email. It was also good to talk to you on last Monday to better understand your position. I’m afraid that we do not have anyone available to attend your event on the BBRS but thank you for the invitation.

Although we have not had advanced sight of the agenda or any particulars on the topics raised, given the points discussed during our conversation, we understand that you are going to broadly seek to address the BBRS's eligibility criteria and BBRS independence – where there continues to be a fundamental misunderstanding about the role and set up of the BBRS. We thought it would be helpful to you and your members if we provide short statements, which you can read out at your event for the record.

On the eligibility criteria:

"The BBRS does not have the power to change its eligibility criteria. We must abide by the Scheme Rules that were set and unanimously agreed by the Implementation Steering Group (ISG), which included SME representatives. This means the BRRS can only assess eligibility, process complaints and deliver adjudications against the Scheme Rules.

"The BBRS was not set up as an appeals body and cannot overrule cases that have been to the Financial Ombudsman Service or the judiciary, which would require a change in UK legislation. We know this can be frustrating for those that fall outside the eligibility criteria, but while the BBRS cannot change the Scheme Rules, our expert case handlers are diligently and consistently delivering fair outcomes according to the rules given to them.

" The BBRS cannot take a position on the rules and remains neutral about the eligibility rules we have been given."

On independence:

"The BBRS is entirely independent in its leadership, governance and adjudication process. This independence is safeguarded by a board of independent directors, and the independence of the Chief Adjudicator is safeguarded directly by the Scheme Rules and the BBRS' Articles of Association. The BBRS Articles of Association were drafted, reviewed and agreed unanimously by the Implementation Steering Group (ISG), which included SME representatives who sought and received independent legal advice as part of the consultation process."

We hope the above statements will genuinely help frame the discussion at your event and be useful to anyone seeking to understand the remit of the BBRS.

Lastly, I'm sure you will understand that in the event any inaccurate or defamatory material is presented or statements made concerning the organisation, its history or any of its employees, we reserve our rights to take such steps as may appear appropriate to protect the reputation of the organisation and its important work.

I thank you again for your time last week.

Very best,

Dirk

Dirk Paterson

Customer Director
Business Banking Resolution Service
www.thebbrs.org

……

It seems from the conversation I had with Dirk and the email he sent to me that BBRS is keen to convey a narrative that 'everything was agreed with the SME representatives, so there can't be a problem, nothing to see here' [my paraphrasing].

But I get the impression from you (and others) that there have been real and significant differences of opinion about key issues, including the eligibility criteria question and the independence question.

I also acknowledge Andy that there has been a huge amount of criticism of SME Alliance by those that believe SME Alliance has let victims down.

If I were a betting man, I'd bet that whatever SME Alliance failed to do well (and being perfectly honest I think it failed to do quite a bit not very well), the root cause of that would have been BBRS/UK Finance/The Banks ability to outmanoeuvre SME Alliance (and others) at every opportunity. Please don't take that as an insult Andy. Given the resources, technical competence, motivations, incentives, political relationships, subject-matter mastery and resources [deliberately repeated], of 'the other side' it does not in any way surprise me that SME Alliance was outmanoeuvred in such a way that you may have found yourselves being engineered into a position of acceptance on various fronts.

Again, please don't think of that as an insult. I know you're not a fool; what I'm trying to get at is that 'the other side' are 'professionals' at doing what they do; and it seems to me they have done it so well that they may win the battle and the war.

But then again they may not.

And what would be the deciding factor?

In all honesty, it would most probably be the quantity and quality of the evidence given to Parliamentarians and others that in an Evidence-Based way challenges the narrative being put across by BBRS that they were fair, that they performed well, that they haven't gamed the system, that there was nothing wrong with the eligibility criteria and that BBRS is independent as advertised.

You now have a choice Andy; to do all you can to share whatever concerns you have had about BBRS at the December 13th meeting, or not to.

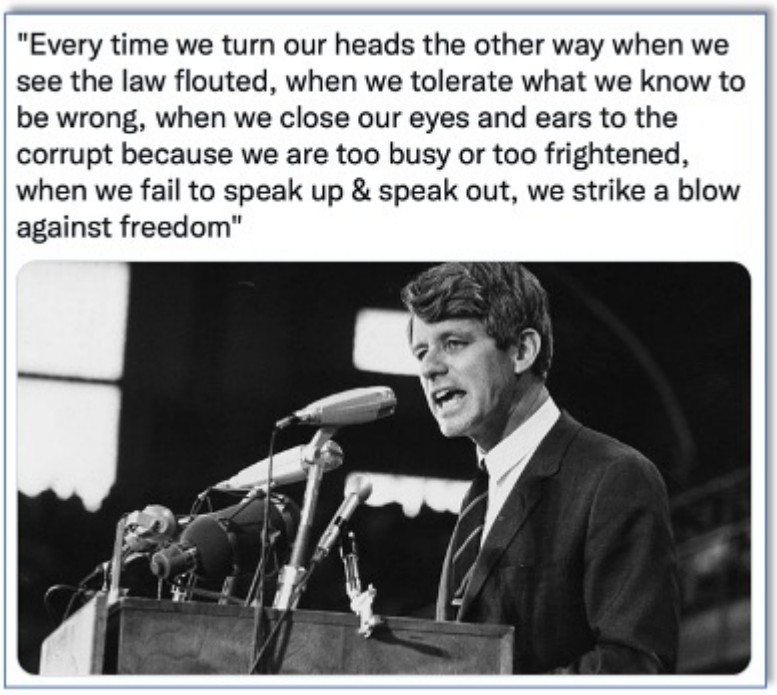
If you choose not to, it will be an opportunity missed.

If you choose to, there is a chance that you and SME Alliance will be seen in a fairer light than some see you/it now.

What do I think you should do?

Simple.

Read this:



…and please carry on sharing the truth. Please do the right thing – read out a statement at the December 13th event that you have freely written and that you believe to be a 100% true

and accurate account of the key issues with the BBRS as you see them, including what you believe to have happened in relation to the eligibility criteria, what you think of the BBRS' 'independence', the times you/BBRS may have resigned from being part of the Independent Steering Group/SME Liaison Panel (when and why; and what caused you to un-resign) and of course why SME Alliance appears to have freely accepted the idea of the Bank Appointed Member being put in place, along with rather interesting changes to the Articles of Association; plus of course anything else that you think Parliamentarians and others might value knowing.

I look forward to your swift reply and remember I will be publishing whatever that reply is.

Your thoughts please.

Warm regards,

Andy

Andy Agathangelou FRSA
Founder, Transparency Task Force; a Certified Social Enterprise
Chair, Secretariat Committee, APPG on Personal Banking and Fairer Financial Services
Chair, Violation Tracker UK Advisory Board

……..

From: Andy Keats

Date: Wednesday, 7 December 2022 at 13:33

To: Andy Agathangelou

Subject: Re: VERY HIGH PRIORITY: Re: BBRS - Zoom Meeting

Andy,

Typical response from a very bad organisation. Not the evidence led, sympathetic, evidence driven organisation we helped set up. Note the overt threat at the foot. That sums up the BBRS. If it was truly independent it would be sympathetic to the concerns of TTF and others such as the SMEA and be concerned enough to require the Banks, because they now have veto, to look again at the eligibility rules that plainly are not working by any standard. I have evidence that the last EFG was signed off after a bank spokesperson stated that if there were problems with the scheme the Banks wanted to resolve the problems.

All the BS about resolved cases through the FOS and courts etc is smoke and mirrors and just that - BS.

Cheers

Andy [Keats]

PS: You can show this as well if you want to.

……..

On Wed, Dec 7, 2022, 6:41 PM Andy Agathangelou wrote:

Thanks Andy.

What's your recollection of what happened regarding the Bank Appointed Member?

From what the BBRS seem to be saying, the Bank Appointed Member was something you/SME Alliance and all those representing victims freely agreed to.

Is that what happened?

What's your side of the story?

Kind regards,

Andy

Andy Agathangelou FRSA
Founder, Transparency Task Force; a Certified Social Enterprise
Chair, Secretariat Committee, APPG on Personal Banking and Fairer Financial Services
Chair, Violation Tracker UK Advisory Board
Telephone: +44 (0)7501 460308

……..

From: Andy Keats

Date: Wednesday, 7 December 2022 at 19:23

To: Andy Agathangelou

Subject: Re: VERY HIGH PRIORITY: Re: BBRS - Zoom Meeting

Andy,

That is such crap. The BAM was suggested by the SME reps as a man/woman, have to be careful, on the board to prevent the Banks walking away. Osbourne Clarke notified SME reps in Dec 2020 that BAM had certain unnamed reserved powers but that SME's, on the legal architecture working group were happy that board and directors controlled things. At ISG it was mentioned that the Banks has formed a company to meditate their participation in scheme! In the minutes it said the company was incorporated into the scheme! Very different!

It's all [smoke] and mirrors.

A[ndy Keats]

…….

On Thu, 8 Dec 2022 at 08:57, Andy Agathangelou wrote:

Hi Andy,

Thanks again for sharing your thoughts.

I'll assume 'meditate' below [sic, now above] is a typo and you meant 'mediate' 😉

The points you have covered are, in my opinion, very important.

You seem to be suggesting that what actually happened in the end was different to what you and others on the Independent Steering Group/SME Liaison Panel expected to happen; i.e. that what the BBRS *said* they were doing/were going to do was different to what they were actually doing/were going to do.

That's how I'm interpreting what you have written.

Have I got that right? - and if so please elaborate on what actually happened and in particular what happened regarding changes to the BBRS' Articles of Association.

Your thoughts again please.

Kind regards,

Andy

Andy Agathangelou FRSA
Founder, Transparency Task Force; a Certified Social Enterprise
Chair, Secretariat Committee, APPG on Personal Banking and Fairer Financial Services
Chair, Violation Tracker UK Advisory Board

……..

From: Andy Keats

Date: Thursday, 8 December 2022 at 13:31

To: Andy Agathangelou

Subject: Re: VERY HIGH PRIORITY: Re: BBRS - Zoom Meeting

Andy,

You are correct that it is 'mediate' not what I said.

You are correct that:

..what actually happened in the end was different to what you and others on the Independent Steering Group/SME Liaison Panel expected to happen; i.e. that what the BBRS *said* they were doing/were going to do was different to what they were actually doing/were going to do.

I have written a statement that is with Counsel. I cannot get involved further at this stage or I would have attended the meeting on the 13th. Suffice to say I was unaware of any veto rights by any party, even within the BBRS. As far as I was concerned the BBRS, in its entirety, was going to be entirely independent of the banks and the SME's after 09/02/2021. If I missed something in the forests of paperwork that were generated for each of the working groups I would say so but checking back I have found nothing.

Kind regards

Andy

Andrew M Keats

CEO

……..

On Thu, Dec 8, 2022, 1:45 PM Andy Agathangelou wrote:

Hi Andy,

Thanks again, that's helpful.

It's a pity that you can't attend Tuesday's meeting but at least by publishing this email trail I can help show there was a difference between expectations and reality.

Do you know roughly by when your Counsel may have completed his/her consideration of your statement?

Kind regards,

Andy

Andy Agathangelou FRSA
Founder, Transparency Task Force; a Certified Social Enterprise
Chair, Secretariat Committee, APPG on Personal Banking and Fairer Financial Services
Chair, Violation Tracker UK Advisory Board
Telephone: +44 (0)7501 460308

……..

From: Andy Keats

Date: Thursday, 8 December 2022 at 16:16

To: Andy Agathangelou

Subject: Re: VERY HIGH PRIORITY: Re: BBRS - Zoom Meeting

Andy,

Thank you.

I have no idea when counsel will review my statement. It is not my case and counsel will not talk to me about my statement - I tried and he gave me a gentle bollocking for trying. He was right to do so.

I cannot go public except to say what I have to date.

Kind regards

Andy

…….

On Thu, Dec 8, 2022, 5:16 PM Andy Agathangelou wrote:

Thanks Andy.

A hypothetical question that might become relevant:

If a Parliamentary Committee were to open an inquiry about the BBRS, and were to invite you to give evidence to provide you with a chance to tell your side of the story, would you be happy to do so?

Kind regards,

Andy

Andy Agathangelou FRSA
Founder, Transparency Task Force; a Certified Social Enterprise
Chair, Secretariat Committee, APPG on Personal Banking and Fairer Financial Services
Chair, Violation Tracker UK Advisory Board

…….

From: Andy Keats

Date: Thursday, 8 December 2022 at 20:17

To: Andy Agathangelou

Subject: Re: VERY HIGH PRIORITY: Re: BBRS - Zoom Meeting

Andy

Yes of course!

Cheers

Andy

…….

On Thu, Dec 8, 2022, 8:25 PM Andy Agathangelou wrote:

That’s good to know, thank you Andy.

From a timing point of view, when might be ideal for you?

Do you think there might be others on the SME Liaison Panel that might also welcome such an opportunity?

Kind regards,

Andy

Andy Agathangelou FRSA
Founder, Transparency Task Force; a Certified Social Enterprise
Chair, Secretariat Committee, APPG on Personal Banking and Fairer Financial Services
Chair, Violation Tracker UK Advisory Board

…….

Andy
I'm sure there would be!
Cheers
Andy

…….

We believe the above exchange of emails and the testimony from Andy Keats, CEO of SME Alliance shows beyond any reasonable doubt that the BBRS’s position that they only did what was agreed with all the SME representatives is wholly false.

A more accurate portrayal of what actually happened is that they use every trick in the book to create the illusion by deception that all the SME representatives were knowingly comfortable with everything that was going on and were in agreement with it - they were neither.

TTF urges the Committee to take the testimony above seriously, and to pay particular attention to the testimony that may be independently submitted by the likes of Andy Keats and Mark Bishop, both of whom were on the SME Liaison Panel prior to it being illegitimately and wrongfully disbanded by the BBRS following the resignation of its Chair, Antony Townsend.

Has the BBRS handled evidence of criminality in the correct manner?

We understand that many of the historic cases show clear evidence of mis-selling, fraud, forgery, asset stripping and perjury.

One complainant, whose case had been deemed ineligible, wrote to the BBRS in October 2021 (after having submitted a stack of evidence of criminality) and stated:

*"*If the BBRS is presented with clear evidence of criminality, does it not have a duty to complete a suspicious activity report under the Proceeds of Crime Act 2002? Perhaps Alexandra Marks would be the best qualified person to answer that question?"

Sadly, that complainant never received any response or reply from the BBRS.

The Consequential Reputational Damage Problem

The abysmal failure of the BBRS to deliver on its purpose has continued to cause reputational damage to the Government (particularly HM Treasury) and also to the FCA, both of which are closely linked to it and both of which should be ensuring good conduct by the banks. That's a problem because the Government, HM Treasury and the FCA are meant to be in charge. The very public ongoing failure of the BBRS is happening on their watch, so it's not a good look for them that the banks through UK Finance and the BBRS seem to be in the driving seat.

The optics are that "the tail is wagging the dog?" which in turn contributes to the corrosion of the sector's reputational integrity and the public's general distrust of it.

The Westminster Hall Debate

A Westminster Hall Debate about BBRS was held on 11th July 2023. It was led by William Wragg MP, Chair of the APPG on Fair Business Banking.

Almost all of the speakers were extremely critical of the BBRS, and many spoke about how its poor performance contributed to the erosion of trust and confidence between banks and business.

The Hansard Report is here and the Parliament TV recording is here.

Furthermore, a helpful Research Briefing was produced for Parliamentarians, see here - much of its content includes criticisms of the BBRS from various stakeholders including Parliamentarians.

In the above section we have gone to great effort to expose the long list of reasons why the BBRS has completely failed to rebuild trust between banks and business; we hope the reader accepts that to have been conclusively shown to be true.

9. THE BANKS HAVE WASTED THEIR SHAREHOLDERS' MONEY ON THE BBRS

There has been a mountain of criticism by victims and in the press about the huge sums that have been spent in setting up and running the BBRS. The vast amounts spent could be forgivable if the outcomes achieved were in some way proportionate; but that simply hasn't been the case.

This Times article sets out some of the concerns; and this one is even more scathing.
By the end of 2022 the Schemes operating costs were £42.2 million, comprised of:

- Pre-launch costs of £23 million
- £10.2 million of costs in 2021
- £9.2 million of costs in 2022

Taking into account the 2023 operating costs, by the time the BBRS closes at the end of 2023 in total, costs across the Scheme's lifetime are very likely to be in excess of £45 million. That's many times more than what has actually been paid out in redress.

How can that possibly make sense unless the BBRS' real purpose from the banks perspective was to minimise the amount of redress payable? Looking at the issue from that point of view, the approximate £45 million spent represents remarkably good value for money for the banks.

The Companies House records for the BBRS including its accounts can be found here.

And how can the BBRS possibly justify expenditure of shareholders' funds on covert observations?

To explain the question - we have hard evidence (available on request) that the BBRS appointed a firm named DeHavilland to scour social media and obtain as much information as they could for the BBRS on UK lawmakers (MP's), specifically who was 'liking',

‘commenting on’ or 're-tweeting’ Tweets made by the likes of pro-consumer campaigners active in trying to expose the many and varied ‘shortcomings of the BBRS’.

The BBRS and DeHavilland claim this was for a legitimate purpose, but what legitimate purpose does this serve? It doesn’t serve any legitimate purpose at all, and further erodes trust and confidence. If the BBRS or an MP want to engage with each other, they are free to do so via the normal channels. It is covert surveillance, and covert surveillance that cannot possibly be legitimate for a supposedly independent body to undertake on individuals or especially UK lawmakers.

Of course, the banks could argue that if they want to waste millions of pounds they can; it’s their money. That’s true. But it's also true that ultimately their customers provide the revenues that they choose to spend, through the various fees banks charge their customers.

10. THE REDRESS RESULTS ACHIEVED

Despite the original hope and intention that thousands of victims would be properly dealt with, the appalling facts are out in the public domain about how few cases have been settled; and this contrasts with the very large sunk running costs since inception described in the previous section.

The BBRS CEO Mark Grimshaw’s own statement (see page 4 of the 2022 Annual Statement) states:

“The BBRS opened for case registrations in February 2021, and as of 31 December 2022, 56 settlements had been made between banks and businesses. More than £1 million of financial awards have been made to customers as a result of using the BBRS.”

So no more than just £2 million in awards as at the end of 2022 - doesn’t that say it all?

OUR CONCLUSIONS AND PROPOSED NEXT STEPS

We hope our response has shown why those that have doubted the authenticity of the BBRS, believed that it has not been fit for purpose, and that it has simply set out to minimise the amount of compensation payable by the banks regardless of the merits of each case; have been right.

As explained earlier, it is vital that for those that may take the view that none of this matters because the BBRS is closing at the end of the year anyway, that their position is challenged robustly, because if we don't fully understand what has gone wrong with the BBRS and why, there is a very real risk that the flawed 'DNA' that has caused the BBRS to be a grotesque failure will reappear in the next iteration of a redress scheme designed to deal with disputes between banks and businesses; and such an elementary mistake would be truly tragic.

Rather, we should take a similar approach to how the aviation industry operates when a plane crashes; they keep investigating until the precise causes of the crash are known, and engineer-out the likelihood of something similar happening again.

We must now do the same, for the same reasons - lives have been ruined, and lives have been lost.

We believe the best way forward is for three things to happen:

Firstly, we would like the Treasury Committee, as part of this inquiry into SME Finance to ask questions of the BBRS, the 7 participating banks, HM Treasury, the FCA and Andrew Bailey to get to the bottom of what went on. We would be delighted to offer a range of suitable questions that, if answered honestly, would reveal what has been going on and we believe will tie in with the many serious claims we have made in our submission. We know precisely what questions need to be asked, and to whom.

Secondly, for the Treasury Committee to open an inquiry to explore the relative merits of the FOS being given an expanded remit to deal with disputes between banks and businesses; or whether a statutory independent tribunal, preferably a modification of the existing Financial Services and Markets Tribunal, is the best way forward from here - we believe the right conclusion is Tribunals; just as it was in 2018, but this time we hope the banks don't use their immense power over the Treasury to stop the right thing from happening. This article by Richard Samuel provides an excellent summary of the many reasons why Tribunals should be used.

Thirdly, for the Treasury Committee to champion the introduction of reforms to enable incorporated entities to be able to make use of Data Subject Access Requests (DSARs). As explained earlier, doing so would be truly transformational in relation to the asymmetry of

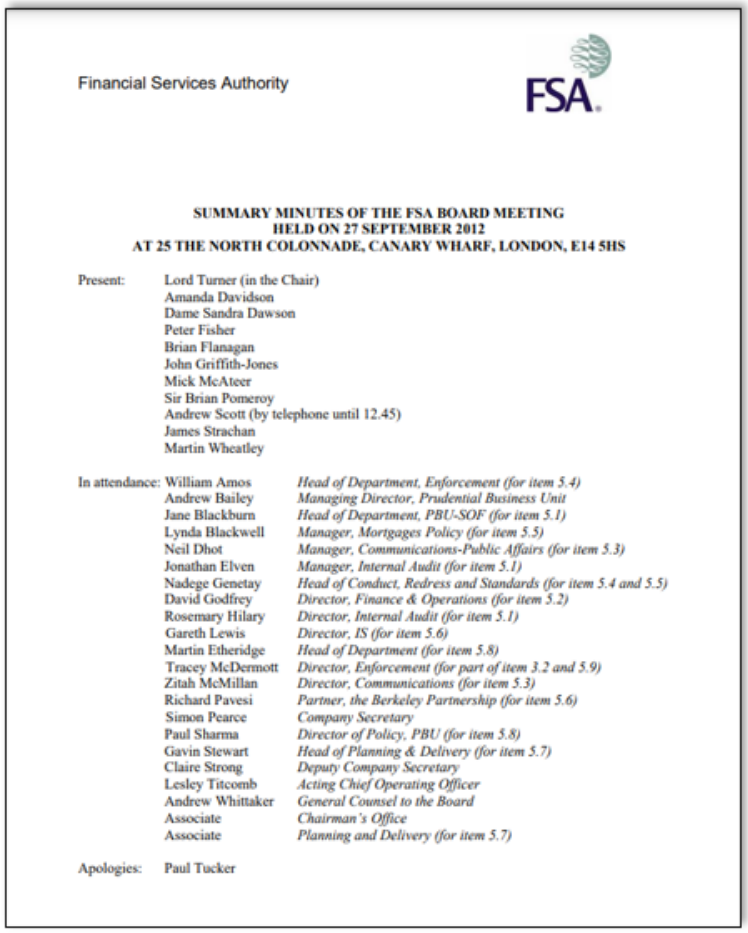
disclosure issues that thwart SMEs getting justice. It really would be a positive step that would not get any push-back from any stakeholder with integrity. It would provide a right to access information for SMEs that would result in the resolution of countless historic cases, but it would also deter banks and their employees from committing offences because of the right of the SME to obtain any and all information. This is a 'low hanging fruit' reform opportunity that would be easy and inexpensive to introduce and we urge the Committee to pick up on it.

Fourthly, for the Treasury Committee to open an inquiry into a matter about the conflicted interests and priorities within the FCA; the tension between prudential and conduct regulation.

That fourth point is very much needed, because:

- There are various sources that point to the inherent conflict between prudential regulation and conduct regulation, i.e. that there is a clear tension between sufficiently fining firms for bad conduct/ensuring victims of their bad conduct are given a fair level of redress; and whether the balance sheets of the bad-acting firms may be placed in jeopardy if the level of fines and redress were particularly high.

- One of those voices is Andrew Bailey himself, when he served as Managing Director, Prudential Business Unit of the Financial Services Authority. The irrefutable evidence for that is in the FSA Summary Minutes of the FSA's Board meeting that was held on 27th September 2012.



Financial Services Authority

FSA

SUMMARY MINUTES OF THE FSA BOARD MEETING
HELD ON 27 SEPTEMBER 2012
AT 25 THE NORTH COLONNADE, CANARY WHARF, LONDON, E14 5HS

Present:	Lord Turner (in the Chair)	
	Amanda Davidson	
	Dame Sandra Dawson	
	Peter Fisher	
	Brian Flanagan	
	John Griffith-Jones	
	Mick McAteer	
	Sir Brian Pomeroy	
	Andrew Scott (by telephone until 12.45)	
	James Strachan	
	Martin Wheatley	
In attendance:	William Amos	*Head of Department, Enforcement (for item 5.4)*
	Andrew Bailey	*Managing Director, Prudential Business Unit*
	Jane Blackburn	*Head of Department, PBU-SOF (for item 5.1)*
	Lynda Blackwell	*Manager, Mortgages Policy (for item 5.5)*
	Neil Dhot	*Manager, Communications-Public Affairs (for item 5.3)*
	Jonathan Elven	*Manager, Internal Audit (for item 5.1)*
	Nadege Genetay	*Head of Conduct, Redress and Standards (for item 5.4 and 5.5)*
	David Godfrey	*Director, Finance & Operations (for item 5.2)*
	Rosemary Hilary	*Director, Internal Audit (for item 5.1)*
	Gareth Lewis	*Director, IS (for item 5.6)*
	Martin Etheridge	*Head of Department (for item 5.8)*
	Tracey McDermott	*Director, Enforcement (for part of item 3.2 and 5.9)*
	Zitah McMillan	*Director, Communications (for item 5.3)*
	Richard Pavesi	*Partner, the Berkeley Partnership (for item 5.6)*
	Simon Pearce	*Company Secretary*
	Paul Sharma	*Director of Policy, PBU (for item 5.8)*
	Gavin Stewart	*Head of Planning & Delivery (for item 5.7)*
	Claire Strong	*Deputy Company Secretary*
	Lesley Titcomb	*Acting Chief Operating Officer*
	Andrew Whittaker	*General Counsel to the Board*
	Associate	*Chairman's Office*
	Associate	*Planning and Delivery (for item 5.7)*
Apologies:	Paul Tucker	

In our view, nothing illustrates more clearly the FCA's later conflicted remit than Andrew Bailey's intervention on page 4 (second bullet point); and as mentioned earlier:

'there could be some prudential risks arising from the cumulative fines and redress costs relating to conduct issues and the FSA

was working with some firms on how to mitigate these'

The redacted minutes are in full here. The extract above is a strikingly significant point, at the very epicentre of what ultimately caused the BBRS to be the catastrophic failure it has been.

……..

As mentioned earlier, we are available to give in-person testimony to the Committee, and we believe the collective insights of our witnesses would provide profoundly valuable and rather unique evidence that is directly relevant to this inquiry and its aims.

And finally (bar the Appendix) we are very grateful that the Committee opened this inquiry that we are so pleased we campaigned for - we shall share this submission to all that participated in that campaign and our wider community.

With the utmost sincerity, and much thanks to the many TTF volunteers that co-created this piece of work.

Andy

Andy Agathangelou FRSA
Founder, Transparency Task Force; a Certified Social Enterprise
Founder, RSA's Financial Services Network
Chair, Secretariat Committee, APPG on Personal Banking and Fairer Financial Services
Chair, Violation Tracker UK Advisory Board
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APPENDIX:

A. Bank Confidential's letter to BBRS about the BAM

The letter sent by the bank whistleblower charity Bank Confidential to the BBRS on 20th October 2022 sets out in clear and compelling terms the concerns that they and many others have had about the *interesting* changes to BBRS' Articles of Association and the nature and purpose of the Bank Appointed Member (BAM).

TTF believes that the challenges made in the letter are legitimate, appropriate and deserve proper answers.

Perhaps the Treasury Committee can look into this important matter.

B. Valuable input from the CEO of SME Alliance

There are several important documents on the BBRS that we hope will assist the Committee, all kindly provided by Andy Keats, CEO of SME Alliance. They are each an easy and compelling read and collectively they do a remarkably good job of evidencing many of the claims in TTF's submission.

There are two documents that relate to insights shared prior to the BBRS' creation about live pilot complaints and a report on eligibility criteria.

Two documents concern Andy Keats' own case (NSB Ltd) against RBS and they show specifically how the BBRS has dealt with it before review of the merits i.e. the BBRS Dismissed the claim without considering its merits - stating Merchant Services (card transactions) is a Banking Service but not a Banking Service provided by Acquirer Banks (RBS). It seems this 'Banking Service' is provided by private limited technology companies like WorldPay Ltd. It made no difference that Andy Keats' complaints were about RBS and made to RBS and in all other aspects we were eligible for review.

The two opinions from Simon Reevell, Thomas More Chambers, give a great flavour of how a BBRS Case Assessor is not engaging properly or at all and misrepresented the evidence and even the barrister's opinion to Dismiss without consideration. There are some powerful quotes within it.

The additional three barrister opinions and summaries, also from Simon Reevell, concern BBRS in general. The second opinion is an update on the first and the third opinion deals mainly with the BBRS BAM (Bank Appointed Member).

And the final document is a hard-hitting statement of truth from Andy Keats; a must-read.

Altogether, there are many more powerful, evidence-based and legally sound criticisms in these documents:

29th April 2020 AK report on the CEDR 28-4-20 email to Live Pilot complainants and attached Complaint form

1st July 2020 3rd May 2021 - Eligibility criteria for BBRS v Reality (Report by AKeats) provided to A Marksand P Taylor

28th December 2021 SR - RE BBRS -Opinion Final

28th December 2021 SR - EXECUTIVE SUMMARY of BBRS OPINION

14th June 2022 SR - Updated BBRS OPINION

14th June 2022 SR Updated BBRS OPINION - SUMMARY

30th August 2022 Opinion Simon Reevell

9th September 2022 SR 2nd Opinion re BBRS BAM

20th September 2022 BBRS BAM Opinion Summary

23rd March 2023 SR 2nd Opinion RE NSB -Final

23rd March 2023 Further Opinion Simon Reevell

16th February 2023 updated - 20221006 A Keats draft statement of truth v D5

End. E&OE.